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Clothes Don't Make the Man (or Woman), But Gender Identity Might

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Gender Identity and Sexual Orientation Discrimination in the Workplace

A Practical Guide

Chapter 47: Clothes Don't Make the Man (or Woman), But Gender Identity Might

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Chapter 47

CLOTHES DON'T MAKE THE MAN (OR WOMAN), BUT GENDER IDENTITY MIGHT

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Editor's Note: Dress and grooming codes have generally withstood judicial oversight because courts have viewed them within the prerogatives of management. In time, however, some very limited inroads have been made, particularly where a requirement has a disparate impact based on race[a] or is sexually exploitive of women. Despite some changes in social conventions over the past 20 years, such as men wearing ear jewelry,[b] personal appearance standards have pretty much remained immune from challenge.

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[a]For example, as explained in Chapter 35 (Appearance, Dress, and Grooming Codes), Section III.A., a prohibition on beards can have a disparate impact on African-American men because of their predisposition to pseudofolliculitis barbae after shaving and, thus, could violate the prohibition against race discrimination set forth in Title VII of the Civil Rights Act of 1964 (Title VII) and analogous state laws.

[b]*Compare* Vernon v. Wackenhut Corp., ERD Case No. CR200801597 (Wis. LIRC Oct. 18, 2011), *available at* http://dwd.wisconsin.gov/lirc/erdecsns/1259.htm (holding that the Wisconsin Fair Employment Act was violated where an employer barred men from wearing earrings: "While at one time earrings for males would have undoubtedly been viewed as being outside of the boundaries of commonly accepted social norms, the commission does not believe that this remains the case."), *with* Informal Maine Human Rights Commission Counsel Memo (May 25, 2010), *available at* www.maine.gov/mhrc/guidance/memo/20100525_g.pdf ("it is not unlawful sex discrimination [under the Maine Human Rights Act] for an employer to allow women but not men to wear earrings").

This presents a significant challenge for employees who are gender affirmed or gender diverse because they are often forced to dress and groom in a manner inconsistent with their gender identity. However, inroads are starting to be made in this area. As of May 2014, 18 states, the District of Columbia, Puerto Rico, and hundreds of local jurisdictions have enacted laws that permit employees to follow the part of an employer's personal appearance standards that matches their gender identity.[c] In jurisdictions that do not have such laws, advocates are utilizing a litigation strategy that has proven successful in challenging such standards—asserting disability discrimination claims on behalf of transgender individuals.[d]

In this chapter, we reprint an article by Jennifer Levi, professor of law at Western New England University School of Law and director of the Transgender Rights Project at Gay & Lesbian Advocates & Defenders (GLAD). In her commentary, Professor Levi carefully explains the rationale for bringing disability discrimination claims, shows how these claims help overcome what she calls the "collective hunch theory" of adjudication, and provides decision makers a new lens through which to view dress and grooming codes.

Application of Professor Levi's approach resulted in a positive outcome in the leading case *Doe v. Yunits*,[e] which she litigated and is discussed later in this chapter. In *Yunits*, the Massachusetts' Superior Court initially held that a person's gender expression "is not merely a personal preference but a necessary symbol of her very identity,"[f] and thereafter expressly rejected engrafting onto the commonwealth's three-pronged, American with Disabilities Act–like definition of disability the federal exclusion of gender identity disorders not resulting from physical impairments.[g] These holdings from the *Yunits* litigation have been cited and relied on by numerous courts, including the India Supreme Court in its 2014 landmark decision in *National Legal Services Authority v. Union*

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[c]See Chapters 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace) and 35 (Appearance, Dress, and Grooming Codes).

[d]Employees might also be able to assert gender-stereotyping claims of sex discrimination under Title VII and similar state laws. See Chapters 14 (Title VII of the Civil Rights Act of 1964) and 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace).

[e]2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom.* Doe v. Brockton Sch. Cmte., 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000), *subsequent proceeding sub nom.* Doe v. Yunits, 15 Mass. L. Rep. 278, 2001 WL 664947 (Super. Ct. Feb. 26, 2001).

[f]2000 WL 33162199, at *3. This aspect of the *Yunits* litigation is also discussed in Chapter 35 (Appearance, Dress, and Grooming Codes), Section III.B.3.a.

[g]Doe v. Yunits, 15 Mass. L. Rep. 278, 2001 WL 664947, at *4–5 (Super. Ct. Feb. 26, 2001). This aspect of the *Yunits* litigation is also discussed in Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973), Sections III.G.2.c.i. and III.G.3.d.

of India,[h] where the high court quoted the passage in *Yunits* from which the preceding quote was taken and held that transgender individuals have a constitutional right to self-identify and present as female, male, or a "third gender."[i]

In the February 1977 issue of *Ms*., Gloria Steinem, a leader in the fight for women's equality, dismissed the legitimacy of transsexual narratives, asserting that gender-affirmed individuals "surgically mutilate their own bodies" to pay "extreme tribute to the power of sex roles."[j] Steinem argued in her article that feminists "are right to feel uncomfortable about the need for . . . transsexualism," and closed her essay with the question, "If the shoe doesn't fit, must we change the foot?," suggesting that individuals with gender dysphoria should simply accept their bodies rather than trying to conform to socially imposed binary gender roles.[k] Steinem's essay reflects a fundamental misunderstanding of transgender identities and the fact that these individuals are trying to conform to their gender identities, not a social construct (although, in some cases, a person's gender identity may align comfortably with the gender binary construct). In her article, Professor Levi puts forth an experiment where readers are forced to express their gender identity in a way inconsistent with their sense of self—for the purpose of helping them better appreciate the experience of transgender people. One can wonder whether Steinem, who once went undercover as a Playboy Bunny® for a journalistic assignment,[l] had ever tried a variant of that experiment—imagining what it would be like if, all of a sudden, she had male genitalia. Would she be content living that way for the rest of her life? Professor Levi's article explains why an underlying premise of Steinem's argument—that there is nothing essential about gender identity—is simply wrong.[m]

Thirty-six years later, in October 2013, Ms. Steinem published a long overdue essay that recanted her original views:

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[h] Writ Petition (Civil) No. 400 of 2012 (India Sup. Ct. Apr. 15, 2014), *available at* http://supremecourtofindia.nic.in/outtoday/wc40012.pdf.

[i] *See id*., slip op. at ¶¶64–65, 76–77, 129.

[j] Gloria Steinem, *If the Shoe Doesn't Fit, Change the Foot*, Ms. (Feb. 1977). Steinem's article is reprinted in both editions of her collection of writings, OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS (1983, 2d ed. 1995), in the chapter titled "Transsexualism."

[k] *Id*.

[l] See Gloria Steinem, *I Was A Playboy Bunny*, *in* OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS 32–75 (2d ed. 1995), *available at* www.gloriasteinem.com/updates/2011/8/22/i-was-a-playboy-bunny.html.

[m] *See also* Julie Greenberg et al., *Beyond the Binary: What Can Feminists Learn from Intersex and Transgender Jurisprudence?*, 17 MICH. J. GENDER & L. 13 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651285; JULIA SERANO, EXCLUDED: MAKING FEMINIST AND QUEER MOVEMENTS MORE INCLUSIVE (2013) (excerpts available at www.juliaserano.com/excluded.html).

> So now I want to be unequivocal in my words: I believe that transgender people, including those who have transitioned, are living out real, authentic lives. Those lives should be celebrated, not questioned. Their health care decisions should be theirs and theirs alone to make. And what I wrote decades ago does not reflect what we know today as we move away from only the binary boxes of "masculine" or "feminine" and begin to live along the full human continuum of identity and expression.[n]

CLOTHES DON'T MAKE THE MAN (OR WOMAN), BUT GENDER IDENTITY MIGHT

Jennifer L. Levi, Esq.[*]

The Ninth Circuit's [2004] decision in *Jespersen v. Harrah's Operating Co.*[1] reflects the blinders on many contemporary courts regarding the impact of sex-differentiated dress requirements on female employees.[2] Although some courts have acknowledged the impermissibility of imposing sexually

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[n]Gloria Steinem, *Op Ed: On Working Together Over Time: Journalist, Feminist, and Political Activist Gloria Steinem Says Transgender Identities Should Be Celebrated, Not Questioned*, ADVOCATE.COM (Oct. 2, 2013), www.advocate.com/commentary/2013/10/02/op-ed-working-together-over-time.

[*] [*Editor's Note:* The article is reprinted with the permission of the author and the *Columbia Journal of Gender and Law,* 15 COLUM. J. GENDER & L. 90 (2006), and is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1972941. Copyright © 2006 Jennifer L. Levi. In the footnote appended to her name at the beginning of the published article, Professor Levi stated: "Many thanks to Jamison Colburn, Susan Donnelly, Anne Goldstein, Leora Harpaz, David Kaiser, Ben Klein, Shannon Minter, and Barbara Noah for discussions about and review of this Article, without which I could not have completed it. I am also indebted to Nik Andreopoulos, Jeffrey Noonan, Maggie Solis, and the editors of this Journal for invaluable research assistance and editing."

Nonsubstantive editorial changes, such as revising case names and citation formats and changing "Part" to "Section" and "article" to "chapter," have been made to this article without notation to conform to the style of the treatise. Other additions, such as editor's notes and other information that might be helpful to readers, have been added as bracketed insertions. Many of the cases discussed and cited in this article are discussed in greater detail in other sections of this treatise; please refer to the Table of Cases at the end of this treatise. Dress and grooming standards are discussed further in Chapters 14 (Title VII of the Civil Rights Act of 1964) and 35 (Appearance, Dress, and Grooming Codes).]

[1]392 F.3d 1076, 94 FEP 1812 (9th Cir. 2004), *reh'g granted*, 409 F.3d 1061, 95 FEP 1536 (9th Cir. 2005)[, *aff'd en banc*, 444 F.3d 1104, 1107–08, 97 FEP 1473 (9th Cir. 2006)].

[2]The Ninth Circuit has granted rehearing of the case en banc, which offers some hope for reversal of the decision. *See* Jespersen v. Harrah's Oper. Co., 409 F.3d 1061, 95 FEP 1536 (9th Cir. 2005). Regardless of what happens in the case, the panel decision underscores a major thesis of this chapter, namely, that many judges ignore the pain experienced by nontransgender persons of forced gender conformity. [*Editor's Note:* See notes 37 and 107 *infra* for brief discussions of the majority and dissenting opinions issued by the *en banc* court and the article Professor Levi subsequently wrote about the en banc decision, respectively.]

exploitive dress requirements,[3] they have done so only at the extreme outer limits, ignoring the concrete harms experienced by women (and men) who are forced to conform to externally imposed gender norms.

On the other hand, some transgender litigants have recently succeeded in challenging sex-differentiated dress requirements.[4] This success is due in part to their incorporation of disability claims based on the health condition associated with each litigant's transgender identity.[5] Such an approach has allowed transgender litigants to introduce evidence of the essentialism of gender identity and its inelasticity for a specific individual.[6] In combining disability claims with sex discrimination claims, transgender litigants have advanced a broader agenda of challenging normative beliefs about gender for all persons, transgender and nontransgender alike.

Postmodern theorists who have exposed the social construction of gender have been instrumental in expanding the scope of sex discrimination laws. By showing that there is nothing natural or essential about stereotypical assumptions about gender—for example, that women are naturally weaker than men—these theorists have moved courts to help both women and men out of the double binds that limit their career advancement.[7] For example, most courts now recognize that enforcing gender-based stereotypes that restrict women from being successful investment bankers[8] or men from being successful nursery school teachers[9] amounts to sex discrimination.

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[3]*See* EEOC v. Sage Realty Corp., 507 F. Supp. 599, 611, 24 FEP 1521 (S.D.N.Y. 1981) (ruling that an employee could not be required to wear a "sexually revealing . . . uniform"); Marentette v. Michigan Host Inc., 506 F. Supp. 909, 912, 24 FEP 1665 (E.D. Mich. 1980) (suggesting that a sexually provocative dress code requirement would be impermissible).

[4]*See* Lie v. Sky Pub. Corp., 15 Mass. L. Rptr. 412, 2002 WL 31492397, at *8 (Super. Ct. Oct. 7, 2002) (allowing discrimination suit where the employer prohibited a transgendered employee from wearing clothing consistent with her gender identity); Doe v. Yunits, 2000 WL 33162199, at *8 (Mass. Super. Ct. Oct. 11, 2000)[, *aff'd sub nom.* Doe v. Brockton Sch. Cmte., 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000)] (allowing injunctive relief for a transgender student barred from school for refusing to comply with sex-specific dress code requirements).

[5]*See Lie*, 2002 WL 31492397, at *1; *Doe*, 2000 WL 33162199, at *8.

[6]*See infra* note 104. *See also* Farmer v. Brennan, 511 U.S. 825, 829 (1994) (defining a transsexual individual as "one who has '[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,' and who typically seeks medical treatment including hormonal therapy and surgery to bring about a permanent sex change" (quoting American Medical Association, Encyclopedia of Medicine 1006 (1989))).

[7]The paradigmatic example of this double bind was at issue in the case of *Price Waterhouse v. Hopkins*, 490 U.S. 228, 49 FEP 954 (1989). In that case, Ann Hopkins brought a sex discrimination claim against Price Waterhouse after its failure to promote her to partnership. 490 U.S. at 231–32. The double bind she faced was that she was denied partnership because of her failure to act sufficiently feminine, and yet, had she acted feminine, she would assuredly also have been denied. *Id.* at 235. At the time Hopkins was recommended for partner, Price Waterhouse had 662 partners of which seven were women. *Id.* at 233. Hopkins was recommended for partnership along with 87 others, all of whom were men. *Id.*

[8]*Id.* at 251–52 (supporting a discrimination claim based on sex stereotyping by those reviewing a female employee for promotion).

[9]*See* DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327, 328, 19 FEP 1493 (9th Cir. 1979). The court considered *Strailey v. Happy Times Nursery School, Inc.*, consolidated on appeal with *DeSantis*, in which a male nursery school teacher alleged that he had been subjected to gender discrimination when he was fired from his job shortly after he wore a small earring to work. The court denied that he had suffered gender discrimination, instead classifying

However, there remains a seemingly impenetrable boundary to successful challenges of widely accepted gender norms. This chapter argues that until courts understand the inelasticity of gender for most individuals alongside its social construction, sex discrimination claims will have limited utility.

Section I. of this chapter explores at least one root of the problem influencing courts that hear dress code challenges—something this chapter will refer to as "the collective hunch theory," which others have referred to as "normative stereotypes." It then analyzes the *Jespersen* case and compares it to two other cases where transgender litigants brought challenges to sex-differentiated dress codes. Section I. concludes by analyzing how the incorporation of disability claims by the transgender litigants humanized their pain and, arguably, affected the outcomes of their cases. Section II. advocates bringing disability claims where available for transgender plaintiffs and responds to some of the criticisms against doing so. Finally, Section III. offers suggestions for framing and litigating future dress code challenges pursued on behalf of nontransgender litigants. In the process, it highlights the limitations of the postmodern insight that gender is socially constructed and its potential negative effect on cases brought by nontransgender litigants. Section III. concludes by reconciling a seeming conflict between the social construction theory of gender and the arguably essentialist position advanced by this chapter.

I. IGNORING HER PAIN, ACKNOWLEDGING THEIRS

A. Collective Hunch Theory

Unfortunately, the postmodern insight that gender is socially constructed[10] has not broadly convinced courts that every gender-based distinction or requirement in the workplace is impermissible sex discrimination. The limits of this insight are best seen in dress code cases, where the *Jespersen* outcome—affirming a sex-differentiated dress and appearance requirement—is common.[11] Courts seem to reject these claims based on the principle that,

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discrimination based on nonconformance with gender stereotypes as akin to discrimination based on sexual orientation. *Id.* at 332. Under the analysis of gender discrimination applied by the Ninth Circuit in *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1067–68, 89 FEP 1569 (9th Cir. 2002) (en banc), *cert. denied*, 538 U.S. 922 (2003), it seems that the court would reach a different outcome today. [*Editor's Note:* In *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 874–75, 86 FEP 336 (9th Cir. 2001), the Ninth Circuit recognized that *DeSantis* is no longer good law. The *Nichols* court added that "[w]e do not imply that all gender-based distinctions are actionable under Title VII. For example, our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards." 256 F.3d at 875 n.7.]

[10] *See* Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other,"* 48 HASTINGS L.J. 1223, 1228–35 (1997) (discussing gender as social construct and the tension between that idea and transsexualism); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990).

[11] *See* Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387, 77 FEP 854 (11th Cir.), *cert. denied*, 525 U.S. 1000 (1998) (dismissing a challenge to a policy that prohibited men,

at some point, there is a zone of permissible gender-based distinction based on what scholar Anthony Appiah calls "normative stereotypes."[12]

Appiah defines a "normative stereotype" as a social consensus on how members of a group should "behave in order to conform appropriately to the norms associated with membership in their group."[13] He argues that normative stereotypes and the different treatment groups receive as a result of them are not negative or invidious because the stereotypes are based on social norms, not intellectual error.[14] In arguably reductive fashion, Appiah maintains that normative stereotypes are unobjectionable because they are different from "false stereotypes," reflected in, for example, negative and factually inaccurate racial stereotypes, and "statistical stereotypes," which are sometimes true for some members of a group but not all.[15] Appiah's analysis, while helpful in describing differences among types of stereotypes, does not explain why the ubiquity of social norms condones them. Instead, Appiah suggests that social norms and normative stereotypes may be enforceable because, at some level, the support for them is so widespread. This unarticulated justification for creating an exception to nondiscrimination law drives the *Jespersen* court's analysis.

A different characterization of the motivating principle behind the *Jespersen* holding, as well as other cases upholding sex discriminatory dress codes, is "the collective hunch theory." Under this theory, even if there are some individuals harmed by certain gender-based requirements, courts

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but not women, from having long hair); Tavora v. New York Mercantile Exch., 101 F.3d 907, 908, 72 FEP 979 (2d Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997) (upholding an employer's policy which required male employees to have short hair, but which did not require the same for female employees); Wislocki-Goin v. Mears, 831 F.2d 1374, 1380, 45 FEP 216 (7th Cir. 1987), *cert. denied*, 485 U.S. 936 (1988) (dismissing a Title VII claim alleging that a grooming policy imposed unduly harsh requirements on women); Fountain v. Safeway Stores, Inc., 555 F.2d 753, 755–56, 15 FEP 96, 95 LRRM 3106 (9th Cir. 1977) (requiring male, but not female, employees to wear ties was not sex discrimination under Title VII); Barker v. Taft Broad. Co., 549 F.2d 400, 401, 14 FEP 697 (6th Cir. 1977) (upholding a policy that limited the manner in which hair of men could be cut and that limited the manner in which women's hair could be styled); Earwood v. Continental S.E. Lines, Inc., 539 F.2d 1349, 1351, 14 FEP 694 (4th Cir. 1976) (finding sex differentiated grooming standards consistent with Title VII); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685, 685, 12 FEP 1668 (2d Cir. 1976) (upholding a policy which required short hair for men, but not women); Knott v. Missouri Pac. R.R. Co., 527 F.2d 1249, 1252, 11 FEP 1231 (8th Cir. 1975) (finding grooming policy that "reflect[ed] customary modes of grooming" acceptable even though differences in policy existed for men and women); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336, 6 FEP 1066 (D.C. Cir. 1973) (upholding a policy that prohibited only men from wearing long hair); Austin v. Wal-Mart Stores, Inc., 20 F. Supp. 2d 1254, 1257, 78 FEP 457 (N.D. Ind. 1998) (finding acceptable under Title VII a grooming policy requiring male employees to maintain their hair length above the collar); Rogers v. American Airlines, Inc., 527 F. Supp. 229, 231, 27 FEP 694 (S.D.N.Y. 1981) (upholding a "policy that prohibits to both sexes a style more often adopted by members of one sex" under a Title VII challenge); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1392, 19 FEP 1039 (W.D. Mo. 1979) (finding a sex discrimination claim insufficient where an employer prohibited female, but not male, employees from wearing pantsuits in the executive office).

[12] *See* K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 Cal. L. Rev. 41, 48 (2000)[, *available at* http://scholarship.law.berkeley.edu/californialawreview/vol88/iss1/2].

[13] *Id.*

[14] *Id.* at 49.

[15] *Id.*

refuse to conclude that the imposition of gender-based requirements could be actionable, particularly when imposed on nontransgender individuals. The collective hunch is that gender requirements, especially those concerning dress and appearance, are acceptable, and should survive challenge in most circumstances. What seems to fuel this collective hunch theory is that everyone has a gender identity and expression, meaning an internalized or felt sense of being male or female, and that for most people who identify as female, the expression of that gender identity coincides with feminine, while for most people who identify as male, the expression of that gender identity coincides with masculine.[16] Many judges hearing a challenge to a sex-differentiated workplace rule imagine how they themselves might respond and surmise that if they are comfortable with the rule, then others should be as well.[17]

B. *Jespersen* Analysis

In *Jespersen v. Harrah's Operating Co.,* plaintiff Darlene Jespersen, an employee of defendant company for 20 years, challenged a sex-differentiated grooming policy imposed on Harrah's employees.[18] Among other things, the policy required female, but not male, bartenders to tease, curl, or style their hair and wear stockings and nail polish.[19] It also required them to attend a "Personal Best" program which taught them how to maximize their appearance and conform to that appearance on a daily basis at their job.[20]

Jespersen found the requirements so inconsistent with her gender identity that she ultimately declined to comply with them.[21] Prior to the implementation of the grooming code, Jespersen's employer had suggested, but not required, that women employees wear make-up; Jespersen tried wearing makeup for a short period of time,[22] but stopped, however, when she found that wearing it "made her feel sick, degraded, exposed, and violated."[23] As

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[16]For others, many of whom (but not all) identify as transgender, the fit is otherwise.

[17]This analysis focuses on the judge because most of these cases are resolved on dispositive motions. The collective hunch theory can as easily apply to jurors as judges.

[18]*See* Jespersen v. Harrah's Oper. Co., 392 F.3d 1076, 1078, 94 FEP 1812 (9th Cir. 2004), *reh'g granted*, 409 F.3d 1061, 95 FEP 1536 (9th Cir. 2005)[, *aff'd en banc*, 444 F.3d 1104, 1107–08, 97 FEP 1473 (9th Cir. 2006)]. For the previous 20 years that Jespersen worked at Harrah's, her employer encouraged her and other female beverage servers to wear makeup although it was not a job requirement. 392 F.3d at 1077. It was not until 2000 that Harrah's implemented its "Beverage Department Image Transformation" program, imposing "appearance standards" on its employees. *Id.* Although all beverage servers, regardless of gender, were required to "[be) well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform," it incorporated sex-differentiated requirements to carry out its goals. *Id.* Notably, women were required to wear colored nail polish, make-up, and styled hair; men were prohibited from doing so. *Id.*

[19]*Id.*

[20]*Id.* at 1078. Harrah's also required its male employees to abide by the male Personal Best standards, which included "maintain[ing] short haircuts and neatly trimmed nails." *Id.* at. 1081.

[21]*Id.* at 1077.

[22]*Id.*

[23]Jespersen v. Harrah's Oper. Co., 392 F.3d 1076, 1077, 94 FEP 1812 (9th Cir. 2004), *reh'g granted*, 409 F.3d 1061, 95 FEP 1536 (9th Cir. 2005)[, *aff'd en banc*, 444 F.3d 1104, 1107–08, 97 FEP 1473 (9th Cir. 2006)].

the Ninth Circuit explained, she "felt that wearing makeup 'forced her to be feminine' and to become 'dolled up' like a sexual object, and … 'took away [her] credibility as an individual and as a person.' "[24] Notably, during the litigation, Harrah's never questioned Jespersen's sincerity regarding her response to the make-up requirement.

As a result of Jespersen's refusal to cooperate with the newly imposed grooming policy, Harrah's terminated her.[25] Jespersen sued, alleging that the "Personal Best" requirement constituted disparate treatment based on sex discrimination.[26] The basis of her claim was simple—the "Personal Best" program required women, but not men, to conform to certain dress and make-up requirements and, therefore, constituted disparate treatment based on sex.[27] According to the Ninth Circuit and well-established law, in order to prevail, Jespersen only had to prove that "but for" her sex, she would have been treated differently.[28] A clearer case could hardly have been framed.

Notwithstanding the clarity and simplicity of her claim, the Ninth Circuit rejected it in a surprisingly brief decision, finding that, although different standards were imposed on male and female employees, there was no class-based harm; Jespersen could not demonstrate that the differential treatment amounted to an unequal burden on women.[29] Citing a broad doctrinal exception to the general rule for proving a disparate treatment claim, the court explained that it had "previously held that grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex."[30] The court's interpretation of this doctrinal exception was that, in the case of differential dress and appearance standards, the court should apply an unequal burdens test that focused on whether female employees are more significantly burdened than their male counterparts.[31]

As an initial matter, the Ninth Circuit's suggestion that an "unequal burdens" test is automatically applicable in dress code cases conflicts with precedent. Since dress codes and sex discrimination are not mutually exclusive categories, many courts have delineated the circumstances where sex-differentiated dress codes violate prohibitions against discrimination. They have not uniformly done so by comparing requirements for male and female employees in the workplace.[32] While it is hard to reconcile these inconsistent outcomes, some generalizations can be drawn, at least as to when dress codes violate sex discrimination prohibitions. For example, some courts have struck down sex-differentiated dress codes because they were applied

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[24] *Id.*

[25] *Id.* at 1078.

[26] *Id.*

[27] *Id.* at 1081.

[28] Jespersen v. Harrah's Oper. Co., 392 F.3d 1076, 1079–80, 94 FEP 1812 (9th Cir. 2004), *reh'g granted*, 409 F.3d 1061, 95 FEP 1536 (9th Cir. 2005)[, *aff'd en banc*, 444 F.3d 1104, 1107–08, 97 FEP 1473 (9th Cir. 2006)].

[29] *Id.* at 1083.

[30] *Id.* at 1080.

[31] *Id.*

[32] *See infra* notes 33–35 and accompanying text.

differently to men and women without sufficient justification.[33] Others have held that even a sex-neutral dress code may violate the law if it is applied in a discriminatory fashion.[34] Still others have struck down sex-specific dress codes because a particular hardship fell on only one sex in its application.[35]

While courts have used the "unequal burdens" language in evaluating the legitimacy of dress codes, they have generally not applied that test as mechanistically as the Ninth Circuit did in *Jespersen*, essentially evaluating whether the "Personal Best" program imposed the same time burdens on men and women.[36] The Ninth Circuit characterized the application of this test to *Jespersen* as one of first impression,[37] arguably because it misinterpreted the unequal burdens precedent.

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[33] *See* Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 609, 30 FEP 235 (9th Cir. 1982), *cert. denied*, 460 U.S. 1074 (1983) (holding Continental's desire to compete by featuring attractive female cabin attendants insufficient to support a discriminatory weight requirement).

[34] *See* Harding v. Goodyear Tire & Rubber Co., 929 F. Supp. 1402, 1406 (D. Kan. 1996) (considering evidence that a "no tank tops" requirement only applied to female employees could support inference of sex discrimination); Tamimi v. Howard Johnson Co., 807 F.2d 1550, 1553–54, 42 FEP 1289 (11th Cir. 1987) (finding that the creation of facially neutral makeup rule was evidence of a pretext for sex discrimination).

[35] *See* O'Donnell v. Burlington Coat Factory Whse., Inc., 656 F. Supp. 263, 266, 43 FEP 150 (S.D. Ohio 1987) (finding a dress code requiring female sales clerks to wear a "smock" while allowing male sales clerks to wear shirts and ties impermissible, even absent a discriminatory motive, because it perpetuated sexual stereotypes); EEOC v. Sage Realty Corp., 507 F. Supp. 599, 611, 24 FEP 1521 (S.D.N.Y. 1981) (finding a sexually provocative uniform requirement impermissible); Marentette v. Michigan Host, Inc., 506 F. Supp. 909, 912, 24 FEP 1665 (E.D. Mich. 1980) (concluding that a sexually provocative dress code may violate Title VII); Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi., 604 F.2d 1028, 1029–30, 20 FEP 764 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980) (striking down a dress code that required women to wear a uniform but allowed men to wear business suits).

[36] *Cf. Gerdom*, 692 F.2d at 605–06. The court considered the "burdens" on women in comparison to men in deciding the discrimination claim, but the discussion of "burdens" came in response to defendant's argument. The defendant argued that its policy was similar to previous policies that had been upheld by the court, and the court proceeded to distinguish the case before it by focusing on the unduly harsh burdens imposed solely on women.

[37] *See* Jespersen v. Harrah's Oper. Co., 392 F.3d 1076, 1080, 94 FEP 1812 (9th Cir. 2004), *reh'g granted*, 409 F.3d 1061, 95 FEP 1536 (9th Cir. 2005)[, *aff'd en banc*, 444 F.3d 1104, 1107–08, 97 FEP 1473 (9th Cir. 2006)]. [*Editor's Note:* The *Jespersen* "unequal burdens" analysis was followed in *Schroer v. Billington*, 424 F. Supp. 2d 203, 207–09, 97 FEP 1506 (D.D.C. 2006) (*Schroer I*), a landmark Title VII case not involving dress codes. Subsequent to the publication of Professor Levi's article, and just two weeks after the *Schroer I* opinion was released, the Ninth Circuit, sitting en banc, reached the same result as the three-judge panel that originally heard the appeal:

> We agree with the district court and the panel majority that on this record, Jespersen has failed to present evidence sufficient to survive summary judgment on her claim that the policy imposes an unequal burden on women. With respect to sex stereotyping, we hold that appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping, but that on this record Jespersen has failed to create any triable issue of fact that the challenged policy was part of a policy motivated by sex stereotyping. We therefore affirm.

Jespersen v. Harrah's Oper. Co., Inc., 444 F.3d 1104, 1106, 97 FEP 1473 (9th Cir. 2006). The panel decision was decided 2 to 1; the en banc decision was decided 7 to 4. After the en banc decision was issued, Professor Levi wrote a critique of both the *Jespersen* en banc majority and *Schroer I* opinions. *See* Jennifer L. Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence*, 14 DUKE J. GENDER LAW & POL'Y 243 (2007), *available*

Further, rather than acknowledging that sex discrimination law protects individuals, not just classes of individuals, the Ninth Circuit turned Title VII on its head by interpreting its precedent to mean that Jespersen could not prevail unless her case demonstrated that *all* women are burdened, not just those who, like her, are offended and harmed by having to wear make-up. As a result, the Ninth Circuit departed from well-established law. Moreover, even if the court had correctly identified how other courts had applied the unequal burdens test, the Harrah's policy could not have survived it. The court basically concluded that Jespersen could not prove her case because she had not introduced evidence that could establish that wearing make-up on a daily basis pursuant to the "Personal Best" program would take more money or time than was required by the men to "maintain short haircuts and neatly trimmed nails."[38] One can only conclude that the judges either never applied make-up on a daily basis or drew their conclusion so reflexively that they could not imagine the extra time, energy, and money the makeup rule required.[39]

C. Behind the *Jespersen* Analysis

The *Jespersen* outcome, though wrong, was not surprising, given the widespread notion that forced conformity to normative beliefs about appropriate gender expression is perfectly acceptable. This notion is hard to justify under any application of a disparate treatment test. Taken seriously, disparate treatment means just that—a female plaintiff may prove a claim by demonstrating a male employee would be treated differently. By definition, sex-differentiated dress and appearance requirements are disparate treatment. Regardless, since many challenges to them have failed, a closer analysis is warranted.[40]

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at www.law.duke.edu/shell/cite.pl?14+Duke+J.+Gender+L.+&+Pol'y+243+pdf. Thereafter, in his posttrial opinion, the judge in the *Schroer* case reversed himself, stating as follows:

> In her post-trial briefing, Schroer convincingly argues that *Jespersen*'s disparate treatment requirement ought not apply in this case. Unlike *Jespersen*, this case does not involve a generally applicable, gender-specific policy, requiring proof that the policy itself imposed unequal burdens on men and women. Instead, Schroer argues that her *direct evidence* that the Library's hiring decision was motivated by sex stereotypical views renders proof of disparate treatment unnecessary.

Schroer v. Billington, 577 F. Supp. 2d 293, 304, 104 FEP 628 (D.D.C. 2008) (*Schroer III*). In *Schroer III*, the court held that the plaintiff, a gender-affirmed woman, was subjected to sex discrimination based on gender stereotypes and because of her planned change in anatomical sex when the defendant withdrew a job offer after she disclosed her transgender status. The *Schroer* litigation is discussed extensively in Chapter 14 (Title VII of the Civil Rights Act of 1964).]

[38] *Jespersen,* 392 F.3d at 1081.

[39] Perhaps the easiest way to expose the flaw in the court's analysis is to recognize that both women and men had to maintain haircuts and have neat-appearing nails. *Id.* The women's requirements to wear make-up, stockings, nail polish, and have teased, styled, or curled hair was above and beyond those minimal requirements imposed on both men and women.

[40] *See supra* note 11. *See also* Annotation, *Employer's Enforcement of Dress or Grooming Policy as Unlawful Employment Practice Under §703(a) of Civil Rights Act of 1964 (42 U.S.CA. §2000e-2(a)),* 27 A.L.R. FED. 274, §3 (2005) (discussing numerous failed dress code and grooming policy challenges).

The justifications for sustaining sex-differentiated dress codes, both theoretical and judicial, can best be characterized as lacking substance. Perhaps more charitably, they could be referred to as defense by analogical reasoning. The proponent of sex distinctions argues that, because all, or at least most, persons would agree that it is not harmful to enforce some sex stereotypes, figuring out where to draw the line when enforcement is inappropriate entails drawing the line around widely shared normative beliefs about appropriate gender expression.

This form of defense has been advanced, for example, by Robert Post.[41] Professor Post looks for examples of employment that discriminate on the basis of sex that he believes most would agree are justified.[42] The examples he considers concern matters of privacy where an individual—a woman in all of his scenarios—is exposed or vulnerable. Because he believes most people would want a court to sustain a sex-differentiated job requirement in such circumstances, he maintains that the disparate treatment is not unlawful.[43] Finding the right example is key to Post's argument, and the ones he chooses are those to which nearly everyone can relate, since even if the reader has never been in a comparably vulnerable position, he or she can imagine a relative, dependent, or friend who has or could be. His quintessential example is when an elderly woman has to be bathed.[44] Post argues that, naturally, the elderly woman should be able to preference hiring a female attendant, a position supported by at least one court.[45] In doing so, he presumes that there is little harm associated with this normative belief about what people are or are not uncomfortable with. This, of course, ignores the harm to the male applicant who has no interest in invading anyone's privacy, is qualified for the position, and needs the money.

The problem with Post's reasoning, much like the problem with the *Jespersen* court's analysis, is that no amount of hand-waving or analogical reasoning can deny the fact that, despite widespread normative beliefs and conformity to gender stereotypes, many people do suffer real harm from being subjected to these beliefs and stereotypes. Further, not everyone shares prevailing societal norms.[46] The difficulty for courts is that judges who are, by and large, men and women who share the societal norms do not experience the harms associated with forced gender conformity. Therefore, they often cannot imagine the extent of the harm it causes.[47]

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[41] *See* Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1 (2000)[, *available at* http://digitalcommons.law.yale.edu/fss_papers/192].

[42] *Id.* at 15–16.

[43] *Id.* at 25–26.

[44] *Id.* at 25 (citing Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 17 FEP 330 (D. Del. 1978)[, *aff'd*, 591 F.2d 1334, 19 FEP 887 (3d Cir. 1979)]).

[45] *See Fesel,* 447 F. Supp. at 1353–54.

[46] For a particularly poignant account of the pain one person experienced as a result of not sharing prevailing societal gender norms, including forced hospitalization and curative therapy, see DAPHNE SCHOLINSKI, THE LAST TIME I WORE A DRESS (1997).

[47] Perhaps more accurately, most judges cannot understand the extreme harm caused by forced gender conformity. They likely do have some concept of how forced gender conformity affects individuals like themselves. However, because they may have experienced it as simply

D. The Transgender Cases

In contrast to *Jespersen*, cases where litigants have been transgender, and therefore better able to plead and highlight the specific harms of forced conformity, have afforded plaintiffs more success. Consider, for example, the case of *Doe v. Yunits*.[48] Pat Doe was a 15-year-old student who sued the principal of her junior high school when he refused to allow her to attend school wearing girls' clothing.[49] Pat had been diagnosed with gender identity disorder (GID) and, although born biologically male, she had a female gender identity.[50] As a result, her treating therapist concluded "that it was medically and clinically necessary for plaintiff to wear clothing consistent with the female gender and that failure to do so could cause harm to plaintiff's mental health."[51]

Although the court did not describe it as such, the case, in essence, was a challenge to a sex-differentiated dress code. The policy itself was gender neutral, prohibiting "clothing which could be disruptive or distractive to the educational process or which could affect the safety of students."[52] As interpreted by the principal, however, this meant that Doe, a biologically male student, could not wear "padded bras, skirts or dresses, or wigs."[53] By contrast, biologically female students were not categorically prohibited from wearing such clothing. As a result, the case, like *Jespersen*, was a dress code challenge.

In ruling in Doe's favor, the court did not even mention any dress code exceptions to sex discrimination law. Rather, the court applied the traditional disparate treatment rule to which the *Jespersen* court adverted. As the *Doe* court explained, "the right question is whether a female student would be disciplined for wearing items of clothes plaintiff chooses to wear. If the answer to that question is no, plaintiff is being discriminated against on the basis of her sex, which is biologically male."[54]

The court did distinguish the case from one that found a dress code exception.[55] However, the distinction was based on the reason why plaintiff challenged the dress requirement.[56] Notably, in distinguishing the case

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a minor inconvenience (because they have never faced forced conformity to a gender norm in any way grossly inconsistent with their gender identity) it is easy to minimize a litigant's related (but vastly different) experience. After all, if judges have no experience with which to compare a case before them, then they are less likely to use themselves as a measure of evaluating the plaintiff's experience.

[48] 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000)[, *aff'd sub nom.* Doe v. Brockton Sch. Cmte., 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000)]. This author served as counsel for Pat Doe in her capacity as Senior Staff Attorney at GLAD.

[49] *Id.* at *1.

[50] *Id.*

[51] *Id.*

[52] *Id.* (internal quotation marks omitted).

[53] 2000 WL 33162199, at *2 (Mass. Super. Ct. Oct. 11, 2000)[, *aff'd sub nom.* Doe v. Brockton Sch. Cmte., 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000)].

[54] *Id.* at *6.

[55] *Id.* (citing Harper v. Edgewood Bd. of Educ., 655 F. Supp. 1353 (S.D. Ohio 1987)).

[56] *Id.*

from one affirming a sex-specific dress code, the court found relevant that the plaintiff sought to wear girls' clothing in order to express her personal identity, holding that suppression of that identity, simply because it "departs from community standards," would be impermissible.[57]

By way of distinguishing the *Jespersen* analysis, it is useful to consider a second case involving, essentially, a dress code challenge. In *Enriquez v. West Jersey Health Systems*, a transsexual plaintiff brought a claim against her employer when she was terminated during the process of transitioning from male to female.[58] Carla Enriquez had been a practicing pediatrician for over 20 years when she was hired by defendant West Jersey Health Systems to be the medical director of an outpatient treatment facility.[59] Less than a year after being hired, she began the process of transitioning.[60] She "shaved her beard and eventually removed all vestiges of facial hair. She sculpted and waxed her eyebrows, pierced her ears, started wearing emerald stone earrings, and began growing breasts."[61] Several coworkers and supervisors grew uncomfortable with her process of transitioning in the workplace and confronted her.[62] According to Enriquez, one supervisor told her to "stop all this and go back to your previous appearance!"[63] Following some administrative changes at her place of employment, Enriquez was required to renegotiate her contract.[64] At that time she was told, "[N]o one's going to sign this contract unless you stop this business that you're doing."[65] The implication was clearly that, unless she conformed to male gendered stereotypes, her employment would not be continued. Shortly thereafter, Enriquez was terminated.[66]

Although not explicitly a dress code case because no dress code was cited as justification, Enriquez's underlying sex discrimination claim is doctrinally indistinguishable from those brought by Pat Doe and Darlene Jespersen. As in *Doe*, the *Enriquez* court sustained the plaintiff's claim.[67] The court never considered whether there was some exception to sex discrimination law for dress codes. It did, however, analyze whether there was some exception to sex discrimination law for transsexual persons.[68] It concluded that there was not.[69]

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[57] *Id.* at *6 n.5.

[58] Enriquez v. West Jersey Health Sys., 777 A.2d 365, 367, 86 FEP 197, 11 AD 1810 [(N.J. Super. Ct. App. Div.), *certification denied*, 785 A.2d 439 (N.J. 2001)].

[59] *Id.*

[60] 777 A.2d at 368.

[61] *Id.*

[62] *Id.*

[63] Enriquez v. West Jersey Health Sys., 777 A.2d 365, 368, 86 FEP 197, 11 AD 1810 [(N.J. Super. App. Div.), *certification denied*, 785 A.2d 439 (N.J. 2001)].

[64] *Id.*

[65] *Id.* (alteration in original).

[66] *Id.*

[67] *Id.* at 380.

[68] Enriquez v. West Jersey Health Sys., 777 A.2d 365, 371–73, 86 FEP 197, 11 AD 1810 [(N.J. Super. App. Div.), *certification denied,* 785 A.2d 439 (N.J. 2001)].

[69] 777 A.2d at 373.

One key difference between *Jespersen* on the one hand and *Doe* and *Enriquez* on the other is the incorporation of disability claims on behalf of Doe and Enriquez, and, more importantly, extensive discussion of the centrality of gender expression and its inelasticity.[70] While completely irrelevant to the sex discrimination claim, the existence of the disability claim itself allowed the introduction of evidence relating to the condition of being transgender and the sincere reasons why the plaintiff could not conform to a sex-differentiated dress requirement.[71] As a result, the *Doe* and *Enriquez* courts had a more specific and concrete understanding of how painful it is to require the plaintiff to conform to the particular expectation of gender at issue in the case. Even though the harm of gender conformity had no relevance to the sex discrimination claim, the outcome in the two cases was quite different.

Notably, both the *Doe* and *Enriquez* decisions reflected the fact that the courts could imagine the specific harm a transgender litigant might experience from forced conformity to gender norms.[72] For example, in *Enriquez*, the New Jersey Superior Court referred in detail to a letter Enriquez wished to send to her patients explaining her condition. The letter, in part, stated:

> Current research tells us that early in fetal development, the infant's brain undergoes masculinization or feminization unrelated to chromosomal complement. Later, as we grow up, we identify with the "cortical" or brain gender we were endowed with. Happily, for the majority of the population, the genetic (or chromosomal gender) and the cortical (or brain gender) are congruent. . . . [S]ome people do not have this harmony. We call these feelings "dysphoria" in medicine. Literally, this means "unhappy," but doctors have expanded its meaning to describe conditions that significantly effect [sic] the individual. Gender Dysphoria describes a condition in which there is not this harmony. The physical and the inner selves are at odds.[73]

Although irrelevant to the sex discrimination claim or its analysis, the language seemed to move the court in its interpretation of the New Jersey Law Against Discrimination. Acknowledging that some states are split on

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[70] *See id.* at 369–70; Doe v. Yunits, 2000 WL 33162199, at *2–6 (Mass. Super. Ct. Oct. 11, 2000)[, *aff'd sub nom.* Doe v. Brockton Sch. Cmte., 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000)].

[71] *See Enriquez*, 777 A.2d at 370–71 (describing in depth the plaintiff's gender dysphoria diagnosis); *Doe*, 2000 WL 33162199, at *7 (describing gender-specific dress code requirements as "stifling of [the] plaintiff's selfhood").

[72] *See Doe*, 2000 WL 33162199, at *8. The court stated that the school had suspended Doe "on account of the expression of her very identity," and in ruling in Doe's favor, the court considered the harm that Doe would suffer if she was not allowed to return to school in clothing which conformed to her gender identity. "[I]f plaintiff is barred from school, the potential harm to plaintiff's sense of self-worth and social development [would be] irreparable." *See Enriquez*, 777 A.2d at 373. The court discussed gender and its relation to one's sense of self before concluding that the law should prohibit discrimination on the basis of sex or gender. In the end, the court agreed with the notion that "a person's sex or sexuality embraces an individual's gender, that is, one's self-image, the deep psychological or emotional sense of sexual identity and character." *Id.* (citation omitted).

[73] *See* Enriquez v. West Jersey Health Sys., 777 A.2d 365, 370, 86 FEP 197, 11 AD 1810 [(N.J. Super. App. Div.), *certification denied*, 785 A.2d 439 (N.J. 2001)].

the issue of whether transgender people are excluded from state sex discrimination laws,[74] the New Jersey court concluded that

> it is incomprehensible to us that our Legislature would ban discrimination against heterosexual men and women; against homosexual men and women; against bisexual men and women; against men and women who are perceived, presumed or identified by others as not conforming to the stereotypical notions of how men and women behave, but would condone discrimination against men or women who seek to change their anatomical sex because they suffer from a gender identity disorder.[75]

It is likely that the incorporation of the medical information relating to the compelling reasons why someone would undergo that physical transformation moved the court in its analysis.

Similarly, in *Doe*, the plaintiff stated as part of her case that she was diagnosed with childhood GID and that it was due to this diagnosis that a treating therapist advised that it was medically and clinically necessary for the plaintiff to wear clothing consistent with her female gender identity.[76] In the context of a student plaintiff, this information seemed to move the court in framing the question as it did—whether the school would treat a biologically female student the same by similarly disciplining her for wearing female clothing.[77] If not, the court concluded, the plaintiff could prove her disparate treatment claim.[78] Importantly, the court understood that Doe was motivated to wear the clothing for which she was disciplined for genuine reasons and not for the purposes of causing disruption.[79] This allowed the court to distinguish the case from others in which courts disallowed related claims brought by nontransgender litigants.[80]

Comparison of these cases suggests that successes have been achieved on behalf of transgender litigants because litigating sex discrimination in those cases offers a vehicle for challenging normative beliefs about gender

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[74] 777 A.2d at 372. The court considered the following cases before coming to its conclusion: Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 474, 47 FEP 1217, 1 AD 442 (Iowa 1983) (concluding that the word "sex" in Iowa's Civil Rights Act does not include transsexual people); James v. Ranch Mart Hardware, Inc., 881 F. Supp. 478, 481, 67 FEP 862 (D. Kan. 1995) (holding that a male-to-female transsexual could not sue for discrimination under Kansas law); Underwood v. Archer Mgmt. Servs., Inc., 857 F. Supp. 96, 98, 65 FEP 791 (D.D.C. 1994) (finding that, under the District of Columbia's Human Rights Act, transsexuality is not a "sex"); Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 395–96, 68 FEP 1039 (Sup. Ct. 1995) (interpreting the word "sex" in a state antidiscrimination law to include transsexual people).

[75] *Enriquez*, 777 A.2d at 373.

[76] *See* Doe v. Yunits, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000)[, *aff'd sub nom.* Doe v. Brockton Sch. Cmte., 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000)].

[77] *Id.* at *6 (stating that "[s]ince plaintiff identifies with the female gender, the right question is whether a female student would be disciplined for wearing items of clothes plaintiff chooses to wear").

[78] *Id.*

[79] *Id.* at 6 n.5.

[80] *Id.* (distinguishing Harper v. Edgewood Bd. of Educ., 655 F. Supp. 1353 (S.D. Ohio 1987)). As the *Doe* court explained, in *Harper*, the student plaintiffs were unsuccessful because their challenge to a gender-specific prom dress code stemmed from "rebellious acts to demonstrate a willingness to violate community norms," and was not for the purpose of expressing their personal identity. *Id.*

in a way that is less threatening to the nontransgender judges who adjudicate them. In other words, because courts have been able conceptually to marginalize the impact of their decisions to a minority community (of transgender persons), it may be easier for them to allow some small incursion into widely held beliefs about the fundamental differences between men and women.

In contrast to the understanding of the *Doe* and *Enriquez* courts of the plaintiffs' perceived need to violate gender norms, the *Jespersen* court belittled the burden that a sex-differentiated dress code imposed on the plaintiff, all but ignoring the individual harm alleged.

II. In Defense of Disability

Bringing a disability claim along with a sex discrimination claim has sometimes been the key to successful challenges of sex-differentiated dress codes. It humanizes the plaintiff, helps convince courts of the seriousness of the underlying claims, and counteracts the collective hunch theory by giving a judge a basis for removing him or herself as the evaluator of the harm of a sex-differentiated rule. A disability claim gives a court a construct for understanding why someone cannot conform to a gender stereotype and does so in language a judge can understand. That is, different health conditions are widely understood to change the way an individual might respond to a particular job requirement, making the judge without the health condition a poor arbiter of the job requirement's effects. By incorporating a medical claim associated with one's gender identity or gender expression, courts can distance themselves from the particular facts and circumstances of a case and take seriously the dysphoria experienced by a plaintiff's forced conformity to a gender norm.

Nevertheless, some have criticized the incorporation of disability counts into claims of discrimination brought by transgender litigants. The basis of the criticisms is not the effectiveness of bringing a disability claim.[81]

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[81] As an initial matter, of course, federal disability law, the Americans with Disabilities Act, and the Federal Rehabilitation Act contain an express exclusion for transgender litigants. *See* 42 U.S.C. §12211(b)(1) (2005). Despite this exclusion at the federal level, many state (and local) laws contain no such express exclusion and have been used successfully by transgender litigants. *See* Jette v. Honey Farms Mini Mkt., 23 Mass. Discr. Law Rptr. 229, 2001 WL 1602799, at *3 (Comm. Ag. Discr. Oct. 10, 2001) (interpreting a Massachusetts discrimination statute as providing protection for transsexual people); Enriquez v. West Jersey Health Sys., 777 A.2d 365, 373, 86 FEP 197, 11 AD 1810 [(N.J. Super. Ct. App. Div.), *certification denied*, 785 A.2d 439 (N.J. 2001)] (finding protection for transsexual persons under New Jersey discrimination statute); Doe v. Yunits, 2000 WL 33162199, at *6 (Mass. Super. Ct. Oct. 11, 2000)[, *aff'd sub nom*. Doe v. Brockton Sch. Cmte., 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000)] (finding Massachusetts law against sex discrimination applicable where a student with GID was prevented from wearing feminine clothing); Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 395–96, 68 FEP 1039 (N.Y. Sup. Ct. 1995) (interpreting the word "sex" in a New York City ordinance prohibiting discrimination as protective of transsexual people); Doe v. Electro-Craft Corp., 1988 WL 1091932, at *7 (N.H. Super. Apr. 8, 1988) (concluding that New Hampshire law against discrimination does encompass protection for transsexualism as a protected handicap). *See also* Smith v. City of Jacksonville Corr. Inst, 1991 WL 833882, at *14 (Fla. Div. Admin. Hrgs. Oct. 2, 1991)[, *aff'd in part, rev'd in part on other grounds,* FCHR Order No. 92-023 (Fla.

Rather, the criticisms stem principally from the stigma of disability and reflect central misunderstandings of disability law. Four basic criticisms emerge. First, people have a reflexive aversion to being included within the stigmatized community of disability.[82] Second, some argue that a disability theory is under-inclusive because it may not be available to all persons who identify as transgender, specifically those who reject a medical diagnosis as being at the root of their identity. Third, a class-based critique raises a concern about the medicalization of the transgender condition.[83] Finally, a postmodern approach that seeks to disaggregate sex and gender concludes that, because all gender is culturally defined,[84] an essentialist approach, which only crassly describes a disability model, should be rejected.[85]

The first of these objections, rooted in the stigma associated with health conditions, should not guide litigation choices because it exacerbates the stigma that disability laws seek to redress while ignoring the reality of the transgender condition and identity for many individuals. As to the first of these points, the distinction between the use of the word "disability" in nondiscrimination laws and its use in, for example, entitlement programs must be noted. The purpose of disability nondiscrimination laws is to protect individuals who, despite a health condition, are able to work but are prevented from doing so because of the prejudice of others.[86] As a result, the word "disability" that appears in nondiscrimination laws describes a health condition, but not conditions that preclude an individual from performing the essential elements of a job with or without accommodation.[87] In other

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Comm. Hum. Rel. June 10, 1992)] (holding that an individual with gender dysphoria is within the disability coverage of the Florida Human Rights Act, as well as the portions of the Act prohibiting discrimination based on perceived disability); Evans v. Hamburger Hamlet, 1996 WL 941676, at *9 (Chi. Comm. Hum. Rel. May 8, 1996) (denying the defendant's motion to dismiss a disability claim brought by a transsexual plaintiff). [*Editor's Note*: For a discussion of the Americans with Disabilities Act's GIDs exclusion, the "physical impairment" exception to the exclusion, suggested ways to counteract the exclusion, and the cases cited in this footnote, see Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973).]

[82] *See* Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 34 (2003)[, *available at* www.deanspade.net/wp-content/uploads/2010/07/resisting.pdf]. Spade relates the concern that "trans people do not want to be seen as 'disabled' " because it implies that to be transgendered is to be flawed.

[83] *Id.* at 35. Spade expresses particular concern that the use of disability claims and the medical model of gender identity disorder in general means that lower income individuals will be denied protections available to wealthier individuals because they lack the resources necessary to access a GID diagnosis.

[84] Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1 (1995)[, *available at* http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/pnlr144&div=10&id=&page].

[85] These objections, and an affirmative case for bringing disability claims on behalf of transgender individuals, have been made elsewhere. TRANSGENDER RIGHTS (Paisley Currah et al. eds. 2006).

[86] LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW 26–27, 266 (2d ed. 1997).

[87] *See* Jackson v. Veterans Admin., 22 F.3d 277, 279–80, 3 AD 483 (11th Cir.), *cert. dismissed*, 513 U.S. 1052 (1994) (finding that an employee with rheumatoid arthritis who was terminated from housekeeping job did not have a valid discrimination claim because he was unable to meet his job attendance requirements).

words, unlike the word "disability" that appears in entitlement programs,[88] the language of nondiscrimination law does not reflect the use of the word "disability" in the vernacular.[89]

As a result, the main point of disability law is to ensure that individuals who can work despite having a health condition (or having a history of such condition or being perceived as such) should not be prevented from doing so because of the stigma attached to the condition. To avoid relying on disability law for protections because of stigma would exacerbate the problem the laws seek to redress.

Getting beyond the stigma associated with the law, some transgender, as well as nontransgender, individuals balk at relying on such law because of the often incorporated requirement that a litigant demonstrate that the health condition limits a major life activity.[90] For many transgender people, of course, the condition of being transgender has no impact on their lives. For others, however, the identity or condition, without any medical intervention or care, is seriously limiting.[91] Acknowledging this fact does not, however, universalize that experience or suggest that to be the case for everyone who identifies as transgender. Nor does acknowledging that fact require that every transgender individual follow any particular course of care or treatment for the condition.[92]

In addition, most disability laws cover not just individuals with a particular health condition but also those who have a history of such condition or are regarded as having such a condition.[93] Therefore, even for those

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[88] *See* 42 U.S.C. §1382(c)(1) (2005). Supplemental Security Income payments are "determined on the basis of the individual's . . . income, resources, and other relevant characteristics," indicating that the program was designed to provide a minimum income to those who are unable to work. In this context, "disabled individual" clearly refers to a person who is unable to work.

[89] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 642 (1993). Among the definitions of "disability" is "an inability to do something" and "the condition of being disabled."

[90] Spade, *supra* note 82, at 33–34.

[91] *See* Kosilek v. Maloney, 221 F. Supp. 2d 156, 175 (D. Mass. 2002) (finding that an inmate with GID did not receive adequate medical care for a serious medical need because a prison official initiated a blanket policy restricting the treatment options doctors could prescribe for inmates). [*Editor's Note:* Ten years later, the same judge determined that the prison continued to deny the inmate adequate medical treatment for GID. Kosilek v. Spencer, 889 F. Supp. 2d 190 (D. Mass. 2012), *aff'd*, 740 F.3d 733 (1st Cir. 2013), *reh'g en banc granted and majority and dissenting appellate opinions withdrawn by Order of Court*, No. 12-2194 (1st Cir. Feb. 12, 2014) (oral argument en banc held on May 8, 2014). The *Kosilek* appeal can be tracked at the GLAD's web page that follows the litigation: www.glad.org/work/cases/kosilek-v.-spencer.]

[92] *See* Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law,* 36 COLUM. HUM. RTS. L. REV. 713, 730–32 (2005) (discussing the shortcomings of courts' reliance on the "medical model" when dealing with transgender litigants). Romeo believes that the medical model is tilted toward those who have the means to access the health care system, and that it does not protect gender nonconforming people who are unable to access trans-friendly health care, intersex people who refuse "corrective" medical procedures, people who identify as genderqueer or otherwise express nontraditional gender identities, people who are unable to physically modify their bodies, and those who choose not to undergo surgical and hormonal treatments in order to express their gender. *Id.*

[93] *See* Michalski v. Reuven-Bar Levav & Assocs. P.C., 625 N.W.2d 754, 759–60, 12 AD 375 (Mich. 2001). The court interpreted the Michigan Handicappers' Civil Rights Act as requiring the plaintiff to show that the plaintiff was regarded as having a determinable physical or

persons whose transgender identity or condition does not lead to medical care or treatment, disability laws may provide protections as well. The stigma and misunderstandings, therefore, associated both with disability law and transgender identity should not limit the availability of those laws to persons who face discrimination.

In addition to objections based on stigma and under-inclusion, the two remaining most common objections to pursuing disability protections stem from concerns about class and the social construction of gender. The articulation of the first of these objections comes mainly in the form of the following: by pursuing disability law as an avenue for protecting transgender people, many transgender people facing discrimination will not be covered because they cannot afford access to the medical system, either to formally be diagnosed with some condition, like GID, or to purchase hormones or surgeries.[94] Responding to this objection is straightforward. A medical diagnosis is neither necessary nor sufficient to meet the legal definition of disability in most states.[95] More fundamentally, one need not demonstrate that one is receiving medical care or treatment in order to demonstrate that he or she has experienced discrimination on the basis of disability.[96]

An alternate way to see the fallacy of this objection is to consider it in the context of any other health condition. Would someone possibly object to a person with cancer bringing a claim of disability discrimination simply because the individual could not afford medical treatment for their cancer? Would one possibly object to a pregnant woman bringing a claim of pregnancy discrimination simply because she could not afford pre-natal care?

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mental characteristic; the perceived characteristic was regarded as substantially limiting one or more of the plaintiff's major life activities; and the perceived characteristic was regarded as being unrelated either to the plaintiff's ability to perform the duties of a particular job or position or to the plaintiff's qualification for employment or promotion. *Id.*; *see* Chevron Corp. v. Redmon, 745 S.W.2d 314, 318, 56 FEP 870, 1 AD 1174 (Tex. 1987) (in considering the Texas antidiscrimination statute, the court found that "in order for a disability to be considered a handicap in the first place it must be one which is generally perceived as severely limiting him in performing work-related functions in general").

[94]Spade, *supra* note 82, at 35–36.

[95]Connecticut is one of the rare jurisdictions that defines disability to track disorders included within the *Diagnostic and Statistical Manual of Mental Disorders*, at least as to mental disabilities. CONN GEN. STAT. §17a-540 (2004). *See also* Conway v. City of Hartford, 19 Conn. L. Rptr. 109, 1997 WL 78585, at *4–5 (Super. Ct. Feb. 4, 1997). [*Editor's Note*: In 2001, the Connecticut Fair Employment Practices Act was expressly amended to define "mental disability" as "refer[ring] to an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's 'Diagnostic and Statistical Manual of Mental Disorders.' " CONN. GEN. STAT. §46a-51(20).]

[96]*See, e.g.,* Sanglap v. LaSalle Bank, FSB, 345 F.3d 515, 520 (7th Cir. 2003) (finding "that liability for disability discrimination does not require professional understanding of the plaintiff's condition. It is enough to show that the defendant knew of symptoms raising an inference that the plaintiff was disabled"); Martinson v. Kinney Shoe Corp., 104 F.3d 683, 686, 6 AD 434 (4th Cir. 1997) (acknowledging that employee may prove discrimination on account of disability by showing that termination was due to physical manifestations of " 'specific attributes' of his disease"). In *Martinson*, the termination was due to employee's epileptic seizures. In downgrading the importance of determining whether the termination was due to the epilepsy itself or due to the seizures, the court stated that "[t]o fire for seizures is to fire for a disability." *Id.*

To ask these questions, hopefully, is to answer them. The ability to afford medical care or treatment is no element of stating a claim of disability discrimination. Moreover, to object to pursuing such claims from a class-based analysis is to turn the analysis on its head. The result of that position is to deny poor people with health conditions protection from discrimination that is otherwise extended to persons of means, an untenable position particularly from the progressive position that launched it.

The second of the latter two objections comes from the postmodern perspective that all gender is socially constructed and that there is nothing essential about gender identity.[97] This chapter fundamentally rejects the premise that there is nothing essential about gender identity upon which this objection is made. Even accepting the underlying premise as true, however, there are several responses to it. First, it bears mentioning that this objection, taken to its logical conclusion, posits that transsexualism does not exist. In other words, this perspective implies that if people could fully embrace their masculinity (from the female-to-male (FTM) perspective) or femininity (from the male-to-female perspective), despite the social construction of biologically female traits as feminine or biologically male traits as masculine, no one would ever need to take hormones or have surgery to fully express their gender identity. The objection essentially argues that, if masculinity could be re-socially constructed to include any form of chest, then someone who identifies as FTM would not need or want to have chest surgery. This questioning of trans-identity is deeply offensive to many transsexuals and somewhat surprising to those within the transgender community.

Second, a rejection of this objection comes from within the transgender community in the form of an acknowledgement of the interrelatedness of a disease model of disability (which is not even reflected in disability nondiscrimination laws as distinct from entitlement programs) and environmental factors. As physician Nick Gorton has explained, a commonplace understanding of disease is that it is "a clinically significant adverse effect or experience for an organism due to an interaction between one or more biological traits of that organism and the environment in which it resides."[98] In other words, a disease model itself takes into account the fact that a particular health condition may be present in one's body and, depending on the environment, either have or not have an adverse or disabling effect. The example Gorton offers is non-insulin-dependent diabetes mellitus (NIDDM). According to Gorton, the genes that in the "developed world result in NIDDM are not a disease when abstracted from their environment."[99] Consequently, if one lives in an environment where food is not in abundance and where people lead non-sedentary lives, then the same genes that in a different context are destructive are actually beneficial because of their greater potential to store

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[97] *See supra* note 11.

[98] Nick Gordon, *Toward a Resolution of GID, the Model of Disease, and the Transgender Community* [(undated), *available at* www.makezine.enoughenough.org/giddisease.htm].

[99] *Id.*

fat and preserve energy. NIDDM only results in disease, that is, a "clinically significant adverse effect," where an individual with such genes is in fact harmed by said genes.

What Gorton's argument illustrates is that the transgender condition is neither essentially bad nor good; that is to say, like having NIDDM, being transgender is neither disabling nor benign, at least not in a vacuum. However, the environment in which the condition is experienced ultimately determines whether it constitutes a disabling condition (what he calls disease) or not.[100] Therefore, even for persons who ascribe to a socially contingent understanding of gender identity, a disability discrimination model is appropriate.

Finally, the underlying disagreement about the essentialism of gender, and more specifically transgender identity, need not be resolved in order to advocate pursuing disability protection. Both disability and gender-based claims can be pursued where the discrimination a transgender person experiences is rooted in both. Likely, no one would argue that a Jewish person with Gaucher disease[101]should not pursue both disability and religion-based claims simply because there is nothing essential about religion or because not all Jewish persons have Gaucher disease. Finding redress for discrimination hardly creates identity characteristics and, certainly, avoiding identity-based discrimination claims does nothing further to question them.

III. LESSONS TO BE LEARNED AND APPLIED

What relevance, if any, does this debate have to Darlene Jespersen, a nontransgender employee terminated as a result of the enforcement of gender stereotypes? Postmodern challenges to the essentialism of gender notwithstanding, nontransgender litigants have a tremendous amount to learn from transgender litigants. Some suits brought by transgender litigants have moved courts forward in their understanding about the inelasticity of gender for such persons. A medical model has allowed litigators to introduce scientifically based reasoning that for certain persons, the requirement that they conform

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[100]This debate is not exclusive to the transgender community. Other health conditions are sometimes argued not to constitute disability, often by insurance providers that wish to avoid coverage of a condition. Consider, for example, the condition of infertility, which has no consequences to one's life absent the desire to have children. One could argue that the condition is a socially constructed one. However, accepting that premise does not refute the serious, adverse consequences for one who has the health condition. In recognition of that, many states have adopted laws to require coverage for the condition of infertility. *See, e.g.*, MASS. GEN. LAWS ch. 175, §47H (2005); 215 ILL. COMP. STAT. 5/356m (2005); TEX. INS. CODE §1366.003 (2005); CAL. HEALTH & SAFETY CODE §1374.55 (2005).

[101]Gaucher disease is a lipid storage disorder, prevalent among Jewish people of Eastern European ancestry, which causes enlargement of the spleen or liver, anemia, and bone problems. The carrier rate for Gaucher disease may be as high as 1 in 10 among Jewish people of Eastern European ancestry, in comparison to 1 in 200 among those in the general population. *See* NATIONAL GAUCHER FOUNDATION, www.gaucherdisease.org. [*Editor's Note*: The carrier rates set forth in this footnote have been updated to reflect the data reported on the National Gaucher Foundation's website in April 2014.]

to normative stereotypes is exceedingly harmful. Perhaps believing that it is only at the margins of the community that the imposition of normative stereotypes is harmful, some courts have allowed their imposition. Because doing so at the margins would not transform the social norm itself, or its force in the main, such courts have not necessarily departed from the collective hunch theory.[102] For example, in *Doe* and *Enriquez*, two state courts agreed that a school's and an employer's enforcement of normative gender stereotypes of dress and appearance impermissibly excluded persons from an education and a work environment, respectively.

The job now for litigators advancing similar claims for nontransgender litigants is to convince courts that the harms experienced by these plaintiffs is every bit as real and significant as that experienced by the transgender litigants. Part of the difficulty of this challenge is the courts' (over-)identification with nontransgender litigants and their subscription to the collective hunch theory.[103] The role of progressive lawyers and litigants concerned about the harmful effects of enforced gender norms should be to call into question the collective hunch by exposing its limited applicability.

Postmodern social constructionists have gone far in laying the groundwork for robust enforcement of sex discrimination laws. It is, after all, their insight that nothing is natural or essential about sex stereotypes that has, in significant part, moved sex discrimination jurisprudence beyond cases protecting women qua women and men qua men. As a result of that critical work, courts have acknowledged claims rooted in enforcement of invidious stereotypes as sex discrimination.

The limits of the postmodern insight may be seen, however, in cases like *Jespersen*. What may move courts beyond those limits is to strengthen and personalize the harm in the same ways that incorporating disability claims into cases brought by transgender litigants has done. A critical point to be made in future cases is that a person's core sense of gender identity is innate and impervious to change.[104] This is true for transgender and nontransgender individuals alike:

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[102] As the New Jersey Superior Court explained, "A person who is discriminated against because he changes his gender from male to female is being discriminated against because he or she is a member of *a very small minority* whose condition remains incomprehensible to most individuals." Enriquez v. West. Jersey Health Sys., 777 A.2d 365, 372, 86 FEP 197, 11 AD 1810 [(N.J. Super. Ct. App. Div.), *certification denied*, 785 A.2d 439 (N.J. 2001)] (emphasis added).

[103] Is conformity to gender norms even so easy for most individuals, given all the energy put into their continued enforcement? In other words, why would anyone care about the policing of gender norms when it is so easy for everyone to fall into them? The author would like to thank Anne Goldstein for raising these questions.

[104] This issue was raised before the Ninth Circuit. Brief of National Center for Lesbian Rights & Transgender Law Center as Amici Curiae Supporting Petitioner, Jespersen v. Harrah's Operating Co., Inc., 392 F.3d 1076, 94 FEP 1812 (9th Cir. 2004) (No. 03-15045). The brief cites the following to support this principle: Kosilek v. Maloney, 221 F. Supp. 2d 156, 163 (D. Mass. 2002) ("The consensus of medical professionals is that transsexualism is biological and innate."); Doe v. McConn, 489 F. Supp. 76, 78 (S.D. Tex. 1980) ("Most, if not all, specialists in gender identity are agreed that the transsexual condition establishes itself very early, before the child is capable of elective choice in the matter, probably in the first two years of life; some say even earlier, before birth during the fetal period."); *In re* Heilig, 372 Md. 692, 708, 816 A.2d

> [J]ust as a person's core gender identity as male or female is innate, a person's relative degree of masculinity or femininity is also deep-seated and generally impervious to manipulation or change. While individuals can alter the way they dress and can change their appearance to some degree through the use of make-up and other accessories, there is a core aspect of gender identity and gender expression that is deeply rooted and that cannot be changed.[105]

One author has advanced an interesting thought experiment that could be used effectively in litigation. Daphne Scholinski writes and asks readers to imagine being forced to express their gender identity in a way inconsistent with their sense of self, and to imagine doing so not as a lark, but rather as against one's will—first, for a day, then for a week, and then for an extended period of time. "Try changing things," she instructs.[106] "Try it. Wear an outfit that is utterly foreign—a narrow skirt when what you prefer is a loose shift of a dress. Torn-up black jeans when what you like are pin-striped wool trousers. See how far you can contradict your nature. Feel how your soul rebels."[107] For most people who seriously engage the thought experiment, the result is the same—serious discomfort that could translate into humiliation and degradation of one's sense of self. For a judge, or even a jury, willing to seriously undertake this exercise, the result hopefully would be to push the boundaries of the collective hunch theory.

One final comment about the interplay between the postmodern approach of social construction and the inelasticity of gender identity bears mention. While these approaches may seem diametrically opposed, they are easily reconciled. At the most basic level, even physical objects, much less ideas or concepts, can be both in motion and unmoving (at rest), at the same time depending on the point of reference. This fundamental concept, which inspired Albert Einstein to develop his theory of relativity,[108] is based on Einstein's observation of two trains in motion. He recognized that, to a

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68, 78 (2003). The *Heilig* court stated that, "[b]ecause transsexualism is universally recognized as inherent, rather than chosen, psychotherapy will never succeed in 'curing' the patient." *Id.*

[105]*See* Brief of National Center for Lesbian Rights & Transgender Law Center, *supra* note 104.

[106]DAPHNE SCHOLINSKI, THE LAST TIME I WORE A DRESS xi (1997).

[107]*Id.* [*Editor's Note*: In her article critiquing the en banc decision in *Jespersen v. Harrah's Operating Co.,* 444 F.3d 1104, 1106, 97 FEP 1473 (9th Cir. 2006), Professor Levi observed that Judge Kozinski, in his 2006 dissenting opinion, was able to successfully engage in the Scholinski exercise. Jennifer L. Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence*, 14 DUKE J. GENDER L. & POL'Y 243, 246–47 (2007), *available at* www.law.duke.edu/shell/cite.pl?14+Duke+J.+Gender+L.+&+Pol'y+243+pdf.]

[108]Einstein makes extensive use of the train analogy in his popular book, RELATIVITY: THE SPECIAL AND GENERAL THEORY (Robert W. Lawson trans., Crown 1961). Einstein also used the analogy of observing moving trains in his original article on special relativity, published in 1905. Albert Einstein, *Zur Elektrodynamik bewegter Koerper* [On the electrodynamics of moving bodies], 17 ANNALEN DER PHYSIK 891–921 (1905). An English translation of the paper is available in JOHN STACHEL, EINSTEIN'S MIRACULOUS YEAR: FIVE PAPERS THAT CHANGED THE FACE OF PHYSICS 123–60 (2d ed. 2005). On the third page, Einstein invokes a moving train to introduce his ideas about simultaneity: "We have to bear in mind that all our judgments involving time are always judgments about simultaneous events. If, for example, I say that 'the train arrives here at 7 o'clock,' that means, more or less, 'the pointing of the small hand of my watch to 7 and the arrival of the train are simultaneous events.' " *Id.* at 125.

person traveling at 60 miles per hour on a train in motion, another person sitting in a second train moving at precisely the same speed appears to be at rest. Indeed, the person sitting on either train, when asked, would answer that he or she is sitting still. Einstein's observation illustrates in a physical context the same phenomenon offered by this chapter, that gender may be socially constructed and responsive to social, political, and cultural pressures, but that a given individual's gender identity remains impervious to change.

Another way to reconcile these seemingly inconsistent positions is to acknowledge that, although the descriptive aspect of gender may be socially constructed, as an ascriptive facet of human identity, gender is not socially constructed for any particular individual. That is to say, even though lives are given meaning and structured by social norms that are contingent, the fact still remains that for any given individual, the experience of inhabiting those norms feels, and in some sense is, non-contingent.

IV. Conclusion

Cases in which courts affirm the enforcement of sex-differentiated dress requirements in employment reveal how little judges understand the harms associated with forced gender conformity for persons whose gender identity and expression are not shared by the judges. Cases brought by transgender litigants provide insight into what may move judges to understand both the harms of forced gender conformity for those individuals and the inelasticity of gender identity. Part of the insight is that medicalizing the experience of gender identity both strengthens the realness of the claims and offers a way for judges to remove themselves as the appropriate measure for the discomfort a litigant may experience. Objections to bringing disability claims on behalf of transgender litigants are principally rooted in misunderstandings of disability law and should be rejected by progressive minded advocates and litigants. The rejection of these objections clears the way for nontransgender litigants to bolster challenges to sex-differentiated dress requirements and to advance a conception of gender identity that ultimately strengthens claims brought by transgender and nontransgender plaintiffs alike.