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Toward a More Transformative Approach: The Limits of Transgender Formal Equality

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Toward a More Transformative Approach:

The Limits of Transgender Formal Equality

Andrew Gilden†

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The recent debates over the inclusion of transgender\(^1\) protections in the Employment Non-Discrimination Act ("ENDA") illustrate an increasing awareness of the widespread injustices wrought by mainstream understandings of sex and gender. Supporters of a trans-inclusive bill have forcefully argued the imperative of explicitly protecting the employment rights of trans people so as to dismantle the binary, biologically-centered gender beliefs that stigmatize gender non-conformity in all people. According to these arguments, without additional transgender anti-discrimination provisions ENDA's sexual orientation protections fail to confront the gender-phobia that stigmatizes gay, lesbian, and bisexual identities.\(^2\) Supporters of a trans-exclusive ENDA do not necessarily refute the vested interest of lesbian, gay, and bisexual ("LGB") people in trans rights, but they have argued that existing sex discrimination laws provide sufficient protection for gender non-conformity to protect the interests of trans people and lesbian, gay, bisexual, and transgender ("LGBT") people more broadly.\(^3\) In what has become the LGBT communities' most prominent national debate about the construction of gender in our society, transgender rights have been anointed as the key to a broad liberatory transformation of gender.

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

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


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

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

Although the lawyers who bring trans-discrimination claims are undeniably

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

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

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

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

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

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

II. THEORETICAL UNDERPINNINGS OF A TRANSGENDER RECONSTRUCTIVE PROJECT

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

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


8. See Valdes, supra note 7.
the fundamentality of the categories of birth-assigned sex and cultural gender.\(^9\)
By illustrating that gender functions as a regulatory social norm in and of itself and is not merely the cultural manifestation of some fundamental aspect of human existence, postmodern theories provide space for transgender persons to question their marginal status by asserting the contingency of the social norms that condemn deviation from biologically-imposed, gendered expectations.

A. Challenging Biological Essentialism: Sex Does Not Presuppose Gender

In order for gender to be understood as a site for legal and political reform, it cannot be understood as flowing from one’s inclusion in one of two biologically determined sexes. Gender is not merely the cultural manifestation of one’s biological sex. Rather, it is a normative ideology that creates the appearance of a determinative biological self: “Gender is the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being.”\(^10\) By insisting from generation to generation that certain bodies must perform particular acts from the moment of birth and throughout the course of one’s life, the regulatory framework of gender creates the illusion that it is the body and not the social institution that dictates the performance of these acts. However, bodily sex cannot be prior to, and thus determinative of, gender. One only becomes legible as male or female as a result of the cultural inscription of sex at birth by a medical practitioner acculturated to conflate a particularly stylized body with a particular set of gendered acts:

Consider the medical interpellation which (the recent emergence of the sonogram notwithstanding) shifts an infant from an “it” to a “she” or a “he,” and in that naming, the girl is “girled,” brought into the domain of language and kinship through the interpellation of gender. But that “girling” does not end there; on the contrary, that founding interpellation is reiterated by various authorities and throughout various intervals of time to reinforce or contest this naturalized effect. The naming is at once the setting of a boundary, and also the repeated inculcation of a norm.\(^11\)

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

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

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

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

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

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

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12. Butler, Bodies that Matter, supra note 11, at 5.
constituted by the very expressions that are said to be its results." According to this theory of gender performativity, one can only become a subject within a given culture through the repeated performance of particular acts that become legible within a particular cultural lens:

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

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

C. Transgender Possibilities

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

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

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

19. See, e.g., Sandy Stone, The Empire Strikes Back: A Posttranssexual Manifesto, in BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 280, 296 (Julia Epstein & Kristina Straub eds., 1991) ("In the transsexual as text we may find the potential to map the refigured body onto conventional gender discourse and thereby disrupt it, to take advantage of the dissonances created by such a juxtaposition to fragment and reconstitute the elements of gender in new and unexpected geometries."). Accordingly, Judith Butler argues that it is necessary to encourage the emergence and perpetuation of individuals who do not conform to the matrix of intelligibility underlying the fictions of sex and pre-discursive gender identity:

Inasmuch as "identity" is assured through the stabilizing concepts of sex, gender, and sexuality, the very notion of "the person" is called into question by the cultural emergence of those "incoherent" or "discontinuous" gendered beings who appear to be person[s] but who fail to conform to the gendered norms of cultural intelligibility by which persons are defined . . . . The cultural matrix through which gender identity has become intelligible requires that certain kinds of "identities" cannot "exist"—that is, those in which gender does not follow from sex and those in which the practices of desire do not "follow" from either sex or gender . . . . Their persistence and proliferation . . . provide critical opportunities to expose the limits and regulatory aims of that domain of intelligibility. BUTLER, GENDER TROUBLE, supra note 10, at 23-24.

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

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

III. THE DISCURSIVE LIMITS OF CLASS-BASED APPROACHES

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

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

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

1. Brief History of Sex-Stereotyping under Title VII

Prior to the Supreme Court’s 1989 decision in Price Waterhouse, transgender employees were generally unable to utilize federal anti-discrimination laws. Courts concluded that Title VII’s prohibition on discrimination “because of sex” was intended to reach only “traditional notions of ‘sex’” and refused to give the term an expansive meaning to reach trans people.26 As explained by the Ninth Circuit in 1977:

[Plaintiff] has not claimed to have been treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex . . . . A transsexual individual’s decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII.27

Discrimination against trans people did not stem from being a member of the male or female class but from their volitional decision to alter their birth sex, and this act was not protected by Title VII.28 By explicitly refusing to protect the acts constituting transgenderism, these early transgender discrimination cases indicated that advocates would need to find protection for stigmatized acts before trans people could find protection as an overarching class.

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

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

27. Id. at 664; see also Ulane v. E. Airlines, 742 F.2d 1081, 1085-87 (7th Cir. 1974) (“[A] prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition against discrimination based on an individual’s sexual identity disorder or discontent with the sex into which they were born . . . . It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who take female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.”).
at Price Waterhouse and was up for promotion to partner.\textsuperscript{29} However, her
supervising partner refused to submit her candidacy to the full partnership and
advised Hopkins that in order to make partner, she should "walk more
femininely, talk more femininely, dress more femininely, wear make-up, have
her hair styled, and wear jewelry."\textsuperscript{30} The Supreme Court subsequently held that
this treatment of her partnership candidacy violated her rights under Title VII:

In saying that gender played a motivating part in an employment decision, we
mean that, if we asked the employer at the moment of the decision what its
reasons were . . . one of those reasons would be that the applicant or employee
was a woman. In the specific context of sex stereotyping, an employer who
acts on the basis of a belief that a woman cannot be aggressive, or that she
must not, has acted on the basis of gender . . . . As for the legal relevance of
sex stereotyping, we are beyond the day when an employer could evaluate
employees by assuming or insisting that they matched the stereotype
associated with their group, for in forbidding employers to discriminate against
individuals because of their sex, Congress intended to strike at the entire
spectrum of disparate treatment of men and women resulting from sex
stereotypes.\textsuperscript{31}

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

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

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

\textsuperscript{30} \textit{Id.} at 235.
\textsuperscript{31} \textit{Id.} at 250–51.
\textsuperscript{32} \textit{Id.} at 258.
(holding that plaintiff was terminated because he was a transsexual, not because he was
2000) (same).
\textsuperscript{34} 378 F.3d 566, 575 (2004).
Because Smith, "biologically and by birth a male," had been effectively terminated for "expressing a more feminine appearance on a full-time basis" after being diagnosed with Gender Identity Disorder, she stated a sex-stereotyping claim under Title VII.\textsuperscript{35} Defendant's belief that Smith's appearance and mannerisms were "inappropriate for his perceived sex" constituted unlawful discrimination "because of sex."\textsuperscript{36} Smith thus apparently shielded expression in ways non-stereotypical of one's biological sex from adverse employment actions. Because sex-stereotyping theory seemingly embraces gender non-conformity, the rationale adopted by Smith has received widespread support before and after the Sixth Circuit's decision.\textsuperscript{37}

2. Critique of Transgender Sex-Stereotyping Claims

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

\textsuperscript{35} Id. at 568.
\textsuperscript{36} Id. at 574.
\textsuperscript{38} See Kramer, supra note 25, 484–87.
\textsuperscript{39} See Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 9 (2003) ("Because transsexuals are not protected per se, every lawsuit begins with a descriptive misfit (usually that the discrimination occurred because of "sex," meaning biological status as male or female). This 'check-a-box' type of requirement immediately demands traditional gender classification from a plaintiff whose entire legal problem arises precisely because she does not have one."); Richard Storrow, *Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination*, 55 ME. L. REV. 117 (2003) (noting that in *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000), plaintiff consistently referred to herself as a man, despite self-identifying as a woman).
state a claim for sex-stereotyping discrimination, it seems to be because every plaintiff is cast as fundamentally either male or female. Once transgenderism is reconceptualized in terms of traditional binary notions of sex its ability to uproot sex and gender categories is significantly neutralized.40

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

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

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

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


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

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

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

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

It should be noted that there is some ambiguity within Title VII jurisprudence over whether plaintiff must establish that she actually is a member of a protected statutory category or whether she must show that the employer perceived her to be a member of that class. See Leonard v. Katsinas, 2007 WL 1106136, at *8-13 (C.D. Ill. Apr. 11, 2007) (discussing the ambiguity of Title VII where plaintiff’s ethnic ancestry could not be determined conclusively). If a trans plaintiff only needs to argue that her employer perceived her as a man who fails to conform to male stereotypes, that might suggest that she need not actually describe herself as a man in order to obtain Title VII protection, and the radical potential of Price Waterhouse might remain intact.

This argument is unavailing for a number of reasons. Unlike other federal remedial statutes such as the Americans with Disabilities Act or certain state anti-discrimination laws, Title VII contains no explicit protection for persons merely perceived as being a particular race, gender, religion, etc. In order to establish a prima facie case of employment discrimination under Title VII, it is well established that a plaintiff must establish that “he is a member of a protected class.” McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Even though a number of courts have indicated that the employer’s perceptions are the guidepost in determining class membership, see, e.g., Estate of Amos v. City of Page, Ariz., 257 F.3d 1086, 1094 (9th Cir. 2001), most of these court plaintiffs point to some objective criteria which would support a perception of her as being a member of a protected class even if she is not. Leonard, 2007 WL 1106136, at *12; Lewis v. State of Del. Dept. of Pub. Instruction, 948 F. Supp. 352, 360 (D. Del. 1996); Perkins v. Lake County Dept. of Utilities, 860 F. Supp. 1262, 1277 (N.D. Ohio 1994).

Therefore, even if a plaintiff asserting a Price Waterhouse theory is able to focus on employer perceptions rather that her own identity, she must point to objective reasons that would support an employer’s thinking she is a gender non-conforming man. In doing so she must both describe the rationality of being perceived as a man and the deviancy of her behavior from that rationally perceived sex. Even if she never describes herself as male, she is required to spell out the binary assimilative reading of her sex/gender experience and reinforce her non-normative status.

47. See Dylan Vade, Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People, 11 Mich. J. Gender & L. 253, 296 (2005) ("Currently, there is virtually no legal recognition of people
requiring plaintiffs to make biologically essentialist claims wherever possible in order to receive Title VII protection and denying such protection where such essentialist claims are impossible, the sex-stereotyping claim reifies the restrictions of dominant gender norms through the proliferation of the category of sex.

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

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

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

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

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

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

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

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

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


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

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

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

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

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

56. 502 F.3d 1215 (10th Cir. 2007).
57. Id. at 1224.
solace for an otherwise trans-suspicious court. The *Etsitty* decision underscores the limited reach of *Price Waterhouse* in restructuring our fundamental beliefs about sex and gender.

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

**B. Sui Generis Protections**

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


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

1. **The “Transgender” or “Transsexual” Class**

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

The problem she faces is not because she does not conform to the Library’s stereotypes about how men and women should look and behave—she adopts those norms. Rather, her problems stem from the Library’s intolerance toward a person like her, whose gender identity does not match her anatomical sex.

Nevertheless, Judge Robertson suggested that Title VII might protect transsexuals as transsexuals under Title VII’s “because of sex” provision:

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

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

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

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

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

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

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

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

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

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

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

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

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


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

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

2. The “Gender Identity/Expression” Class

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

73. Spade, supra note 7, at 25; see also Butler, Bodies that Matter, supra note 11, at 3 (“The abject designates here precisely those ‘unlivable’ and ‘uninhabitable’ zones of social life which are nevertheless densely populated by those who do not enjoy the status of the subject . . . . This zone of uninhabitability will constitute the defining limit of the subject’s domain; it will constitute that site of dreaded identification against which—and by virtue of which—the domain of subject will circumscribe its own claim to autonomy and to life.”).
74. See Currah & Minter, supra note 59, at 52-53 (general discussion of legislative strategies).
personhood,” the gender identity/expression class protects against “discrimination on the basis of external as well as internal manifestations of identity.”

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

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

77. Currah & Minter, supra note 59, at 54-55.
78. Paisley Currah, Gender Pluralisms Under the Transgender Umbrella, in TRANSGENDER RIGHTS 23 (Currah et al. eds., 2006) [hereinafter Currah, Gender Pluralisms].
79. Currah & Minter, supra note 59, at 54.
80. See Currah, Gender Pluralisms, supra note 78, at 18 (“[T]ransgender advocates stay within the bounds of the logic of civil rights discourse by emphasizing immutability, but, significantly, they reverse the traditional idea that gender is an expression of sexed bodies and instead identify gender identity as the presocial fixed category.”).
82. See id. at 124-25; Dunson, supra note 28, at 503 (citing research that people are less willing to help a stigmatized group who are perceived as responsible for their predicament, arguing that “people may favor inclusion in the [protected] category for those who are seen as having no control over their gender identity—i.e., that they were born transgender or have had transgender feelings for a significantly long time.”); cf. Hernandez-Montiel v. INS, 225 F.3d 1084 (2000) (in granting asylum to a Mexican man, finding his “female sexual identity” to be immutable because it is a characteristic that one “cannot change, or should not be required to change because it is fundamental to their individual identities or consciences”), overruled on other grounds, Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005); Robinson v. California, 370 U.S. 660 (1962) (prohibiting criminalization of the status of being addicted to narcotics).
commendable, if the expression is protected only because it cannot be changed, then the underlying presumption is that if such expression could be changed, then it would be changed.83 If the conduct subject to discrimination—e.g. cross-dressing or genital reconstruction—were divorced from identity-based compulsion and thereby completely volitional, it would still be justifiably stigmatized and without legal protection.84 Thus, by protecting transgender rights within an immutability framework, the marginality of gender transgressive acts persists, perpetuating the marginality of the gender identities constituted by such acts. While legal protection for all gender identities establishes legal tolerance for the existence of transgender identities, and may shelter gender non-conformists from the explicit violence of sanctioned intolerance, it fails to eliminate the implicit badge of inferiority cast upon those whose identities involve the commission of stigmatized binary sex/gender non-conforming acts.85

A regime of tolerance must be distinguished from a regime of respect, value, and dignity,86 and the latter regime cannot be achieved so long as gendered acts remain hierarchically constructed. The gender identity/expression class allows the gendered regulation of particular acts to perpetuate, masked by the liberal legal guise of compassion for the immutably afflicted.

The process by which gender identity protection can conceal and perpetuate underlying regulatory norms is well-illustrated by ENDA itself. While there has been much criticism of the decision by ENDA’s sponsors to delete its trans-inclusive provisions,87 there has been surprisingly little attention given to

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

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

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

88. See H.R. 2015 § 8(a)(5).
90. Id.
91. See H.R. 2015 § 8(a)(3).
performativity, as it fails to acknowledge that wearing particularly gendered clothing is constitutive and not reflective of one's gender identity. Where gendered acts can be conceptualized as volitional and untethered to an immutable identity, the trans-"inclusive" ENDA would have provided no protection for gender-motivated discrimination. Where gendered acts can be conceptualized as "consistent" with an essentialized, immutable gender identity a trans-inclusive ENDA would have required respect for that identity without questioning what cultural norms produce the appearance of consistency.

By protecting transgenderism via the framework of immutable identity, the legal inquiry into a particular discriminatory act will always be whether the stigmatized conduct inevitably flows from that identity; it will never focus on the social meaning attached to that act. If an employee is terminated because he is someone "with a beard wearing a dress," the gender identity/expression framework would analyze whether this expression stems from his underlying identity and would not investigate the reasons why such conduct was disfavored in the first place.92 The perils of this analytical framework have been exposed analogously in the racial discrimination context. In the much-criticized Rogers v. American Airlines, a black female employee unsuccessfully challenged American Airlines' policy of prohibiting all its employees from wearing their hair in cornrows.93 In dismissing her Title VII claim, the court reasoned:

[Plaintiff's hair style] is not the product of natural hair growth but of artifice. An all-braided hair style is an "easily changed characteristic," and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.94

Even though cornrows were associated with a particular race, they were not an immutable characteristic of that race, and thus could be validly prohibited as a condition of employment. However, this analysis overlooks the fact that cornrows were prohibited by the employer only because they were associated with Rogers's racial background.95 It is only because cornrows signified blackness to customers that American Airlines chose to prohibit them, and this conscious and deliberate stigmatization of mutable "black" conduct received the sanction of the Rogers court. American Airlines could not reprimand employees for being black in the ontological sense, but because it could reprimand them for actions conceivably extractable from ontological blackness, it could reprimand

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

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

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

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


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

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

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

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

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

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

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

C. Anticipating the Counter-Critiques

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

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

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

104. See Currah, *Gender Pluralisms*, supra note 78, at 20 ("perhaps gender nonconforming practices will be recognized as expressive activity worthy of constitutional protection at some moment in the future . . . "); Currah, *Defending Genders*, *supra* note 7, at 1368 ("Rather than challenging the categories themselves, advocates of the rights of sexual minorities ought to have a long-term strategy of challenging the state's prerogative to define those categories. Let civil society—or what queer theorists call 'culture'—be the sphere in which identities are believed in, deconstructed, nurtured, undermined, performed, and lived. In the short term, however, rights advocates ought to fight for legislation to protect all sexual minorities, including transgendered and transsexual people.").
Houston's litigation strategy, is intended to place the transgender movement within civil rights discourse in a manner palatable to both the judiciary and society at large. The difficulty with this incremental strategy is that it assumes that short-term victories for the gender-palatable will have benign effects on more gender-"radical" future plaintiffs. There is good reason to question this assumption. As relatively gender-conforming trans people—i.e. post-operative transsexuals or gender non-conforming "men" or "women" in the Price Waterhouse mold—successfully acquire legal protection, they create precedent that will shape and constrain future cases. Short-term victories, which only require slight reconfigurations of sex/gender norms, create lenses through which future plaintiffs will be seen and archetypes against which these plaintiffs will be compared. If plausible transgender legal protections emerge in the short run, there will be significant pressure for future plaintiffs to articulate their legal claims so as to fit within these protections. If these protections involve reaffirmation of binary sexes or essentialized identities, victory may very well hinge upon continued reaffirmation. Plaintiffs who truly wish to challenge these ideologies must thus choose whether to describe themselves disingenuously within these dominant frameworks or have their claims dismissed as unsupported by precedent. Through this pressure to articulate publicly one's identity in terms of those already embraced by socio-legal institution, an incremental strategy dissuades, if not stigmatizes, the emergence of radical new conceptions of identity. If a transgender movement is expected to achieve a long-term reconstructive goal, it must avoid the creation of dominant scripts in the short term that only slightly expand existing gender constructs.

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


Id.

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

See James M. Donovan, Baby Steps or One Fell Swoop? The Incremental Extension of Rights is Not a Defensible Strategy, 38 CAL. W. L. REV. 1 (2001) (arguing that inclusion of certain identities in anti-discrimination laws serves to exclude and further marginalize those identities who seek legal protection later in time).

See BUTLER, GENDER TROUBLE, supra note 10, at 21 ("The articulation of an identity within available cultural terms instates a definition that forecloses in advance the emergence of new identity concepts in and through politically engaged actions . . . ."); Farrell, supra note 83, at 691 ("The consequence of avoiding the subject of transformation may be giving up on transformation as a goal of the movement—either consciously, by settling for "the best we can do" right now, or unconsciously, through neglect."); Grenfell, supra note 9, at 96 ("[Transgender people] must weigh the value of present legal recognition of their 'injury' with the danger that this recognition may have the effect of fixing and totalizing the present condition of this identity.").

See Currah, Gender Pluralisms, supra note 78, at 7-13; see also Doe v. Yunits, 15 Mass. L.
grounding discrimination claims in transgender identity yielded success in the former case, and the failure to do so yielded dismissal in the latter, a juxtaposition of the two cases illustrates the emerging incentives to adhere to dominant scripts of essentialized gender identity. In *Doe*, a trans teenage girl was heavily reprimanded for her gender non-conformity and brought suit against the school district.\(^{111}\) Central to her victorious suit was Doe’s emphasis on her Gender Identity Disorder, making her non-conformity a necessary “expression of her core identity.”\(^{112}\) Because this formulation posits gender non-conformity as the expression of an immutable characteristic, forcing Doe to conform to gender stereotypes would “endanger [her] psychiatric health” and therefore would be unlawful.\(^{113}\) By contrast, in *Youngblood*, a non-trans-identifying teenage girl was prohibited from wearing a suit and tie for her school portrait, and the plaintiff largely based her anti-discrimination claim on Free Expression grounds.\(^{114}\) She did not articulate her gender non-conformity as stemming from a medical condition or fundamental identity, but rather stated that her aversion to feminine clothing was “deep-seated” and “long-lasting.”\(^{115}\) As such, the court found that her expression was not constitutionally protected and dismissed her claim.\(^{116}\) In analyzing these divergent results, Currah infers the advisability of presenting an identity-based claim,\(^{117}\) and most lawyers in search of a successful litigation strategy would likely arrive at the same conclusion. However, this conclusion expressly eschews a legal strategy based upon the intrinsic value of plaintiff’s gender non-conforming conduct in favor of one couched in immutability-based tolerance. As transgender plaintiffs look to precedents such as *Doe* and *Youngblood* to determine their most likely means of success, what emerges is a strategy that fails to directly expose and address the permissibility of stigmatizing gender non-conformity. A gender non-conforming plaintiff may indeed view her non-conformity as completely volitional yet nonetheless deserving of legal protection. However, the jurisprudential pressure to formulate such volitional conduct in identity-based terms may yield a strategic misdescription and a resulting perpetuation of conduct-focused stigma.

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

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\(^{111}\) Currah, *supra* note 78, at 7.

\(^{112}\) *Id.* at 7-8.

\(^{113}\) *Id.* at 10 (quoting Mem. of Decision and Order on Defendant’s Partial Mot. to Dismiss and Plaintiff’s Mot. for Leave to Amend, *Doe v. Yunits*, 15 Mass. L. Rep. 278 (2001)).

\(^{114}\) *Id.* at 9-10.

\(^{115}\) *Id.* at 10 (quoting Plaintiffs Appeal of a Final Order of the District Ct. for the Middle District of Florida, *Youngblood v. Sch. Board of Hillsborough County*, at 2, 3 (May 2003)).

\(^{116}\) *Id.* at 10-11.

\(^{117}\) *Id.* at 13 ("[T]he different legal outcomes for *Doe* and *Youngblood* might tell us something about how identity-based claims can have more traction than conduct-based claims in courts.").
regulatory state, but also from diffuse inter-subjective constructions privileged by the state. Stated differently, the interpellation of subjects not only “comes from above, from a high center of power,” but also “from below, from within resistant social movements.” Janet Halley has articulated the means by which this advocacy script-writing can coercively construct those who seek protection under a particular identity-based framework:

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

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

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

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

2. Argument #2: Protection for the Most Afflicted

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

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

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

Moreover, there is good reason to believe that the transgender movement’s legal goal of zealously representing its specific clients’ material interests hinders the potential representation of transgenderism in a broader reconstructive project.\textsuperscript{126}

\begin{itemize}
\item \textsuperscript{122} See Lloyd, \textit{supra} note 9, at 182 (describing a male-identified but ambiguously appearing biological woman’s decision to argue as a sex-stereotyped woman rather than argue on the basis of his self-identification).
\item \textsuperscript{123} See, e.g., Currah, \textit{Defending Genders}, \textit{supra} note 7, at 1363-69.
\item \textsuperscript{124} \textit{Id.} at 1366.
\item \textsuperscript{125} Halley, \textit{supra} note 81, at 120.
\item \textsuperscript{126} \textit{Contra} Currah, \textit{Transgender Rights Imaginary}, \textit{supra} note 75, at 716 (“I would suggest there
It must be remembered that the objects of subordination are never in a position of exteriority in relation to such subordination; they are the very products of the oppressive norms which they resist.\textsuperscript{127} By seeking legitimacy \textit{from} the very system that serves to oppress transgenderism, transgender people seek legitimacy \textit{within} that system of subordination. If transgender advocates posit themselves primarily as agents of their aggrieved clients and can satisfy their clients through modest expansion of legal sex/gender norms, those sex/gender norms appear capable of accommodating transgenderism despite their continued coercive effects. In such circumstances, where both defenders and opponents of the status quo believe that the existing social structure has the potential for satisfactory notions of justice, the hegemony of this structure is at its most powerful and enduring.\textsuperscript{128} By conceding to claims of injustice through only slight superstructural shifts in the existing order, the underlying social structure maintains its legitimacy because it is perceived as "approximately just."\textsuperscript{129} If advocates of a potentially radical social movement wish to uproot and supplant a fundamentally unjust and repressive social order, they must be able both to imagine and commit to a more liberatory existence. The remedial concessions this commitment may require might be inconsistent with many lawyers' conceptions of their representative roles, but the transgender movement must nonetheless confront this dilemma in structuring its ultimate goals.

\textbf{IV. TOWARD A MORE TRANSFORMATIVE APPROACH}

\textbf{A. Preliminary Thoughts}

Although the inherent limitations of a formal equality approach to transgender rights might lead to the conclusion that the law is an inappropriate venue for gender reconstruction,\textsuperscript{130} this Part will suggest that the legal system can be employed to embrace gender variance without implicitly reaffirming existing gender norms. Rather than conceptualize our legal system as simply a means of concealing and furthering oppressive gender traditions, the following discussion will expose the ways in which legal rules may potentially counter

\begin{itemize}
  \item is no 'zero-sum' tension between defending gender as a coherent category and dis-establishing it.
  \item See MICHEL FOUCALUT, THE HISTORY OF SEXUALITY: AN INTRODUCTION (VOLUME 1) 95 (1978).
  \item See Robert W. Gordon, Some Critical Theories of Law and Their Critics, in THE POLITICS OF LAW 641, 647-48 (Quintin Hoare & Geoffrey Nowell-Smith eds., 1971).
  \item Id. at 647; see Farrell, supra note 83, at 699-700 (arguing that formal sex equality rhetoric is part of "preservation-through-transformation," in which underlying ideology is preserved by transforming the discourse on an issue to adapt to changing social norms.) (quoting Reva B. Siegel, Why Equal Protection No Longer Protects: Evolving Forms of Status-Enforcing State Action, 49 STAN. L. REV. 1111, 1113 (1997)).
  \item See, e.g., Spade, supra note 7, at 35 ("The more I work in law, the more invested I become in the non-legal activism I engage in, because I realize increasingly that the role of law in creating the fundamental shifts we are demanding is limited.")
\end{itemize}
such traditions by eliminating their means of perpetuation while simultaneously laying the foundations for a future that embraces a broad range of gendered expression.\textsuperscript{131} However, in order to harness the powers of the legal system in this fashion, two conceptual shifts must take place to move away from current reifying strategies. First, advocates must be able collectively to imagine a social landscape that would both liberate their existing clients from oppression and allow all people to present themselves to the world unconstrained by gender stigma. By solely focusing on accommodating the needs of existing clients and declaring success upon acquiring such accommodation, lawyers further a "good enough" mindset that can easily yield complacency in a broader critical project.\textsuperscript{132} It is therefore crucial that a gender-utopian future serve as the foundation for reforming the social construction of gender. Second, attention must shift away from obtaining merely superstructural accommodations of gender non-conformity and towards a deeper challenge to the structural underpinnings of contemporary sex/gender norms. If these norms and their corresponding stigmas can persevere despite continually accommodating gender-based political movements, it is crucial to unearth the means by which they are able to persevere, and more specifically the ways in which the legal system contributes to this structural perseverance. Once this contribution is understood, it can be directly challenged and replaced with means for enabling our normative goals. If advocates can dismantle the rights and privileges conferred upon the discursive reproduction of gender norms, they can affirmatively protect the expressive rights of all people as these norms gradually lose traction in the coming generations.

Although these conceptual shifts are by no means simple endeavors, they are not without guidance. While this discussion does not foreclose any other inspirational source, the field of anthropology can provide profound insight into both the imaginative potential of gendered existences and the means by which such existences may be maintained.\textsuperscript{133} Through thick\textsuperscript{134} investigation of cultures dispersed geographically and historically, anthropologists have engaged with societies that indeed conceive of gender in ways dramatically different from our

\begin{itemize}
  \item \textsuperscript{131} Cf. Gordon, supra note 128, at 653 ("Legal discourses don’t just mask the realities of power and life, but participate in constructing those realities.").
  \item \textsuperscript{132} Id. at 648.
  \item \textsuperscript{133} See, e.g., Richard M. Juang, Transgendering the Politics of Religion, in TRANSGENDER RIGHTS, supra note 78, at 256 ("The existence of other cultural taxonomies is part of a larger body of evidence supporting the claim that Western models of sex, gender, and sexuality do not reflect some bedrock cultural necessity but one of several roads of historiographical development that are open to future change."); Katyal, supra note 97, at 115 (noting that anthropologists “have actively deconstructed the presumed equation between identity, desire, and sexual conduct”).
  \item \textsuperscript{134} “Thick” is an anthropological term of art that involves describing a particular cultural phenomenon within its broader social context. See Clifford Geertz, \textit{Thick Description: Toward an Interpretive Theory of Culture}, in THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 3 (1973).
\end{itemize}
own. In numerous societies, one's gendered existence is not indelibly determined by one's biological sex but rather by other aesthetic, occupational, religious, or sexual factors that interweave with the human body to produce gender identities largely incommensurable with existing Western categories. Moreover, these gender identities are not inevitably conceived as pre-ontologically fixed but rather as potentially dynamic throughout the course of one's life. From the dynamic variability of gender identity emerges the possibility of culturally sanctioned gender fluidity. Although there are significant arguments against the "adoption" of any particular culture's gender constructs, the broader landscape of gender fluidity illustrated by gender anthropology provides a useful guidepost in formulating a utopian vision of gender construction.

More difficult than identifying gender fluidity as a normative goal is identifying the means by which it may be implemented. Even if we wish to incorporate ideals of fluidity into Western transgender discourse, we cannot do so without understanding the social mechanisms by which a particular culture enables individuals to engage in dynamic gender expressive conduct without incurring enduring social stigma. When a child is born into a gender fluid society, what expectations are inscribed upon it? What limitations or freedoms attached? What family or kinship structures supervise the child's development? To what cultural images is the child exposed? Broadly speaking, in order to engage usefully with gender fluid traditions, we must examine "the social and psychic landscape of an infant's emergence." It is in this landscape that the plausibility, permissibility, and desirability of gender fluidity reside.

While this is undeniably a daunting task, thankfully it is central to the anthropological project, and significant ethnographic and theoretical work

138. See, e.g., id.  
139. See Don Kulick, Travesti: Sex, Gender and Culture Among Brazilian Transgendered Prostitutes (1998) (exploring Brazil's conceptually different understanding of transgernderism).  
140. See discussion of the berdache, infra this Part; see also Niko Besnier, Polynesian Gender Liminality Through Time and Space, in Third Sex, Third Gender, supra note 135, at 308-11 (describing the "fuzziness" of Polynesian gender identities and the ability of individuals to move in and out of them).  
141. See Mary Anne Case, Unpacking Package Deals: Separate Spheres Are Not the Answer, 75 Denv. U. L. Rev. 1305 (1998) (arguing that adopting the Native American berdache model would be akin to importing separate-but-equal gender "package deals").  
elucidates the structural underpinnings of gender fluidity in various cultures. What the lawyer must do, however, is synthesize this body of anthropological data and produce a set of “legal” rules that enable and perpetuate fluidity. Once a legal rule system of gender fluidity is outlined, the legal reconstructive project can begin. By comparing a rule system of gender fluidity to our existing jurisprudential structure—a rule system of gender rigidity—we can begin to unearth aspects of American jurisprudence that support dominant gender norms in perhaps a non-obvious manner. Because a legal rule system will involve not merely rules directly pertaining to gender recognition but also surrounding rules of kinship, religion, and economics, this approach can direct transgender activists towards areas of law in which gender norms are maintained sub silentio.

The following sections will demonstrate this comparative structural analysis through the example of the Native American “berdache” gender role with a specific focus on the Navajo nadleehiehi. First, a broad overview of these gender roles will be presented. Then, an analysis of what appear to be the primary structural underpinnings that enabled the emergence and inter-generational persistence of nadleehiehi will be provided. Lastly, this structural understanding of Navajo gender fluidity will be used to expose areas of American law that may significantly restrict a more fluid deployment of gender in our own society.

Due to the dangers of cross-cultural misrepresentation and misappropriation, it must be emphasized that the following analysis is not an effort to transplant the berdache role into Western culture or even to reduce the

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143. This process of creating legal rule-systems derives from Mary Joe Frug, A Postmodern Feminist Legal Manifesto (An Unfinished Draft), 105 HARV. L. REV. 1045 (1992). In this article, Frug outlined a similar approach in order to reveal how the legal system produces and perpetuates a “common residue of meaning” associated with the female body. Id. at 1049. By looking beyond discrimination jurisprudence to laws regulating wage markets, child support, abortion, prostitution, sexual harassment, and rape, she was able to demonstrate how these various rules interact to terrorize, maternalize, and sexualize the female body. Id. at 1049-50. By looking at the broad legal landscape that women are forced to confront, Frug was able to identify a legal “rule network” that “‘constructs’ or engenders the female body.” Id. at 1050.

144. I use the term “berdache” due to the unfortunate lack of a more appropriate term. The term derives from an Arabic word for male prostitute and unsurprisingly has become disfavored. However, no suitable replacement has been coined to refer broadly to this traditional gender role, and its prevalence in anthropological literature and legal scholarship thus at times require its use largely for the sake of clarity. See Sabine Lang, Men as Women, Women as Men xii-xiii (1998). While the term “two-spirit” has sometimes been used to describe traditional gender fluidity, it has also come to refer to contemporary Native American LGBT individuals, and its use might confuse the scope of this paper. See Will Roscoe, Changing Ones: Third and Fourth Genders in Native North America 112-13 (1998). Therefore, I will attempt to use tribe-specific terms whenever possible, but I will resort to the term “berdache” when a more general discussion is necessary. Although I have used the term extensively in the past when in need of a generic term for Native American gender variance, here I will primarily use the term “Native American gender variance” to refer to “berdachism.”

I should note that I am not the first legal academic to strategically invoke Native American berdachism. See, e.g., Valdes, supra note 7.
TOWARD A MORE TRANSFORMATIVE APPROACH

berdache role into a static template of gender fluidity. Native American gender categories are the product of a cultural history vastly different from that of Western transgender categories, and it would be impossible and inadvisable to suggest that trans people embrace the Native American identities wholesale. There already exists unease within legal scholarship over importation of a “berdache model,” and any effort to pinpoint with particularity an “essential” berdachism would do injustice to its geographic and historic variations. The following analysis primarily focuses on the way the fluidity of Native American gender identities—vis-à-vis bodily sex and other gender roles—is contextualized within a broader structure of social relationships so as to provide comparative insight into potential ways that gender intransitivity is contextualized within Western social structures. The following sections’ aim is to help LGBT advocates identify specific ways in which utopian gender ideologies are currently stymied by a broader legal rule system of gender construction and illuminate the obstacle they must overcome in order to achieve their normative goals.

B. Native American Gender Variance

1. Background

Before assimilationist American policies were able to radically transform the landscape of Native American society, approximately 113 tribes recognized gender-variant roles that have been generically referred to by Western anthropologists as “berdache.” Broadly stated, these gender-variant individuals were assigned a “male” or “female” gender at birth based upon their genitalia but adopted the culturally-defined social role of the opposite gender in adolescence or adulthood. While this would seem to be roughly in accordance with our understandings of transgenderism, Native American gender variance diverged from mainstream construction of transgenderism in a few notable respects. Although cross-dressing was usually associated with the Native

145. I include this proviso in response to Richard Juang’s insightful cautions against overuse and misuse of cross-cultural comparisons. See Juang, supra note 133, at 255-59 (“Cultures should be recognized ‘not as templates but as dynamic systems containing internal debates, tensions, and contradictions . . . . Information about another culture constitutes a critical vantage point from which to see one’s own culture from a different perspective; it does not enable one to claim those identity categories as one’s own.”); see also Lynn M. Morgan & Evan B. Towle, Romancing the Transgender Narrative: Rethinking the Use of ‘Third Gender’ Concept, 8 GLQ: J. Gay & Lesbian Studies 469 (2002) (“Rather than reify or romanticize presumed gender variability in non-Western societies, we would prefer to see greater attention given to the historical and social contexts in which gendered and sexualized bodies and relationships are produced, reproduced, and transformed.”).

146. See Case, supra note 141; Kirkland, supra note 39, at 34 (citing Case with approval).

147. See Callender & Kochems, supra note 137. As a point of reference, there are 561 tribal entities recognized by the Bureau of Indian Affairs. See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648 (Mar. 22, 2007).
American gender variance role, it was not determinative. 148 "Berdache" often wore clothing in a manner distinct from culturally-defined men and women, and some did not cross dress at all. 149 Most determinative was the adoption of the occupational and spiritual roles typically associated with the opposite physical sex. 150 "Recognition of gender variance typically occurred when a boy showed interest and aptitude in women's work or a girl persistently engaged in the activities of boys and men." 151 It is important to note that although performance of the opposite gender's occupational and spiritual roles was the primary constituent of Native American gender variance, gender-variant individuals most commonly continued to perform both male and female roles despite their berdache identities. 152

Gender variance was fully incorporated into tribal life and was generally well-respected and valued within the community. 153 In contrast to the familial strife often associated with an American adolescent's revelation of transgenderism, the existence of a gender-variant child in tribes such as the Navajo was often considered a great fortune. 154 A family with a nadleehi (Navajo gender-variant category) among its members "was considered by themselves and everyone else as very fortunate . . . special care was taken in the raising of such children and they afforded favoritism not shown other members of the family." 155 Consequently, nadleehi and other gender-variant persons were integrated into the kinship structures of their tribes despite the seeming divergence between their gender and their physiology. Most notably, marriage was fully sanctioned between a gender-variant and a "non-variant" of the opposite lived gender role. 156 Accordingly, gender variant individuals were free to adopt and were often entrusted as caretakers of children. 157 Gender variance, unlike its counterpart in American transgenderism, was not relegated to the margins of society.

The way Native American communities value gender variance is not only

148. ROSCOE, supra note 144, at 41-42.
149. See id.
150. See Callender & Kochems, supra note 137, at 443; ROSCOE, supra note 144, at 8.
151. ROSCOE, supra note 144, at 8.
152. Id.
153. For instance, at least two berdache traveled to Washington, DC, to personally meet American presidents unaware of their gender roles. See WILL ROSCOE, THE ZUNI MAN-WOMAN 70-71 (1991) (describing We'wha, a Zuni who visited President Cleveland in 1886); ROSCOE, supra note 144, at 56-57 (describing Hastiin Klah, a Navajo, who met President Franklin Roosevelt).
156. See id. at 110-16; RAMÓN A. GUTIÉRREZ, WHEN JESUS CAME, THE CORN MOTHERS WENT AWAY: MARRIAGE, SEXUALITY, AND POWER IN NEW MEXICO, 1500-1846 34 (1991); Elsie Clews Parsons, The Zuni La 'mana', 18 AM. ANTHROPOLOGIST 521, 526 (1916).
157. See Williams, supra note 154, at 154-57.
significant because of the high status granted to gender variant individuals, but also because it highlights a conceptual divergence from Western sex/gender norms. First, they directly refute any necessary linkage between a pre-social “sex” and one’s gender identity. Although one’s physiological “sex” gave rise to a presumption of gender role, this presumption was rebuttable upon displaying preference for the occupational and spiritual roles usually associated with the “opposite sex.”

In analyzing the relationship between bodily sex and gender in Native American societies, Will Roscoe explains:

[In North America, individual, acquired and ascribed traits outweighed sex-assignment in determining gender identity. So while gender categories often include perceptions of anatomical and physiological differences, these perceptions are mediated by language and symbols . . . . Those physical differences that are a part of a culture’s gender categories may not be constructed as dichotomous or fixed, or viewed as determinants of social behavior.]

Since Native Americans viewed bodily difference as extricable from more socially-consequential gender difference, it became unnecessary to divide those bodies into strictly dichotomous categories. Unlike in Western society, the birth of a child with “ambiguous” genitalia did not necessitate emergency medical intervention, as its productive capacity entitled the child to the same social legitimacy as any other child. As summarized by Francisco Valdes, “in native contexts, gender was the social and occupational performance of an individual personality profile, not the social and sexual performance of an official sex assignment.” Many Native American societies thus avoided the dangerous myth of “sex” so prevalent in our cultural heritage. A bodily sex intrinsic to every human being did not dictate one’s culturally manifested gender identity; rather, the repeated performance of gendered acts by human bodies forged such an identity. By placing cultural determinacy in the act and not in the body, these societies were able to eliminate the stigmatization of gender nonconformity, as there was nothing with which gendered acts needed to conform. As such, Native American gender-variant people, unlike trans people, violated no intractable social rules.

Second, constructions of the Native American gender variance did not rely upon essentialist understandings of identity. Just as gender roles did not reflect a determinative sex, one’s performance of a gender-variant role did not reflect

158. See Valdes, supra note 7, at 39-42, 216-17 (describing Euro-American gender as “intransitively” deduced while Native American gender is “transitively” induced from a child’s proclivities).
159. ROSCOE, supra note 144, at 127.
160. See LANG, supra note 144, at 68 (noting that intersex nadleehi held the same high status as other nadleehi).
161. Valdes, supra note 7, at 217.
some underlying gender-variant "self." Although individuals usually identified as gender-variant throughout their entire lives, it was still possible to move successfully in and out of such role without risking social condemnation. This ability indicates that one was not gender-variant in any essential sense, but only in the performance of the constitutive deeds. Furthermore, it must be emphasized that the constitutive acts of gender variance were not strictly fixed, and the assumption of a gender-variant role for the most part did not categorically exclude an individual from male- or female-related acts. Cross-dressing varied across and within tribes and both male and female occupational roles remained open to most gender-variant individuals. This variability in gender-variant behavior from individual to individual and in one individual over time indicates that even if Native American gender categories were binary at their core, these binary categories did not constitute "separate spheres" in the Jim Crow sense. Assumption of gender roles primarily involved the performance of a male or female occupation, but those occupations did not mimetically dictate a host of opposing secondary gender characteristics.

This variability within the gender-variant categories indicates that Native American gender fluidity was not simply

162. See LANG, supra note 144, at 255; WILLIAMS, supra note 154, at 78-79.
163. See supra notes 148-52.
164. See Case, supra note 141, at 1316 (critiquing the "package deal" of berdachism by relying on Plessy v. Ferguson, 163 U.S. 537 (1896)). It should be noted that anthropologists have debated over whether berdachism was part of a binary gender system or whether it constituted a distinct third or fourth category. For the former view, see, e.g., Carolyn Epple, Coming to Terms with Navajo Nádleehi: A Critique of Berdache, "Gay," "Alternate Gender," and "Two-Spirit," 25 AM. ETHNOLOGIST 267, 273 (1998); Evelyn Blackwood, Native American Gender and Sexualities: Anthropological Models and Misrepresentations, in TWO SPIRIT PEOPLE: NATIVE AMERICAN GENDER, SEXUALITY, AND SPIRITUALITY (Sue-Ellen Jacobs et al. eds., 1997). For the latter view, see ROSCOE, supra note 144, at 127-29. Although both the wide morphological variety within Native American gender variance and distinctions between berdache and non-berdache individuals would seem to strongly support the latter view, I would argue that underlying all these differing manifestations of gender roles is a social-role based binary, as there is an undisputed recognition of "male" and "female" present in both arguments. However, this binary appears only weakly determinative of secondary gender characteristics (e.g. appearance, physiology, sexuality) so that it can countenance a substantial degree of fluidity and variability within its conceptual structure. Moreover, conceptualizing berdachism as a distinct third gender category does not necessarily make Native American gender constructs radically more liberatory than Western binary constructs. Just as a "transgender class" can serve to strengthen the legitimacy of normatively binary-conforming men and women through the establishment of a conceptual "other," positing gender fluidity as solely a trait of the third-gender berdache insulates men and women from gender fluid conduct. This conclusion is arguably empirically suspect and certainly normatively undesirable. For a good illustration of the problems of culturally recognizing a distinct third gender category, see SERENA NANDA, NEITHER MEN NOR WOMEN: THE HIJRAS OF INDIA (1990) (documenting the extreme social marginalization of contemporary Indian third-gender category).

165. This is not to assert that berdachism placed no limitations on permissible action. For example, berdache were typically only permitted to marry non-berdache of the opposite gender, see LANG, supra note 144, at 101-04, and both male-bodied and female-bodied berdache were at least sometimes excluded from some occupations, see id., at 69 (describing male-bodied Navajo nádleehi's exclusion from hunting and warfare), 270-72 (surveying the occupations available to female-bodied berdache).
in relation to a bodily sex but rather in relation to any conceptualization of a pre-ontological self.

2. A Rule System of Navajo Gender Fluidity

This section will trace the rule system that governed the life of a Navajo child as she assumed the *nadleeh* role. Focusing on three overarching themes—child autonomy, tribal collectivism, and gender egalitarianism—this discussion will illustrate how a *nadleeh* child was able to enter into a gender role without needing to overcome parental constraints, with a sense of communal worth and belonging, and absent significant socioeconomic disadvantage. This section is a condensed discussion of Native American gender rule system that I have explored more fully elsewhere and is the result of a far more extensive historical and cultural inquiry. With this in mind, a preliminary outline of this rule system is as follows:

1) Child Autonomy: Because principal authority for a child’s life decisions lies with the child and not with the parent, the child is free to explore all forms of occupation and aesthetic presentation without parental constraint. Even if a child’s gender role might be presumed at birth, the child has significant freedom to engage in activity that directly rebuts that presumption.

2) Tribal Collectivism: In the child’s process of autonomous self-discovery, it is exposed to a diversity of ideas and experiences due to its status as a member of a broad kinship network and not merely a nuclear family. Even if the nuclear family would not expose the child to notions of gender fluidity, the broader community’s involvement with the rearing of the child would provide such exposure. Furthermore, to the extent that parents did attempt to impose constraints on gender fluidity, a sense of value and responsibility to the collective tribe would encourage “efficient” assumption of the *nadleeh* role even if at the economic expense of the immediate family (such as through a gendered-labor imbalance).

3) Gender Egalitarianism: As a child is exposed to a diversity of experiences and autonomously determines her gender role, the lack of social or economic hierarchy between men and women meant that there would be no increased social stigma or economic disadvantage in occupying another gender’s social roles. As there is no “high value” or “low value” gender role, there is no


167. In the absence of gender egalitarianism, there might potentially be uni-directional fluidity from the subordinate gender role to the dominant one. However, it is difficult to imagine why such a model would be appealing as a long term reformative goal.
socioeconomic burden associated with movement between available gender roles.

Through these three principles, gender fluidity became possible (as it would not be parentally restrained), plausible (as the child was exposed to its possibility and value), and attractive (as there would be no corresponding loss in socioeconomic value). The following subsections will explore these elements of the berdache rule system in greater detail.

A note on methodology: Because the traditional nadleeh gender category has largely been extinguished due to the American colonialism, examining the rule systems that structured traditional Navajo life (pre-westward expansion) presents both empirical and representational difficulties. In order to mitigate these difficulties, I will employ two types of sources. First, I will use anthropological accounts of the nadleehi and their communities in order to provide first-hand narratives of the lives of gender variant Navajo. Second, in order to provide an emic perspective on traditional law, I will use contemporary tribal courts explications of tribal "common law." For the Navajo, tribal common law is meant to embody the traditional rules of the tribe before American colonization and ideally should reflect the legal landscape facing nadleehi. Additionally, these explications of tribal common law emphasize that the rule systems described herein indeed carried the force of law even without a formal court system, thus providing a degree of commensurability with American jurisprudence. Lastly, because ethnographic data on traditional Navajo gender identity unfortunately remains relatively incomplete, I will at times need to generalize about gender variance in other tribes.

a. Child Autonomy

Traditional Navajo parenting was notable for its substantial deference to the autonomous choices of the child. "The primary focus of parenting is to encourage children to explore their surroundings and develop an understanding of their fit in both their immediate family and the larger world." Accordingly,

168. The focus on these three motivating principles is roughly in accordance with those identified by Will Roscoe as necessary antecedents to a "multiple gender system." See ROSCOE, supra note 144, at 136 (identifying (1) division of labor with possibilities of specialization for women; (2) a belief system where gender is not determined by anatomical sex; and (3) specific historical opportunities that create opportunities for individuals to construct such roles and identities). His first condition is analogous to "Gender Egalitarianism." See id.; infra § 4(C)(3). His second condition is satisfied by child autonomy, as it undermines the authority in assigned sex. See ROSCOE, supra note 144, at 136; infra § 4(C)(1). His third condition is met through the development of tribal collectivism, which provides cultural incentives to adopt the berdache role. See ROSCOE, supra note 144, at 136; infra § 4(C)(2).


the principle of tōdiweajitēego, meaning “self determination,” was instilled in Navajo children at a young age. If in the process of exploring the world around her a child showed a proclivity towards the nadleeh role, the family was expected to respect this self-determination and foster her particular needs. Because childrearing in many tribes was “more a matter of the family adjusting to the child” than of the child adjusting to the expectations and desires of the family, a child’s proclivities for gender variance would not be forcefully repressed.

A story from the Crow tribe is illustrative. Anthropologist S.C. Simms met an individual who was “almost gigantic in stature, but was decidedly effeminate in voice and manner.” As a child, he had “manifested a decided preference for things pertaining to female duties,” and these preferences were accommodated during maturation. Thus, Native American gender variance was a matter of the child’s initiative and “solely a reflection of the basic nature of the individual child.” Equipped with the rights of autonomy, children were able to inscribe themselves with the gender category of their choosing.

The principle of child autonomy was not merely a social practice, but it carried the force of a legal right. “Navajos believe that each person has a right to speak for oneself and to act as one pleases . . . . Desirable actions on the part of others are hoped for and even expected, but they are not required or demanded. Coercion is always deplored.” Although it might be beneficial for the child to live up to the expectations and needs of the family, it was recognized that such benefits were insufficient to justify stifling the individuality of a child. “The Navajos do not view children as property or possessions, but value them as individuals in the community.” Indeed, under contemporary Navajo family law the desires of the parent must consistently give way to the needs of the children. For example, in a custody proceeding one tribal court noted that it would “enforce the children’s rights in custody and it [would] only incidentally provide for the rights of the parents.” By so balancing the desires of the parents where they conflict with the desires of the child, traditional legal rule systems prioritized the child’s individual autonomy.

171. Id.
172. WILLIAMS, supra note 154, at 50 (quoting S.C. Simms, Crow Indian Hermaphrodites, 5 AM. ANTHROPOLOGIST 580 (1903)).
173. Id.
174. Id.
175. Id. at 49.
176. In re J.J.S., 4 Navajo Rptr. 192, 194 (W.R. Navajo D. Ct. 1983) (quoting GARY WITHERSPoon, NAVAJO KINSHIP AND MARRIAGE 94-95 (1975)).
177. Alonzo v. Martine, 18 Indian L. Rptr. 6129 (Navajo 1991).
178. Goldtooth v. Goldtooth, 3 Navajo Rptr. 223, 227 (Navajo D. Ct. 1982).
b. Tribal Collectivism

A collectivist philosophy also contributed to emergence of nadleehi. By viewing each individual as part of the greater whole, the community ensured children's exposure to the possibility of other gender roles and safeguarded against restrictive parenting. The traditional Navajo worldview involves a cyclical process in which all individuals are inseparable from each other, creating a deeply-felt interconnectedness between the individual and an extended tribal family:

"Navajos think of [kinship] relationships in a much broader and different sense than does the general American population." (citation omitted). There is the biological family, with husband, wife, and unmarried children; the extended family which adds married daughters and their husbands as well as unmarried children; the outfit, with mixes of extended or biological families; the clan, with relationships which are not restricted to biological connections; and linked clans, with relationships among clans.

Accordingly, a guiding principle of Navajo family law is that "children are not just the children of parents but they are children of the clan," and child custody decisions are aimed at promoting an enduring sense of communal belonging.

The close connection between individuals' autonomy and the broader community ensured that a child had access to a broader range of ideals and values than those of the nuclear family. As the communal structure involved the direct participation of extended family members in child-rearing, the child's process of self-determination was enriched by a diversity of tribal narratives, and this diversity would necessarily expand the universe of life-possibilities. Most directly, as nadleehi themselves were involved in child

179. Carolyn Epple, supra note 164, at 174, 176 (describing the traditional concept of sa'ah naaghâ’ biik’eh hózhó'); see Ben v. Burbank, 24 Indian L. Rptr. 6105 (Navajo Sup. Ct. 1996) ("[T]he Navajo way of k’e is the prevailing law to be applied. K’e recognizes ‘your relations to everything in the universe,’ in the sense that Navajos have respect for others and for a decision made by the group . . . . It is a deeply-felt emotion which is learned from childhood.").


181. Goldtooth v. Goldtooth, 3 Navajo Rptr. at 223.

182. See, e.g., id. (in awarding joint custody, pointing out that "the primary consideration is the child’s strong relationship to members of an extended family" and holding "that it must consider the children’s place in the entire extended family in order to make a judgment based upon Navajo traditional law"); In re J.J.S., 4 Navajo Rptr. 192 (Navajo 1983) ("The Navajo Common Law principles of the expectation that children are to be taken care of and that obligation is not simply one of the child’s parents. The Navajos have very strong family ties and clan ties.").

183. See Valdes, supra note 7, at 219.

184. See In re J.J.S., 4 Navajo Rptr. 192.
rearing, children received first hand exposure to the possibility of gender fluidity.

Additionally, it was in the interests of the community as a whole to foster gender variance even if it was not in the interests of the immediate family. As the vitality of the tribe largely depended on the most efficient allocation of responsibilities possible, it was in the collective tribe’s best interests to foster gender variance as a reflection of a child’s skills and talents.\(^{185}\) It would indeed be a detriment to the tribe to force individuals to perform tasks for which they were ill-suited, and becoming \textit{nadlee} thus potentially allowed the individual to contribute most effectively to the tribe.\(^{186}\) Even if the immediate family would not benefit from \textit{nadlee} (e.g. if it would have no remaining daughters or sons), the sense of responsibility and belonging to a broader community allowed children to follow their proclivities in order to contribute to the tribe as a whole. Accordingly, a sense of value beyond the immediate family inhibited the ability of the immediate family to derail gender variance, further strengthening the child’s autonomy.

c. \textbf{Gender Egalitarianism}\(^{187}\)

Imbued with the right to autonomous self-determination, a Navajo child exploring the gendered world around her confronted a society that placed no socioeconomic disadvantages upon the assumption of the female gender. Preliminarily, it should be noted that most aspects of Navajo life were understood in gendered terms: “The natural order . . . can be understood in male aspects, or \textit{Sa’ah Naaghai}, which include protection, aggressiveness, and building up one’s defenses; and female aspects, or \textit{Bik’eh Hózhó}, which include fruitfulness, creativity, and nurturance. Everything exists in terms of this arrangement.”\(^{188}\) Nevertheless, the conceptual division of the world along male/female lines did not result in a hierarchical distinction between male and female genders. Navajo women were heavily involved in their horticultural society, and such active participation yielded the development of matrilineal descent and matrilocal residence, endowing women with substantial power \textit{vis-à-vis} their husbands.\(^{189}\) As described by the Navajo Supreme Court:

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185. \textit{See Valdes, supra note 7, at 219. According to a Crow traditionalist, “[w]e don’t waste people, the way white society does. Every person has their gift.” WILLIAMS, supra note 154, at 57.}

186. \textit{See Comment by Alice Schlegel, in Calender & Kochems, supra note 137, at 462-63 (proposing that a lack of female laborers would yield greater acceptance of berdachism); see also Parsons, supra note 156, at 526 (noting that if a Zuni household were short of women workers, it would be more accommodating of male-bodied berdachism but that there was never any compulsion to become berdache).}

187. \textit{I use “Egalitarianism” as opposed to “Equality” to emphasize that even though traditional Navajo society lacked gender hierarchy, it was not “gender-blind” in the formal equality sense.}

188. \textit{See Epple, supra note 164, at 276-77.}

189. Mary Shepardson, \textit{The Gender Status of Navajo Women, in WOMEN AND POWER IN NATIVE}
Traditional Navajo society is matrilineal and matrilocal, which obligates a man
upon marriage to move to his wife's residence. The property the couple bring
to the marriage mingle and through their joint labors create[s] a stable and
permanent home for themselves and their children. The wife's immediate and
extended family benefit directly and indirectly, in numerous ways, from the
marriage. If the marriage does not survive, customary law directs the man to
leave with his personal possessions and the rest of the marital property stays
with the wife and children at their residence for their support and
maintenance. 190

As such, women were able to live relatively independently of male control and
were able both to own and control the fruit of their labor, in stark contrast with
the historic ban on American married women's property ownership. 191 Navajo
origin tales reinforce this egalitarian status, as the First Man and First Woman,
unlike Adam and Eve, were created equally and at the same time. 192
Accordingly, because "the Navajo people have traditionally recognized that
Navajo women have equal status with Navajo men to participate in decisions
affecting family and tribe," tribal court decisions have emphasized the absence
of any patriarchal hierarchy subordinating the social status of Navajo women. 193

Women's relative socioeconomic parity with men has been postulated as a
necessary antecedent to the toleration of male-bodied nadleehi. 194 If the female
gender role was economically equivalent to the male gender role, a decrease in
the number of male-gendered individuals would provide no basis for cultural
concern. 195 Although a balance of male and female labor would certainly be
important in a society with dedicated male and female work, gender
egalitarianism would at least in theory offset this diminution with an equivalent
number of female-bodied nadleehi. Without a gender hierarchy, gender fluidity

191. ROSCOE, supra note 144, at 41. For a good overview of American law of coverture, see
generally Claudia Zaher, When a Woman's Marital Status Determined Her Legal Status: A
192. WILLIAMS, supra note 154, at 18-19. In this tale, First Man and First Woman live in bleak,
unhappy worlds, so they escape to the third world. In the third world lived two twins,
Turquoise Boy and White Shell Girl, who were the first berdaches. These twins helped First
Man and First Woman develop tools for survival and made them very happy. Id.; see also
Shepardson, supra note 189, at 173.
193. Davis v. Davis, 5 Navajo Rptr. 169 (Navajo 1987); see also Navajo Nation v. Murphy, 6
Navajo Rptr. 10 (Navajo Sup. Ct. 1988) ("Navajo tradition and culture have always revered
the role of women within Navajo society.").
194. See ROSCOE, supra note 144, at 125, 136; Schlegel, supra note 186, at 462-63.
195. See id.; WILLIAMS, supra note 154, at 66 ("Since women had high status, there was no
shame in a male taking on women's characteristics.").
could thus flourish without fear of social backlash or of any decrease in socioeconomic status.\footnote{See also Valdes, supra note 7, at 223 ("[T]he lack of hetero-patriarchy in native culture(s) allowed individuals a high degree of sex/gender autonomy, which in turn allowed gender and sexual diversity to flourish.").}

d. In Summation

Through its commitment to the three principles outlined in this section—child autonomy, tribal collectivism, and gender egalitarianism—Navajo society was able to accommodate gender fluidity in a manner that benefited the society as a whole while simultaneously valuing \textit{nadleeh} individuals. By endowing a child with the autonomy to determine its particular gendered existence, the child’s gender was not restrained by any gender assignment made at birth. As gender assignment lacked enduring and irrefutable authority in a child’s developmental landscape, no intractable association between bodily sex and gender was formed, and “sex” never solidified as a regulatory norm constraining an individual’s life choices. Free of the “prior restraint” of sex, a child’s process of self-determination involved exposure to a broad familial network with a diversity of life experiences from which the child could draw inspiration. Furthermore, even if a child’s gender variance might be detrimental to the immediate family, the tribal interest in the maximization of each individual’s potential contributions provided independent value to assumption of the berdache status. Lastly, because Navajo society lacked a gender role hierarchy, the attractiveness of the \textit{nadleeh} role would not be hindered by any corresponding loss in social status or economic well-being. Even though Navajo society was heavily gendered, one’s gender role did not interfere with the prosperity that might flow from an individual’s particular talents and abilities.

C. American Jurisprudence Compared

Even though importation of the precise \textit{nadleeh} framework may not be possible or even desirable, the rule system underlying Navajo gender formation provides profound insights into the jurisprudential obstacles facing the gender-transformative project. By demonstrating the interrelatedness of gender fluidity with broader cultural principles, the \textit{nadleeh} rule system indicates that the inhibition of such fluidity within our own culture is embedded within principles seemingly tangential to formal equality’s focus on sex and gender definitions. If lawyers can position their clients’ struggles within a broader socio-legal landscape that restricts fluid gender expression, they can directly confront the legal principles that structure this restriction. A comparison of the legal rule system of the \textit{nadleehi} with its corresponding rules in American jurisprudence illuminates areas of law that might require greater attention so as to enable fluid reconstruction of gender norms. The following sections will compare the
principles underlying Navajo gender fluidity with their American counterparts to
demonstrate ways in which American legal principles impede the potential
reconstructive efforts of the transgender movement.

1. Child Autonomy

In stark contrast with Navajo respect and deference to a child’s right to
autonomous self-determination, American constitutional law places this
determinative authority squarely in the hands of parents. As articulated in *Troxel v. Granville*:

The liberty interest at issue in this case—the interests of parents in the care,
custody and control of their children—is perhaps the oldest of the fundamental
liberty interests recognized by this Court. More than 75 years ago . . . we held
that the liberty protected by the Due Process Clause includes the right of
parents to “establish a home and bring up children” and “to control the
education of their own.” Two years later . . . we again held that the “liberty of
parents and guardians” includes the right “to direct the upbringing and
education of children under their control . . . . The child is not the mere
creature of the State; those who nurture him and direct his destiny have the
right, coupled with the high duty, to recognize and prepare him for additional
obligations.”197

Because of the weighty right to parental authority, the *Troxel* court held
unconstitutional a Washington visitation statute granting visitation to any person
where it may serve the best interest of the child.198 Although the superior court
found that it would be in the best interest of the children to allow visitation by
their grandparents, the statute did not give “special weight” to the decisional
authority of the parent and was therefore unconstitutional.199 As long as the
parent “adequately cares” for her children, there is no need to “question the
ability of that parent to make the best decisions concerning the rearing of that
parent’s children.”200 Nowhere did the Court give “special weight” to the
children’s views on their own best interests and, to the extent that the superior
court’s determination took into account such views, such a determination was
unlawful.

Perhaps more disturbing than the constitutional “rights” of parents to direct
the destiny of their children, is their “high duty” to do so. In *Parham v. J.R.*, the
Court upheld the constitutionality of Georgia’s mental health institutional
commitment procedure, which permitted the commitment “of any individual
under 18 years of age for whom such application [i]s made by his parent or

198. *Id.* at 60.
199. *Id.* at 69.
200. *Id.* at 68-69.
TOWARD A MORE TRANSFORMATIVE APPROACH

Although it may seem reasonable to place on parents a "high duty to recognize symptoms of illness and to seek and follow medical advice," such a duty becomes problematic where it completely discounts the views of the child. As noted by the Court:

Simply because the decision of a parent is not agreeable to a child or because it involves risk does not automatically transfer the power to make that decision from the parents . . . . Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions including their need for medical care or treatment. Parents can and must make those judgments. 203

Because the parental rights, and corresponding duty, to commit mentally unhealthy children need not constitutionally take into account the viewpoints of those children, they necessarily defer to the parental assessment of a minor's mental state even where there is a reasonable dispute between parent and child over whether the mental state is a healthy one. 204 Where a parent and child, even a mature teenager, disagree about the ramifications of the child's mental state, our Constitution protects the viewpoint of the parent and provides no corresponding protection for the autonomy of the child.

The American constitutional balance of rights between parental authority and child autonomy potentially poses significant obstacles for dismantling dominant sex/gender norms. Absent legal protection for autonomous decision-making, children are unable to explore a variety of occupational, aesthetic, and sexual activities that would be at odds with the gender role imposed and enforced by paternalistic families and state institutions. 205 If parents determine that a child's gender identity should conform to that typically dictated by an assigned birth sex, there is little opportunity to pursue non-conforming activities under the protection of the state, as parental rights under the Constitution prohibit such protection. Moreover, the parent has the right to utilize the state affirmatively in order to enforce its gender-conforming directive. Under Parham, parents enjoy the constitutional right to commit voluntarily their children for mental illness treatment, and, disturbingly, commitment to "treat" gender identity disorder may fall within this constitutional protection. 206 If a parent is

201. 442 U.S. 584, 587 n.3 (1979) (alteration added).
202. Id. at 602.
203. Id. at 603.
204. See id. at 632 (Brennan, J., concurring in part) ("Numerous studies reveal that parental decisions to institutionalize their children often are the results of dislocation in the family unrelated to the children's mental conditions.").
205. See James G. Dwyer, A Taxonomy of Children's Existing Rights in State Decisionmaking about Their Relationships, 11 WM. & MARY BILL OF RTS. J. 845, 986 (2003) ("Most likely, your parents will just cut you off from certain groups of people that they dislike for no good reason, and from extended family members with whom they do not get along, and they will decide with whom you do form relationships on the basis of who they like to associate with themselves, which will likely be only people who think and act the same way they do.").
206. See Patience Crozier, Forcing Boys to Be Boys: The Persecution of Gender Non-Conforming
incapable of enforcing the gender conformity of a child, a parent may invoke state assistance. Even if a child reasonably views her gender nonconformity as healthy individualistic expression, the lack of constitutionally required deference to the child’s autonomy would neutralize her independent beliefs. With significant protection for parental decision-making authority, the possibility of a minor child engaging in gender fluid behavior may be severely limited even if the ultimate transgender identity might subsequently receive its own legal protection.

This admittedly paints an extremely unfriendly portrait of parents and assumes strict adherence to gender traditions. However, where parents decide to respect a transgender child’s autonomy and not enforce traditional gender norms, they may violate their “high duty” to direct their child’s destiny. An incident in Ohio in 2000 illustrates this construction of parental duty. Sherry and Paul Lipscomb’s child Aurora, born Zachary, began expressing herself as a girl in behavior and dress at two years old, and at the age of six, the Lipscombs enrolled Aurora in elementary school as a girl. Learning of this state of affairs, Franklin County Children’s Services immediately removed Aurora from her parents’ care and placed her in a foster home. Aurora remained in foster care until she “successfully” resumed life as Zachary and the Lipscombs agreed to raise their child as a boy. Because the Lipscombs’ parental rights apparently depended on a duty to enforce gender norms, their failure to do so nullified their decision to defer to their child’s decision-making, as well as their right to direct the destiny of their child. Upon the termination of these rights, the state stepped in as the child’s guardian and fulfilled the parental duty to determine the child’s destiny. Aurora’s own decisions regarding her gender expression received no weight; the sole focus of Children’s Services and the courts that sanctioned their actions was whether or not someone was asserting authority over the formation of the child’s appropriate gender identity.

Without a child’s ability to assert her autonomy against either her parents or the state, it becomes extremely difficult to undermine the regulatory authority vested in one’s birth-assigned sex. If a male or female sex is inscribed upon a child by parents and doctors, and such sex dictates a host of expected behaviors, there is little opportunity for a child to express a gender identity that deviates from these expectations, as such expression can, and most likely will, be immediately suppressed. The intractable association between sex and gender requires that one’s anatomical sex correlate with a socially-cognizable gender role, and the parental ability both to enforce the association and compel the


207. Id. at 136-37.
208. Id.
209. See Ben-Asher, supra note 43, at 279-80.
210. See id. at 283.
correlation—combined with parental inability to allow variation—perpetuates the authoritative and binary myths about biological sex.211

By contrast, the Navajo child traditionally was endowed with the ability to self-determine, and this ability significantly undermined any long-term authority vested in biological sex. As sex was only presumptively, and not authoritatively, determinative of gender, there was no social imperative in correlating human bodies with particular gendered behavior. In order to dismantle the social significance of one’s biological birth sex in determining one’s legally-sanctioned opportunities, it is important to strengthen childhood decision-making authority so as to loosen long-run confluences between sex and gender and allow expressive space for developing children.

2. Constructing Family

Further buttressing the difficulty in engaging in gender non-conforming behavior are the limits on constitutional protection for a broadly defined or non-traditional family. Whereas Navajo youth could look to a broad socially and legally protected network of kin for support, guidance, and a sense of value in their processes of self-determination, American constitutional law provides protection only for narrow familial constructions.212 Although individuals have the right to structure their families and domiciles to include grandparents, aunts, uncles, and cousins, in addition to parents and children,213 this right does not extend to relationships not “deeply rooted in this Nation’s history and tradition.”214 Moreover, to the extent that there are conflicts between parents and extended relatives, under Troxel, protections for the extended family are presumed to be trumped by parental decision-making rights. Accordingly, in delineating the contours of the constitutionally protected family, the Court has focused on maintaining the centrality of the nuclear family, with authoritative husband and wife at the helm, and not on protecting the best interests of the child. For example, in Michael H. v. Gerald D., the Court upheld a California law that denied a biological father of a child born to a married woman standing to assert paternity and request visitation rights.215 Even though both the biological father and the biological mother’s husband had held the child out as his own and provided economic and emotional support, the Court refused to
recognize two paternal relationships. According to Justice Scalia's plurality, "California law, like nature itself, makes no provision for dual fatherhood." Significantly, the child's guardian ad litem had argued that the child's best interests would be served by preserving her relationships with both fathers, but the court nonetheless refused to protect the emotional and economic value inherent in her non-traditional family.

This constitutional protection for only narrowly-defined traditional family relationships erects a significant hurdle to the dismantling of dominant gender norms. If a child has no presumptive rights to access emotional and economic support outside of the immediate family, her exposure to life experiences and social values outside of a narrow sphere are similarly limited. As the "traditional family" is marked by binary normative men and normative women, few children have the opportunity to connect intimately with individuals who demonstrate the intrinsic value in non-traditional forms of gender expression. For most children, their only points of psychological identification and disassociation within a traditional family are within traditional gender constructs, and the legal system's alienation of children from other family forms similarly makes implausible non-traditional points of developmental association. Without access to a diversity of life experiences, a child cannot plausibly be expected to embrace non-traditional forms of gender expression, as she will not even be aware of the possibility that such expression can constitute part of a happy and successful existence. The constitutional estrangement of a child from a supportive community posits the traditional family as the sole dependable source for social nurturing. Conversely, the nadleehi illustrate that communal involvement in child rearing can help foster the plausibility of a valued gender-fluid existence. An expansion of protected familial structures may encourage similar dynamics in our own culture.

216. See id. at 130-32.
217. Id. at 118.
218. See id. at 130-32.
219. See Matthew M. Kavanagh, Rewriting the Legal Family: Beyond Exclusivity to a Care-based Standard, 16 YALE J. L. & FEMINISM 83, 98 (2004) ("[Complex familial structures] often also provide children with a depth and diversity of relationships that prepares them for the increasingly diverse communities and experiences that await them in the United States."); cf. Troxel v. Granville, 530 U.S. 57, 88 (2000) (recognizing "the child's own complementary interest in preserving relationships that serve her welfare and protection.").
220. See Barbara Stark, Guys and Dolls: Remedial Nurturing Skills in Post-Divorce Practice, Feminist Theory, and Family Law, 26 HOFSTRA L. REV. 293, 303-05 (1997) (summarizing object relations theories about gender formation within the nuclear family).
221. It should be noted that Lambda Legal filed an amicus brief in Troxel, but it only advocated a slightly expanded version of the Court's ultimate constitutional protections. See Donovan, supra note 108, at 15. The brief argued that the Constitution should protect a parent-like relationship between a child and a party that meets four criteria: (1) a parent-like relationship was consented to and fostered by the biological or adoptive parents; (2) the individual and the child lived together in the same household; (3) the individual assumed significant responsibility for the child's care; (4) the relationship had lasted a significant time. See id. Although extending constitutional protections to these relationships might
3.  Gender Hierarchies

In contrast with the two previous legs of the nadleehi rule system, which rather clearly elucidate gender restrictive aspects of American jurisprudence, the final leg—gender egalitarianism—provides a far more complicated roadmap. As previously noted, the "berdache" framework has been criticized for its furtherance of a separate spheres approach to gender that should be rejected in accordance with the legacy of Plessy v. Ferguson. However, despite a clear conceptual separation between male and female gender attributes, the Navajo nevertheless were able to accommodate a significant degree of fluidity between and within these gendered spheres. What the nadleehi suggest is that it is not necessarily the distinctions between genders that inhibit fluidity, it is the hierarchy between them. Even if Navajo gender was conceptualized in a strictly binary sense, no stigma attached to the performance of either gender role—whether by "biological" men or women—making movement between gendered spheres an event without attendant social stigma. In order to bring about a meaningful reimagination of gender, less emphasis perhaps should be given to employing heightened Equal Protection scrutiny to erase legal gender distinctions, and more should be given to eliminating the legal stigmatization attendant to such distinctions. If the availability of gender fluidity is to become ubiquitous, it must be attractive, and it cannot be attractive where gender roles are hierarchically lopsided.

To argue that gender fluidity requires an erasure of hierarchy but not difference would seem to be in significant tension with both radical and postmodern feminist stances that our practice of gender differentiation stems directly from gender hierarchy. Whether through the sexual appropriation of the female body or through the linguistic association between the male body and an imagined phallus, women are recognized as women only through a lens of powerlessness relative to men. Accordingly, the more we buy into these differences, the more we implicitly buy into underlying hierarchies, and it would seem strange to advocate differentiation in the pursuit of egalitarianism. However, this tension only exists if we view gender differences as "natural," not if we understand them as "contingent." If difference is not understood as provide greater access to a wider variety of viewpoints, it nonetheless maintains the ability of the parent to cut off access to relationships that are in the best interests of the child but contrary to the parents' wishes.

222.  See Case, supra note 141 (rejecting the "berdache" as models for American gender reconstruction due to their perpetuation of distinct male and female "package deals," even if available to everyone).

223.  See Catharine MacKinnon, Feminism, Marxism, Method and the State: An Agenda for Theory, 7 SIGNS 515 (1982).


stemming from within some pre-social self but rather from external cultural signification, it cannot represent a natural sexual hierarchy but can only represent a hierarchy established through political coercion. Although an acknowledgement of the inherently political nature of gender differentiation does not necessarily make the goal of egalitarianism a simple feat, the shift from natural to political difference does open up the construction of gender roles as a site for political engagement. Moreover, if gender differences stem from political engagement, they not only become political, they become normative. Politically-determined gender differences no longer reflect the inherent capacities or incapacities of our gender roles but a cultural valuation of certain human activities and characteristics. In this context, egalitarianism can emerge once our gender roles are normatively valued equivalently. The overall obstacle to gender egalitarianism is thus not the existence of gender difference per se, but the political construction of our gender roles in a hierarchical fashion and the corresponding myth that hierarchy and difference are necessarily inseparable.

Jurisprudentially, the challenge for advocates is therefore conceptually to disaggregate gender difference from gender hierarchy and to argue that the presence of difference is normatively desirable. Unfortunately, dominant "gender-blind" equal protection doctrine provides little assistance in this task, as the aggregation of hierarchy and difference has been central to adjudication of sex discrimination claims. Under a "gender blind" or "gender neutral" approach to sex discrimination, if there is no difference between men and women with regard to the governmental activity in question, there can be no hierarchical treatment on the basis of gender. Contrapositively, if there is hierarchical treatment on the basis of gender, there must be a "real" disparity between men and women. As such, a successful challenge to gender-discriminatory governmental action does not necessarily indicate increased valuation of female
gender roles or a dismantling of gender hierarchy; all it indicates is that a court is convinced that there is no cognizable basis for gender differentiation.

The consequences of doctrinally conflated gender hierarchy and gender differences are perhaps best illustrated by the Supreme Court's decision in *United States v. Virginia.* In *Virginia,* the Court held that the Virginia Military Institute (VMI) could not deny admissions to qualified applicants on account of their female gender. However, in doing so the Court did not question the legitimacy of state sponsorship of an intensely hierarchical, patriarchal institution, but merely required that VMI accommodate female-identifying applicants who could meet its hypermasculine demands. A VMI education involved inculcation into a highly ritualized culture of physical violence and humiliation towards freshman "rats" linguistically marked by such terms as "raping your virgin ducks," "boning a cadet," and "running a period." Life at VMI was infused with stereotypical notions of hypermasculinity, and the formation of a VMI cadet revolved around constant disassociation with, and derogation of, all things feminine. Although it might be expected that the presence of women at VMI would undermine its misogynistic culture, this transformation was unnecessary so long as admitted women were held to the same aesthetic codes (most notably extremely short haircuts), physical demands, and psychological torture. By insisting on maleness in the performative, but not the ontological sense, femininity could remain the negative counterpoint to VMI lifestyle. Because the Court presupposed the permissibility of a gender hierarchical state institution, integration of women did nothing to break down this hierarchy as such integration was conditioned upon the invisibility of female difference in new cadets.

Under the *Virginia* "gender-blind" approach to hierarchy and difference, women who can meet the standards set by men must receive the benefits provided by those standards, but the benefit is provided not because they are women but rather because they are "like" men. If women are "like" women, they may still be excluded from state-sponsored activities because they are different,

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231. See id. at 541.
233. Id. at 72.
234. See Cornelia T.L. Pillard, *United States v. Virginia: The Virginia Military Institute, Where the Men are Men (and so are the Women),* in CIVIL RIGHTS STORIES (Myriam Gilles & Risa Goluboff eds., 2007).
235. See Vojdik, supra note 232, at 72. ("Although VMI conceded that its system was not inherently unsuitable for women, it nevertheless sought to preserve its homosocial environment.").
236. Indeed, when women at VMI were permitted to be cheerleaders and wear cheerleading skirts, they were subjected to considerable public harassment for looking like "men in skirts." See id. at 111-12. Because being a VMI cadet required the *performance* of maleness regardless of one's biological sex, wearing a skirt symbolized a performance of femaleness reviled and punished by VMI culture. Cf. id.
and therefore hierarchically inferior, to their male counterparts. The distinct and disparate constructions of men and women are never questioned in a gender-blind equal protection analysis and indeed provide the sole justification for further hierarchical treatment.

However, even though the presence of hierarchy requires the existence of gender difference, the presence of difference does not itself require the existence of hierarchy. Gender differences may indeed justify hierarchies, but they do not compel them. As such, although hierarchy is doctrinally determinative of difference, gender difference is itself indeterminate, and it is in this indeterminacy that advocacy may strategically intervene in the normative valuation of difference. Rather than argue that a particular hierarchy irrationally differentiates on the basis of gender, advocates must argue that a particular instance of difference does not justify disparate treatment. By presupposing a normative difference and not a hierarchy, lawyers may better expose the political nature of that difference and counter its devaluation. If lawyers refuse to deny that there are indeed differences between female-identifying clients and their male-identifying counterparts and moreover explicitly affirm the value in that difference, the basis for a court's decision must either be that the difference is deserving of hierarchical treatment or that it is not. In either case, the

237. See Reva B. Siegel, Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification, 88 CAL. L. REV. 77, 84 (2000) ("When we say we are distributing goods and opportunities in a race- and gender-blind fashion, we recognize group identity but ignore the ordinary status consequences of group identity for purposes of the relevant social transaction."); Catharine MacKinnon, Reflections on Sex Equality Under the Law, 100 YALE L.J. 1281, 1296 (1991) ("The more perfect the disparity, the more difficult the showing of discrimination, so long as the basis for disparity is not mythic but real.").

238. Cf. Siegel, supra note 237, at 95 ("[T]he conventions of color blindness discourse make it possible for this society to characterize practices that enforce racial stratification as the product of 'race-neutral' and 'nondiscriminatory' principles of social distribution.").

Another example of the unhelpfulness of gender blindness is Mississippi University for Women v. Hogan, which held that the exclusion of males from nursing school "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job." 458 U.S. 718, 729 (1982). While forcing the integration of men into the nursing profession might be viewed as a desire to eliminate the stigma attached to a "female" profession, it is unclear whether it does so in a way that benefits women. Nursing's greater social legitimacy under the Court's logic would seemingly only result from ending its gender association, meaning that social legitimacy required at least potential association with maleness. Women who are nurses might obtain greater social status as a result of Hogan, but this may only be because nursing is no longer coded female. The construction of the nurse's femaleness viewed separately from her occupation is not affected by the decision.

239. See MacKinnon, supra note 237, at 1297 ("Because the 'similarly situated' requirement continues to control access to equality claims ... sexuality and procreation become happy differences or unhappy differences but never imposed inequalities.").

240. See Cornell, supra note 224, at 282 ("Equivalent rights, in other words, do not have as their sole or even their main goal creating a space for women in a male world from which they have previously been shut out ... I would add that the valuation of difference implicit in equivalent rights is essential if we are to actually make these choices of different lifestyles possible without the tremendous suffering of being treated as an outcast.").
contingency and normativity of gender difference are made explicit and are no longer concealed by gender blindness.

One example of the Supreme Court's implicit adoption of this normative approach to gender difference is its 1994 decision in \textit{J.E.B. v. Alabama ex rel. T.B.}. In holding that the Equal Protection Clause forbids peremptory challenges on the basis of gender, the Court did not engage in a gender-blind analysis, which would have simply concluded that men and women are no different with respect to jury service and thus are undeserving of unequal treatment. To the contrary, it admitted that there very well may be gender difference with respect to jury service, but argued that "that fact alone cannot support discrimination on the basis of gender in jury selection." The Court engaged with the history of female exclusion from jury service, found it to be unjust, and refused to rubber stamp this avenue of perpetuating gender hierarchy. Although the majority opinion did not explicitly base its decision on a political affirmation of gender difference rather than gender-blind accommodation, Justice O'Connor's concurrence points out the opinion's normatively anti-hierarchical stance:

\begin{quote}
[T]he import of our holding is that any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact . . . . Today's decision is a statement that, in an effort to eliminate the potential discriminatory use of the peremptory, gender is now governed by the special rule of relevance formerly reserved for race.
\end{quote}

By both refusing to presuppose the historically hierarchical treatment of women jurors and affirming gender differences, the Court was forced to justify its valuation of female gender in purely normative terms (i.e. "special rule of relevance"). Through the disaggregation of difference and hierarchy, the perpetuation of differential gender construction may be affirmed without implicitly marking one gender as inferior.

However, advocates must be careful to avoid justifying affirmations of gender difference on grounds that simply reaffirm hierarchical constructions of men and women. This danger is well-illustrated in \textit{Michael M. v. Superior Court of Sonoma County}, which upheld a California statutory rape law making it only

\begin{footnotes}
\item[241] 511 U.S. 127 (1994).
\item[242] \textit{Id.} at 140 n.11.
\item[243] \textit{Id.} at 132. It should be noted that \textit{J.E.B.} reached the Court after the government struck all men from the jury, leaving a jury composed entirely of women. \textit{Id.} at 129. This fact, however surprising, does not seem to affect the Court's analysis and as a result does not alter the analysis here. See \textit{id.} at 131-36 (discussing at length this history of women's exclusion from jury service).
\item[244] \textit{Id.} at 149 (internal citation omitted).
\item[245] \textit{Id.}
\end{footnotes}
criminal for men, but not women, to have sex with minors.\textsuperscript{246} Although the decision on its face would seem to lower the costs of adopting a female gender role through targeting the disproportionate sexual victimization of feminine expression, its anti-hierarchical effect is limited. In upholding the statutory rape law’s disparate treatment, the Court reasoned that only males could impregnate underage females, and this biological difference rendered men and women differently situated with respect to statutory rape.\textsuperscript{247} Unlike in \textit{J.E.B.}, this affirmation of gender difference does not constitute a normative valuation of female experience. On the contrary, it is a recognition of the \textit{natural} vulnerability of women, and it neither acknowledges the political equation of femaleness and pregnancy nor provides space for political engagement with this equation. There is no room in this reasoning to argue that women should not be \textit{constructed} as victims of a sexual hierarchy, because this sexual hierarchy is portrayed as constitutive of femaleness and therefore unalterable through political action. Thus, even through a benign affirmation of gender difference, the Court conflates differences with the hierarchies that produce them. Women are not disproportionately the victims of rape because they are biologically more vulnerable to unwanted pregnancy but rather because they are women,\textsuperscript{248} and the court avoids confronting the cultural stigmatization of women underlying rape. To bring about truly egalitarian gender relations, the inherently normative aspect of gender difference must not be concealed in an effort to remedy the effects of a culturally constructed hierarchy.

It is perhaps this difficulty in distinguishing between normative valuation and hierarchical reification that has made \textit{Price Waterhouse v. Hopkins} so attractive as a basis for transgender rights. Although \textit{Price Waterhouse} in part relies upon gender blindness to justify finding Ann Hopkins’ treatment unlawful, the decision as a whole can only be justified as a normative valuation of gender difference. To the extent that Hopkins was the same as her male counterparts—in both professional capability and masculine expression—hierarchical treatment could not be justified. However, the Court did not question that Hopkins was indeed \textit{different} from her male counterparts with respect to anatomy and self-identification as female. To the extent that there was difference, she nevertheless was undeserving of hierarchical treatment. Thus, \textit{Price Waterhouse} would seem to represent a normative statement that gender variance has social value. However, just as in \textit{Michael M.}, this normative affirmation of difference is couched in biological sex, and through affirming \textit{natural} gender differences, the Court conceals the perpetuation of gender constructs in the ways described in Part III. Even though the Supreme Court in \textit{Price Waterhouse} very well may

\textsuperscript{246} 450 U.S. 464 (1981).

\textsuperscript{247} See \textit{id.} at 473-74 (plurality opinion); see also Tuan Anh Nguyen v. INS, 533 U.S. 53 (2000) (upholding naturalization procedures for children of unmarried citizen-fathers that is much more burdensome than for children of unmarried citizen-mothers).

\textsuperscript{248} See MacKinnon, \textit{supra} note 237, at 1305.
have intended to provide a normative valuation of gender non-conformity, it relied on forms of gender difference that were created by the very hierarchical structure it purported to combat. If gender hierarchies are perceived as unjust, a normative dismantling must acknowledge their contingent nature and provide an alternative construction of the gender role deserving just treatment. Working entirely within the existing sex/gender system cannot bring forth the reconstruction of gender norms necessary for gender egalitarianism and fluidity.

Accordingly, Michael M. and Price Waterhouse indicate that if gender fluidity is to become attractive, it is “being” a woman in the socially-constructed, performative sense and not the essentialized, biological sense that must be legally protected. If an individual is legally protected only to the extent that she is “innately” female, the performance of femaleness by someone not “innately” female will retain its legally-sanctioned stigma and will remain unattractive. Gender fluidity requires that protection for femaleness derive from recognition of the injustice in hierarchical constructions of femininity and not from fundamental distinctions between men and women. This should not suggest that advocates be disinterested in the legal stigmatization of activities that involve biology, notably pregnancy and reproductive choice. Even though assumption of a female role by a “biological male” would not involve pregnancy-related issues, pregnancy is “the primary emblem” of female inferiority, which discourages gender fluidity.249 If socio-legal constructions of pregnancy feed into the socio-legal constructions of femininity, then the marginality of pregnancy, contraception, lactation, and abortion within legal discourse250 should concern those interested in eliminating hierarchical gender distinctions.

In sum, although the Supreme Court’s gender-blind discourse may seem to improve the social status of female gender roles in some respects, it nevertheless fails to fully address the social construction of gender hierarchy.251 The rule system underlying Navajo gender variance at the very least indicates that it is this hierarchical relationship among gender roles that discourages gender fluidity and not necessarily gender distinction per se. While some might wish to erase completely the relevance of gender within our culture, the nadleehi suggest that gender fluidity may still receive social sanction in a gendered society when fluidity constitutes an attractive life option. So long as the performance of femaleness is systemically subordinated within legal discourse, the ability to use the legal system to encourage gender fluidity will be severely limited.

249. See id., at 1309 (quoting ANDREA DWORKIN, OUR BLOOD 100 (1976)).
251. See MacKinnon, supra note 237, at 1294 (“It is the hierarchy that defines whatever difference matters, not the other way around.”).
V. CONCLUDING THOUGHTS

The preceding discussion has aimed to express a degree of frustration with the increased reliance on transgender rights to reform sex/gender norms but also to emphasize the tremendous liberatory potential of the transgender movement. The transgender movement is uniquely situated to challenge dominant cultural ideologies that have eluded its civil rights forebears and that continue to plague not only transgender persons, but all persons oppressed and constrained by social norms. By directly exposing the fallacy of biological determinacy, transgender people are positioned to dismantle the authority vested in the category of “sex” that has limited the professional opportunities, political participation, and bodily autonomy of women and strictly regulated the permissible intimate relationships available to all of us. By exposing the performative nature of our society’s identity categories, the transgender movement could reveal that prohibiting the volitional acts that constitute these identities can be every bit as racist, misogynistic, or homophobic as prohibiting immutable attributes themselves. Nevertheless, so long as the transgender movement follows the formal equality molds of the identity-based movements that preceded it, the movement risks undermining its broad-based reconstructive potential. By grounding transgender discrimination claims in the categories of “sex” and “gender identity,” these categories retain their cultural legitimacy via a social and legal movement whose very existence undermines their fundamental authority. This is not to say that transgender persons should be martyrs for a greater good or that they should have a sense of responsibility towards a society that overwhelmingly seeks to make them invisible. To the contrary, the transgender movement cannot be expected to overhaul a system of repressive ideologies without awareness by the more-established, and better-financed, civil rights movements that the legal construction of transgender identities affects the legal treatment of everyone’s performatively constituted gender identities. For a coalition of civil rights activists to successfully reconstruct the legal perception of gender, this transformative potential must remain salient, and constant recourse to a limited formal equality framework risks fatally undermining this possibility.

Although our civil rights tradition has forged powerful weapons for combating de jure hatred and discrimination, it has failed to provide means for dismantling underlying structures of animus. A more socially transformative approach to gender reconstruction will require obtaining access to the structural roots of repressive social norms so that they can be unearthed and demolished. Doing so will require looking outside the legal traditions that embody and perpetuate these norms and embracing alternative cultural landscapes that not only tolerate, but also value, gender variant lives. The preceding discussion merely provides one possible means of so doing. If a gender fluid framework ultimately concedes too much, there are infinite ways in which our understandings of gender might be transformed, and we must challenge both our intellect and imagination in obtaining a more perfect gendered existence.