Embracing Law’s Categories: Anti-Discrimination Laws and Transgenderism

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INTRODUCTION .......................................................................................................................... 52

Sex or Gender Discrimination? ............................................................................................ 55

I. A COMPARATIVE ANALYSIS OF DISCRIMINATION LAWS AND TRANSGENDER LITIGATION .................................................................................................................. 56

A. Jurisprudence in the United States .................................................................................. 56
1. Traditional Jurisprudence ................................................................................................. 56
2. New Jurisprudence ........................................................................................................... 60
3. A “Canary in the Sartorial Coal Mine”? .......................................................................... 65
4. The Applicability of the Price Waterhouse Approach .................................................. 67

B. Jurisprudence in the European Community ................................................................... 69

C. Canadian Jurisprudence .................................................................................................. 77

II. THE AIMS, OPERATION, AND EFFECTS OF ANTI-DISCRIMINATION LAW ....... 84

A. The Aim of Anti-Discrimination Law? ........................................................................... 84
1. Is Anti-Discrimination Law Able Truly to Transcend Difference? ................................. 86
2. Post’s Proposal of a Sociological View of Anti-Discrimination Law .............................. 87

CONCLUSION: THE DANGERS OF INSTALLING IDENTITY AND DIFFERENCE IN THE LAW ......................................................................................................................... 94

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INTRODUCTION

The attempt to reduce all persons to the unity of a common measure constructs as deviant those whose attributes differ from the group-specific attributes implicitly presumed in the norm. The drive to unify the particularity and multiplicity of practices, cultural symbols, and ways of relating in clear and distinct categories turns difference into exclusion.¹

Like many other areas of human thought, there is an impulse in law to use categories to understand and simplify complex concepts, such as social identity. In law, identity is understood in a two dimensional manner: difference is recognized but the context of these differences—relationships—is not always acknowledged. Instead, identity is understood through the legal categorization of differences. Through the process of categorization, legal narratives effectively strip the subject of agency by denying the subject the possibility of self-definition—for example, the agency to assert whether one is female, male, or neither.² In this way, legal categories become constitutive of one’s identity (e.g. not male equals female, not white equals black, not middle- (or upper-) class equals poor). One of the effects of establishing and maintaining categories of difference and identity is to make these differences (of one’s identity) concrete rather than fluid. Thus differences become abstracted from their context of shifting social relationships. Another effect is to make these identities appear natural and immutable. Categories also create boundaries and borders between identities. These borders are inhabited by identities that fail or refuse categorization due, in large part, to their fluidity.

In order to explore the practical and theoretical implications of the use of categories in law, I propose to focus on an identity that disrupts the legal process of categorization. It inhabits the borders of these legal identity categories and problematizes the concept of identity itself. It is transgenderism.³

In concrete terms, legal categories affect the lives of transgender people in countless ways. Due to their perceived gender non-conformity, or their failure or measured refusal to fit into extant legal categories, transgender people face

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3. By the term "transgenderism" I mean all those persons whose gender identity does not conform to the rigid gender binary of male/female. It includes those who cross-dress, those who perform drag, those whose gender presentation is ambiguous, those who live and identify as a sex that differs from the sex they were assigned at birth, those who do not identify as any sex, and those who undergo surgery in order to have their anatomy match their self-identified sex. Those in this very last identification are often referred to as ‘transsexual,’ a term which can be used at times interchangeably with the term ‘transgender.’
almost daily harassment, violence, and discrimination. Recently, however, transgender people have begun embracing anti-discrimination laws as a potential avenue of protection from these forms of injury.

This paper examines the implications of this move to embrace and negotiate anti-discrimination laws. In particular, it focuses on the operation and effect of anti-discrimination law and its use of identity categories. In addition, this paper examines how transgender people use legal categories in their search for equality and emancipation. I aim to demonstrate in this paper that the emancipatory attempt by transgender people to encode legal categories with their identity and difference is not a path entirely free of danger.

For example, current U.S. anti-discrimination law appears to operate by attempting to eliminate gender norms and stereotypes of the "real woman" and the "real man." But it is clear that in order to eliminate such gender norms and stereotypes, the law must at first construct and reiterate them. This raises the following questions: Do legal categories effectively operate to enforce the gender norms and stereotypes of appearance and behavior? Is there a possibility that these norms and stereotypes can be eliminated, disrupted or transformed in, or by, the law? Should law regulate discrimination by aiming to eliminate differences, such as gender non-conformity, so as to treat everyone "the same"? Or should law aim to accommodate and affirm such differences? What effect does legal recognition of such differences have on identity?

These questions arise in an examination of transgenderism's engagement with sex discrimination law. In the first part of this paper I undertake a comparative analysis of the operation and effect of anti-discrimination laws in relation to transgender claimants in courts in the United States, Europe, and Canada. I begin by examining U.S. equality jurisprudence where two competing approaches to the application of Title VII to transgender people are apparent. The traditional Title VII jurisprudence refuses to protect transgender persons from discrimination in the workplace. Here the courts take a narrow interpretive approach, focusing on Congress' intent to protect only those who are discriminated against because of their maleness or femaleness. The new jurisprudence focuses more broadly on sex stereotyping rather than strictly on Congressional intent. It represents a shift towards a potentially more emancipatory approach in that it promises protection for those persons, transgender or otherwise, who project astereotypical and non-conforming gender norms. This approach is increasingly becoming the trend in this area of anti-discrimination law litigation in the United States.

I then analyze the approaches of the courts in Europe and Canada. These courts have been ready to read the category of "sex" in discrimination law broadly enough to cover transitional transsexuals. The general approach of the
European Court of Justice is, however, similar to the traditional United States' approach in that it is very legalistic, focusing narrowly on the words and intentions of the relevant provisions. From its use of the "similarly situated" comparator test, it is apparent that the European Court of Justice generally searches for an ideal of formal equality. I argue that within this body of equality jurisprudence, the decision of *P. v. S. and Cornwall County Council*, which recognizes discrimination against transitional transsexuals as sex discrimination, constitutes an anomaly.

In Canada, the courts have been more ready to expand the category of sex discrimination to cover transgenderism. While taking a purposive approach, Canadian courts and tribunals generally consider the question of discrimination in relation to disadvantage, either pre-existing disadvantage or disadvantage as produced by certain acts. Canadian jurisprudence searches for a substantive notion of equality that aims to accommodate and possibly affirm difference. I argue that this approach is broader than that of the new approach in the United States and that, therefore, it may be more practically useful in the long term.

Following this outline of the approaches, I turn in the second part of the paper to the question of which is the best jurisprudential approach to discrimination against transgender claimants. This question involves a consideration not only of the practical results of each approach but also of their theoretical underpinnings. The U.S. approach, for example, aims to eliminate difference. Through the work of Robert Post, I examine the implications and potential of this approach. I query whether difference, as embodied and experienced by transgender people, should be symbolically eliminated or whether we should seek to symbolically (and practically) accommodate and affirm such difference. The ideal of eliminating difference imports the problem of encouraging assimilation. I therefore argue that the Canadian approach, which positively recognizes difference, should be ideally embraced.

In concluding I assert that when considering how transgender people can use law and its categories, it is imperative not to lose sight of the dangers involved in installing identity and difference in the law. To examine this concern, I consider the implications of Catherine MacKinnon's attempt to encode "women's collective experience" into the law. This example demonstrates that caution is necessary before fully embracing the ostensibly emancipatory approach of installing transgender identity into anti-discrimination law.

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Sex or Gender Discrimination?

The following case law in the United States, Europe, and Canada addresses the question of whether transgender people are covered under the term “sex discrimination” and/or the term “gender discrimination.” It raises the related question of whether sex discrimination and gender discrimination are distinct concepts or whether the two terms are interchangeable. In the United States Supreme Court case of *J.E.B. v. Alabama ex rel. T.B.*, Justice Scalia expressed his preference for the term “sex” discrimination and that be it kept separate from the concept of “gender” discrimination. In his view, “the word ‘gender’ has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male.” 7 In this preference, it is evident that Justice Scalia believes that discrimination emanates from the fact of a person’s biological maleness or femaleness rather than from the cultural or attitudinal characteristics of feminine and masculine associated with that femaleness or maleness. In contrast, Katherine Franke generally prefers to use the term “gender discrimination” because it covers a broader field of discrimination. 8 In her view, the central mistake of sex discrimination law is the disaggregation of sex from gender. Her main argument is that sex discrimination focuses too narrowly on biology and fails to take account of the social practice of gender as a set of behavioral, performative norms of which sex is a part. “Sex discrimination” ignores the question of whether a person, who is the subject of discrimination because their appearance or behavior, conforms to expected levels of masculinity and femininity. She argues: “The wrong of sex discrimination must be understood to include all gender role stereotypes whether imposed upon men, women, or both men and women in a particular workplace.” 9

One of the problems facing transgender discrimination claimants is that courts insist on labeling their condition as one of gender identity and yet they generally determine the sex of transgender claimants according to their biological sex (i.e., the courts’ determination of sex fails to take into account the factor of gender identity). In U.S. traditional jurisprudence, this classification has presented problems for transgender claimants in that their claims have been characterized as constituting “gender discrimination” that is not covered under narrow formulations of “sex discrimination,” such as those espoused by Justice Scalia. Only recently have the two terms “sex” and

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7. *Id.* at 157 n.1.
9. *Id.* at 8.
“gender” become understood as inclusive or interchangeable in discrimination law. However, as I show in the following section, Justice Scalia’s view is consistent with the traditional equality jurisprudence regarding transsexuality in the United States.

Ultimately, the debate about whether transsexuals are subjects of “sex discrimination” or “gender discrimination” is of little value: it is pure semantics given that (as we shall see) few legislatures have considered such questions at the time of drafting anti-discrimination laws. I aim to demonstrate in this paper that this strict interpretive approach involves a process whereby courts set out the applicable categories and then define the complainant so as to slot into these extant categories, thereby reducing the complainant’s complex identity to a single (or couple of) attribute(s). Both this process and the semantic debate about sex and gender have distracted courts from the real question of what constitutes discrimination and inequality. In the following comparative analysis, I show that few jurisdictions have seriously addressed this question. I argue that, so far, only Canadian jurisprudence consistently moves beyond this semantic debate into more substantive questions of discrimination.

I. A COMPARATIVE ANALYSIS OF DISCRIMINATION LAWS AND TRANSGENDER LITIGATION

A. Jurisprudence in the United States

1. Traditional Jurisprudence

Transsexual claims in regard to employment discrimination have been argued generally along three avenues in the United States: first, and most commonly, under Title VII of the Civil Rights Act 1964 and other similar human rights legislation; second, under the Fourteenth Amendment to the United States Constitution—predominantly the Equal Protection Clause; and third, under various disability Acts. For the purpose of this chapter, I will focus on only the first two avenues.

Both of these avenues were pursued in Holloway v. Arthur Andersen where a male-to-female (“MTF”) transsexual, Ramona Holloway, claimed that Arthur Andersen had discriminated against her in employment on account of her sex. One year after joining the accounting firm as Robert Holloway, she began female hormone treatment and four years later informed her supervisor of her intention to undergo sex reassignment surgery. A company official

responded to this by suggesting that she would be happier at a new job where her transsexualism was unknown. Shortly after she had her records changed to reflect her new name, her employment was terminated.

In this case, the Ninth Circuit articulated the “sole issue” as being “whether an employee may be discharged, consistent with Title VII, for initiating the process of sex transformation.”1

In determining this issue, the court noted the affidavit of Holloway’s supervisor, which stated that Holloway’s employment was not terminated because of transsexualism “but because the dress, appearance, and manner [Holloway] was affecting were such that it was very disruptive and embarrassing to all concerned.”12 It referred to her “red lipstick and nail polish, hairstyle, jewelry and clothing,” her use of the men’s room and “his behavior at social functions” as constituting a problem for the employer.13

In her submissions, Holloway contended that “sex,” as used in Title VII, can be used synonymously with “gender,” and that “gender” encompasses transsexuals. To determine this question regarding the scope of Title VII, the court focused on the legislative history of the “sex” discrimination provision in Title VII. It noted that the provision was included at the last minute, apparently in a bid to scuttle the entire Civil Rights Bill. The court found that relevant amendments made in 1972 intended to place women on an equal footing with men. From this brief analysis the court stated that Congress had “only the traditional notions of ‘sex’ in mind.”14 Ignoring the fact that Title VII is a remedial statute that should be liberally construed, it argued that “this narrow definition [is] even more evident” given the later introduction and failure of amendments intended to expand “sex” to cover “sexual preference.”15 Without explaining the relevance of these failed “sexual preference” amendments to the question of transsexualism, the court concluded that it was unable to expand the meaning of sex to cover transsexualism “in the absence of Congressional mandate.”16

Thus, without examining the interrelated meaning of the concepts of sex and gender, the court rejected Holloway’s submission that sex and gender were synonymous terms and instead accepted the defendant’s submission that sex be given its “traditional definition based on anatomical characteristics” because this definition was what Congress intended.17 In concluding that Title VII does not embrace discrimination against transsexuals, the court stated that the

11. *Id.* at 661.
12. *Id.* at 661, n.1.
13. *Id.*
14. *Id.* at 662. The court failed to elaborate on this point, but from the decision it is clear that the court meant biological sex.
15. *Id.* at 662. Regarding the construction of remedial statutes, see Norman J. Singer, *Sutherland Statutory Construction*, § 60.01 (5th ed, 1992); see, eg., Westinghouse Elec. Corp. v. Pacific Gas & Electric Co., 326 F.2d 575, 580 (9th Cir. 1964); Ulane v. Eastern Airlines Inc., 742 F.2d 1081, 1086 (7th Cir. 1984).
16. *Holloway*, 566 F.2d at 663.
17. *Id* at 662.
"manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally."

In *Holloway* we see the court implying that for the purposes of equality law, a transitional transsexual such as Ramona Holloway can be defined as neither a man nor a woman but as a transsexual for whom there is no Title VII protection. A transitional transsexual thus has no sex status for the purposes of Title VII while she or he is attempting to make her or his body conform to her or his psychological sex. Furthermore, gender and sex are cast as unrelated terms: biology and anatomy are drawn as somehow completely disparate from socially constructed identity.

In dissent, Judge Goodwin argued that there was bias in the majority opinion in that the right to claim discrimination under Title VII is limited by the decision to those who were "born into the victim class." In other words, the decision's logic was that Holloway was unable to argue sex discrimination as a woman merely because she was not born a woman. Judge Goodwin asserted that, had Holloway's employer waited to terminate her employment post-surgery, the act would have to be classified as one based upon sex. In his view, it served no valid Title VII purpose to distinguish between a termination while Holloway was in a condition that had "not yet become stationary," and a termination made a few days before or after surgery: "[t]he result is the same.... The relevant fact is that she was, on the day she was fired, a purported female."

The second avenue, the Equal Protection Clause, was argued on the basis that the exclusion of transsexuals from the coverage of Title VII operates to exclude transsexuals as a class. The court rejected this argument that transsexuals are a "suspect class," on the grounds that they are not a "discrete and insular minority" and further, that transsexuality has not been established as an "immutable characteristic determined solely by the accident of birth." In addition it rejected the argument that Title VII excludes transsexuals. In the court's view, a transsexual can claim discrimination because he or she is male or female, but not because he or she is a transsexual who chose to change his or her sex. Thus the court attempted to set up a meaningful distinction between discrimination *because of sex* and discrimination *because of a change of sex*.

18. *Id.* at 663.
19. *Id.* at 664.
20. *Id.*
These two avenues have been unsuccessfully pursued in other cases such as Voyles v. Ralph K Davies Medical Center, Kirkpatrick v. Seligman v. Latz Inc., Sommers v. Budget Marketing Inc., Ulane v. Eastern Airlines Inc., and Dobre v. National R.R. Passenger Corp.

In Dobre the Pennsylvania District Court addressed the question of whether the term “sex” as used in Title VII is synonymous with the term “gender.” The facts here were that Andria Dobre was a MTF transitional transsexual who was required by her employer to use the male washroom and to dress in traditionally male attire unless she had a doctor’s note. Her employer referred to her by her former male name, and removed her desk from public view. Dobre asserted that she was discriminated against because of her new gender “while she was transforming her body to conform” to it. Focusing once on Congress’ intent, the court differentiated between sex and gender, determining that sex referred to “an individual’s distinguishing biological or anatomical characteristics” and that gender referred to an individual’s “sexual identity.” The court stated: “Accordingly, an employer may not discriminate against a female because she is female.” The court failed to clarify whether an employer may discriminate against a female because she is, or is not, feminine. Thus the court implied that transsexuals suffer from “sexual identity” problems, as opposed to problems associated with

23. Voyles v. Ralph K Davies Medical Center, 403 F. Supp. 456 (Cal. 1975). In this case, a district court dismissed the plaintiff’s claim of sex discrimination after she was dismissed upon informing her employer that she intended to undergo sex reassignment surgery. The court took a strict purposive approach in stating that Congress did not intend to cover such employment discrimination.

24. Kirkpatrick v. Seligman v. Latz Inc., 636 F.2d 1047 (5th Cir. 1981). In this case, the MTF transsexual plaintiff argued that her employer’s conduct in requiring her to wear male clothing amounted to conspiracy designed and intended to deny and deprive transsexuals as a class. The Fifth Circuit held that this question was not necessary to decide because in its view the complaint did not allege conduct that discriminated against such a class or “against the plaintiff qua transsexual.” Id. at 1050.

25. Sommers v. Budget Marketing Inc., 667 F.2d 748 (8th Cir. 1982). Here Audra Sommers, a MTF transsexual, unsuccessfully argued that she had suffered sex discrimination when her employment was terminated upon informing her superior of her intention to undergo a sex change. Budget alleged that Sommers had misrepresented herself as an anatomical female when she applied for the job and that the misrepresentation led to a disruption of the company’s work routine in that a number of female employees indicated they would leave if Sommers were permitted to use the women’s bathroom. The Eighth Circuit took a strict purposive approach in construing Title VII and also considered that Sommers’s interests were outweighed by the interests of other employees due to practical problems such as bathrooms and the need to protect the privacy interests of other employees.

26. Ulane v. Eastern Airlines Inc., 742 F.2d 1081 (7th Cir. 1984). The Seventh Circuit held that Ulane, a MTF transsexual pilot who was dismissed after her operation, did not come under the protection of “sex” because she was a transsexual. The court held that “sex” under Title VII should be interpreted narrowly as to mean “no more than biological male or biological female.” Id. at 1087. The court found that Ulane was not being discriminated against on the grounds of biology but identity: the court’s logic was that she was not discriminated against as a female because the company did not perceive her as a female. There is also state court jurisprudence that takes the same restrictive approach. See, e.g., Sommers v. Iowa Civil Rights Commission, 337 N.W.2d 470 (Iowa 1983). But see Maffei v. Koaleton Industry Inc., 626 N.Y.S.2d 391 (1995) for an alternative approach.


28. Id. at 286.

29. Id.
their biological or anatomical characteristics, and that these are problems related to gender, which are not covered by the term sex. This sparse decision effectively held that Title VII does not cover gender discrimination and that gender discrimination is the only term that applies to discrimination against transsexuals. The court added that "the acts of discrimination alleged by the plaintiff were not due to stereotypic concepts about a woman’s ability to perform a job nor were they due to a condition common to women alone. If the plaintiff was discriminated against at all, it was because she was perceived as a male who wanted to become a female."  

In this line of jurisprudence we see the courts taking a very narrow view of the term “sex,” which, as we saw in Holloway, has the effect of casting transsexuals as neither male nor female but as a third sex—the sex that changes sex. Thus, because transgender claimants cannot be easily slotted within the legal category of "sex," they do not qualify for protection under Title VII, despite the fact that Congress has given no consideration to the question. As a consequence, transitional transsexuals are not recognized as legally protected persons. The social effect is to encourage transsexuals to conform as much, and as quickly, as possible to male and female sex stereotypes. Transsexuals are thus placed in a double bind: they are discriminated against for their gender non-conformity, and criticized (by radical feminists such as Janice Raymond) precisely for their conformity and assimilation. This line of legal reasoning also encourages transsexuals to withdraw from the public sphere while undergoing transition and to erase their transsexual identity and history once they have performed the transition. They are encouraged to eliminate their difference in order to be accepted as social and legal subjects.

From the facts of these cases it is also apparent that a transsexual employee’s biology is just one factor in an employer’s decision to terminate employment. The major factor appears to be the lack of continuity or “harmony” between the employee’s “cultural and attitudinal characteristics” and their biology. This lack of continuity defies conventional expectations.

2. New Jurisprudence

Some courts have been critical of this rigid interpretation of sex and gender in transgender case law. In Maffei v. Kolaeton Industry, Inc. the Supreme Court of New York County found that the rulings in the above federal cases

30. Id. at 287.
31. This arguably parallels the gender conformity encouraged and required by gender identity clinics in the one to two year period that transsexuals undergo pre-surgery “life tests.” See, e.g., PAT CALIFIA, SEX CHANGES: THE POLITICS OF TRANSGENDERISM ch. 2 (1997).
were “unduly restrictive,” and it decided that such precedent should not be followed in interpreting a New York City statute. In Maffei, the New York City statute was similar to Title VII except that the term “gender” was substituted for the term “sex.” Maffei was subsequently followed by Rentos v. OCE-Office Systems, where a post-operative FTM transsexual alleged sex discrimination and harassment under New York state and municipal human rights laws after his employer refused his request to make payments for expenses connected with his sex change. Citing Maffei as precedent, the District Court in Rentos held that transsexuals are protected under both state and municipal human rights laws despite the fact that the state statute uses the term “sex” rather than “gender.” Unfortunately, the judgment provided negligible analysis of the interchangeability of the two terms and failed to examine the breadth of the term “sex.” Thus, though the precedent value of the decision is minimal, it nevertheless stands as an indicator of the unwillingness of at least some lower courts to take a rigid approach in this field.

Some commentators believe that the tide may be turning in relation to federal protection against discrimination for transsexuals. First, there is a glimmer of hope in relation to the Equal Protection Clause as a result of dicta in Brown v. Zavaras, which suggested that Holloway may need re-evaluation given recent scientific research. Recent cases provide greater hope of the possibility of the inclusion of transsexuals under Title VII. In particular, the case of Schwenk v. Hartford provides this hope in its relaxation of the distinction between the terms “sex” and “gender.” In Schwenk, a pre-operative MTF transsexual inmate of a male prison made a claim under the Gender Motivated Violence Act (GMVA) in respect to an attempted rape by a prison guard that she alleged was motivated by her gender. The Ninth Circuit held that the term “gender” as used in the GMVA should not be narrowly construed, but should be interpreted to encompass those who do not conform to socially prescribed gender expectations.

36. Id.
38. Brown v. Zavaras, 63 F.3d 967, 971 (10th Cir. 1995). In this case a pre-operative MTF transsexual inmate in a male prison made an Equal Protection Clause claim because she was refused the provision of female hormones despite the fact that other inmates were provided with hormones—post-operative transsexuals and inmates with low hormone levels. The Tenth Circuit suggested re-evaluation of Holloway but nevertheless referred to it as authority in dismissing Brown’s claim. It stated, “Mr. Brown’s allegations are too conclusory to allow proper analysis of this legal question.”
39. Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000).
41. The court also held that the defendant was entitled to qualified immunity from the plaintiff’s GMVA claim since the law regarding this question was not clearly established at the time of his alleged sexual assault.
The court in Schwenk found that the GMVA paralleled Title VII except that it used the term "gender" rather than "sex." Addressing the defendant's submission that he was motivated not by Schwenk's gender but by her transsexuality, the court proceeded to consider the use and definitions of the terms "sex" and "gender" in Holloway, Dobre, and Ulane. It found that in these cases "[male-to-female transsexuals, as anatomical males whose outward behavior and inward identity did not meet social definitions of masculinity, were denied the protection of Title VII by these courts because they were the victims of gender, rather than sex, discrimination." In making a critical departure from this line of traditional Title VII jurisprudence, the court stated:

The initial judicial approach taken in cases such as Holloway has been overruled by the logic and language of Price Waterhouse. In Price Waterhouse, which was decided after Holloway and Ulane, the Supreme Court held that Title VII barred not just discrimination based on the fact that she failed "to act like a woman"—that is, to conform to socially-constructed gender expectations. . . . What matters for the purposes of this part of the Price Waterhouse analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who "failed to act like" one. Thus, under Price Waterhouse, "sex" under Title VII encompasses both sex—that is, biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.

The Court concluded that both the GMVA and Title VII prohibit discrimination based on gender as well as sex. It stated that "for the purposes of these two acts, the terms "sex" and "gender" have become interchangeable."

This erasure of the distinction between the terms was influenced by the Supreme Court decision in Price Waterhouse v. Hopkins. The case involved a female senior manager who, upon being proposed for partnership, was the subject of remarks by partners concerning her femininity, or lack thereof. As Justice Brennan stated, "[t]here were clear signs . . . that some of the partners reacted negatively to Hopkins' personality because she was a woman." Hopkins was described by one partner as macho, another said that she "overcompensated for being a woman," and she was advised by a third to take "a course at charm school." Her use of profanity was criticized and it was

42. See Schwenk, 204 F.3d at 1201.
43. Id. at 1201-02.
44. Id. at 1202 (emphasis added).
46. Id. at 235.
47. Id.
suggested that some partners objected to her swearing only "because it's a lady using foul language." But the coup de grace was when she was advised to "walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

Hopkins was denied promotion although her work record surpassed those of other candidates, some of whom were found to have equally abrasive interpersonal skills. Hopkins argued that she had been the victim of sex stereotyping. The Supreme Court agreed, finding that her employer’s conduct constituted unlawful sex discrimination under Title VII.

In construing Title VII, Justice Brennan found that “Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.” In his view, Title VII must be taken to mean that “gender must be irrelevant to employment decisions.” An example he gave of an employer acting “on the basis of gender” by using sex stereotypes is when “an employer . . . acts on the basis of a belief that a woman cannot be aggressive, or that she must not be.” Justice Brennan stated:

> 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 “[i]n 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.”

While the approach in Price Waterhouse appeared to be new, it was in fact the culmination of stereotyping claims that began in the early 1970s. It represented the first time, however, that the Supreme Court recognized that sex stereotyping constitutes sex discrimination.

The Supreme Court judgment of Oncale v. Sundowner Offshore Services Inc. was also influential on the Ninth Circuit’s decision to depart from the

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48. Id.
49. Id. at 239 (emphasis added). Justice Brennan stated: “We need not leave out common sense at the doorstep when we interpret a statute.” Id. at 241. The Supreme Court held that remarks such as those quoted in the text constituted evidence of impermissible gender role stereotyping and that the employer could avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision based on a legitimate reason.
50. Id. at 240.
52. Id. at 251 (emphasis added) (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 (1978)).
53. Varona and Monks argue that “the seed” was planted by the Supreme Court in Phillips v. Martin Marietta Corp. 400 U.S. 542 (1971) when it first recognized “sex-plus” discrimination as being actionable under Title VII. Anthony E. Varona & Jeffrey M. Monks, Engendering Equality: Seeking Relief under Title VII against Employment Discrimination Based on Sexual Orientation, 7 WM. & MARY J. OF WOMEN & L. 67, 76 (2000).
traditional Title VII jurisprudence in \textit{Schwenk}. In this case, Oncale was the subject of harassment by his male co-workers for not being a "real man." Here the Court held that same sex discrimination is actionable under Title VII (as long as the discrimination was on the grounds of sex—not sexual orientation) despite the fact that nothing in Title VII's legislative history suggests that Congress intended to cover such discrimination. Writing the unanimous decision of the Court, Justice Scalia recognized that "statutory prohibitions often go beyond the principal evil to cover the reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."\textsuperscript{55} Thus Title VII's sex discrimination prohibitions must be construed broadly to cover "reasonably comparable evils" such as discrimination involving same sex harassment and sex stereotyping. This decision also indicates that the importance of Congressional intent is only relative in the face of such "evils."

Following these cases, there appears to have been some confusion, in the lower courts at least, as to how broadly the \textit{Price Waterhouse} approach to sex discrimination should be interpreted. In the case of \textit{Broadus v. State Farm Co.},\textsuperscript{56} for example, Judge Wright of the U.S. District Court acknowledged the sex stereotyping approach used in \textit{Price Waterhouse} but stated: "It is unclear, however, whether a transsexual is protected from sex discrimination and sexual harassment under Title VII. In \textit{Price Waterhouse} the plaintiff was not a transsexual."\textsuperscript{57}

In contrast, the \textit{Price Waterhouse} approach was applied with confidence by the Appellate Division of the Superior Court of New Jersey in the explicitly "transgender" employment discrimination case of \textit{Enriquez v. West Jersey Health Systems}.\textsuperscript{58} Here a pre-operative MTF transsexual physician was confronted and questioned by her superiors about her transformed appearance, and told by one superior to "stop all this and go back to your previous appearance!"\textsuperscript{59} Upon her refusal, her contract was terminated and her patients were falsely informed that her whereabouts were unknown by the medical center. The plaintiff made a claim under the "sex" discrimination provisions of the New Jersey Law Against Discrimination (LAD), arguing that she had suffered gender discrimination. The court dismissed the traditional Title VII jurisprudence and found that the approach in \textit{Price Waterhouse, Schwenk}, and

\begin{itemize}
\item \textsuperscript{55} \textit{Id.} at 76.
\item \textsuperscript{57} Here the judge made no reference to \textit{Rosa} or even the explicitly transgender case of \textit{Schwenk}. Note that the decision in the following case of \textit{Doe v. Yunits}, infra, was handed down the same day as \textit{Broadus}, but the court in \textit{Yunits} considered the cases of \textit{Rosa} and \textit{Schwenk} in detail. The question of whether "sex discrimination" under Title VII covers claims by transsexuals was not taken any further by the court in \textit{Broadus} as the FTM transsexual complainant was unable to prove that his employer had created a hostile work environment.
\item \textsuperscript{59} \textit{Enriquez}, 777 A.2d at 368.
\end{itemize}
Embracing Law’s Categories

Rosa v. Park West Bank & Trust Co.\(^{60}\) was more in line with the state’s historical policy of liberally construing the LAD.\(^{61}\) It also approved the words of Judge Handler in the family law case of *M.T. v. J.T.*\(^{62}\) to the effect that the term sex embraces the term “gender” in that it is broader than anatomical sex.

3. A “Canary in the Sartorial Coal Mine”?

The case of *Rosa v. Park West Bank & Trust Co.*,\(^{63}\) referred to above, was not an employment discrimination decision but one dealing with the credit-worthiness of a cross-dressing man. Here Lucas Rosa, a biological male dressed in traditionally female attire, applied for a bank loan, only to be refused unless she went home and returned in more traditionally male clothing. Rosa made a claim for sex discrimination under the Equal Credit Opportunity Act (ECOA) and various Massachusetts anti-discrimination statutes on the ground that she had been required “to conform to sex stereotypes before proceeding with the credit transaction.”\(^{64}\) At first instance the District Court held that the matter was not one of Rosa’s sex but of her choice of dress—and that the Act does not prohibit discrimination based on the manner in which someone dresses. Judge Freedman stated: “neither a man nor a woman can change their status from unprotected to protected simply by changing his or her clothing.”\(^{65}\)

The First Circuit reversed this decision, accepting Rosa’s argument that the District Court had misconceived the relationship between telling a customer what to wear and sex discrimination. In interpreting the ECOA, the First Circuit looked to Title VII. It found it reasonable to infer that Rosa had been told to “go home and change” because her attire “did not accord with his male gender” to mean that she was being treated differently from a similarly situated woman—that is, a biological woman who dresses like a man. The court also referred to Justice Brennan’s judgment in *Price Waterhouse* that “stereotyped remarks [including statements about dressing more “femininely”] can certainly be evidence that gender played a part,” thus implicitly accepting that Rosa had been the subject of prohibited sex stereotyping under Title VII.\(^{66}\) The court remanded the case to a lower court to determine whether sex discrimination was at issue.

Thus the First Circuit affirmed two bases of sex discrimination in relation to effeminate men. First, there is a claim for sex discrimination where, but for

\(^{60}\) *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).
\(^{61}\) *Enriquez*, 777 A.2d at 373.
\(^{62}\) 355 A.2d 204 (1976).
\(^{63}\) *See Rosa*, 214 F.3d at 213.
\(^{64}\) *Id.* at 214.
\(^{66}\) *See Rosa*, 214 F.3d at 251.
an individual’s sex, the individual would not have been treated adversely. Second, there is a sex discrimination claim where sex stereotyping has produced adverse treatment. The court also affirmed the relation between sex discrimination and clothing, a relation to which Judge Freedman was evidently blind.

Of course this case can also be understood as a transgender case. Both Rosa’s brief and that of National Organization of Women (NOW) Legal Defense and Education Fund and Equal Rights Advocates in support of Rosa omitted the fact that Rosa is a transgender person in that she identifies herself as female. This was presumably a strategic omission in that Rosa’s case preceded the decision of Enriquez, and it would thus have had to be viewed by the court in the relatively uncertain and evolving frame of transgender case law and the question of Congressional intent.

Rosa’s case has been described as being a “canary” that has signaled a change in the coal mine—i.e. a part of the recent jurisprudence (the approach in Price Waterhouse, Schwenk, and Rosa) that has expanded the traditional understanding of sex discrimination under Title VII. The strategic omission of Rosa’s transgender status may lessen the case’s ultimate power as a precedent. This is because it can be too easily distinguished from the other cases of Price Waterhouse and Schwenk on the basis that it is a “cross-dressing” case. As a more broadly stated transgender case it could have been of more instrumental use in clearing the path for a larger number of gender stereotyping and transgender claims.

Rosa has been followed by the Superior Court of Massachusetts in the “cross-dressing” case of Doe v. Yunits. In Yunits, Doe, a fifteen year old biological male suffering gender dysphoria brought an injunction against school officials for excluding her from school for “cross-dressing”: wearing traditionally female attire including “items such as skirts and dresses, wigs, high heeled shoes, and padded bras with tight shirts.” The defendants alleged that Doe’s clothing and behavior were disruptive and distractive to the educational process, and that she was “known to primp, pose,

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68. Franke has indirectly described Rosa’s case as “a canary in the sartorial coal mine.” Franke, supra note 65, at 144.
69. While the court in Enriquez, 777 A.2d 365, did cite Rosa, 214 F.3d 213, it was not cited by the Second Circuit in Simonton v. Runyon, 232 F. 3d 33 (2d Cir. 2000), or by the Ninth Circuit in Nichols v. Asteca Restaurant Enterprises, 256 F. 3d 864 (9th Cir. 2001), despite the fact that these courts did refer to Schwenk, 204 F.3d 1187.
apply make-up, and flirt with other students in class.” They argued that the school’s policy was gender neutral given that girls who wore items of male attire, “such as a fake beard,” would be treated in the same way. The defendants relied on the traditional transgender jurisprudence to contend that Doe was being discriminated against because of her gender and not because of her sex.

The court in *Yunits* rejected the defendants’ argument, stating that it failed to “frame the issue properly.” It reasoned that because Doe identified herself as female, the right comparator for Doe was a female student. Therefore, the pertinent question is whether a female student would be disciplined for wearing the traditionally female items of clothing described above; if not, Doe was the subject of discrimination on the basis of her sex. The court found Doe’s reliance on *Price Waterhouse*, *Rosa*, and *Schwenk* to be persuasive authority and held that Doe was likely to establish a case of sex discrimination.

The court in *Yunits* was unsympathetic to the defendants’ argument that such a code serves “important government interests, such as fostering conformity with community standards.” Stating that it refused to allow “the stifling of [Doe’s] selfhood merely because it causes some members of the community discomfort,” the court suggested that students could benefit from being exposed to such diversity at an early age.

4. The Applicability of the Price Waterhouse Approach

As has become evident, the sex stereotyping and gender non-conformity approach outlined in *Price Waterhouse* and *Schwenk* has recently become the trend in trans litigation and commentary. This line of reasoning is apposite to transgender plaintiffs because, by definition, their appearance, mannerisms and behavior, which perform their psychological gender, do not match the social stereotypes associated with their birth sex. In addition, this trend has been

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72. *See id.* at *6.
73. In my view, the court in *Yunits* made better use of the “similarly situated” comparator test than the court in *Rosa* where Rosa was compared not with the sex with which s/he identified, but with a cross-dresser of the opposite biological sex. *See Rosa*, 214 F.3d 213 (1st Cir. 2000). This distinction was probably due to the fact that Rosa’s identification was not spelled out to the court. *Compare* discussion *infra* Subsection 3 (describing how the ECJ uses this test and demonstrating, in my view, the loose operation of this test of treating “likes” “alike”).
74. On this basis the court allowed the injunction. *See Yunits*, 2000 WL 33162199, at *6. The court also found that Doe was likely to establish that she had been denied her First Amendment right to freedom of expression. Doe’s dressing in traditionally female attire was seen as expressive speech, understood by others (such as students and faculty) and suppressed by the defendants’ conduct. *See id.* at *3-4.
75. *Id.* at *7* (emphasis added).
76. *Id.* at *7*.
77. This approach may be limited, in my view, in regards to gay and lesbian discrimination claimants. In *Rosa* the court noted that if the bank employee had thought that Rosa was gay, the ECOA would not be applicable. One commentator, Taylor Flynn, suggests all the same that *Rosa* is useful for
applied to sex discrimination claims made by effeminate men who fail to conform to stereotypes of "real men." As Varona and Monks point out, however, the courts have not consistently applied this approach. It is arguable that a more direct path for transsexual plaintiffs would be for courts to acknowledge explicitly that discrimination because of a person's change of sex constitutes discrimination "because of sex" under Title VII. However, this approach would not protect transgender people such as Lucas Rosa and Doe whose experiences of adverse treatment are unrelated to an intention to undergo a surgical change of sex; indeed, there was no indication, for example, that either Rosa or Doe intended to undergo such a change. Furthermore, such an approach would not have the effect of denaturalizing the gender norms that project femininity as the "real" and "natural" expression of femaleness (female agency) and masculinity as the "real" and "natural" expression of maleness.

All in all, the new sex stereotyping approach appears well tailored for transgender claims of discrimination. There is no doubt that it improves on the traditional transgender jurisprudence in that it engages and protects the complexity of transgender identity. However, its path is not yet clear as only gay and lesbian rights advocates because of the court's emphasis on the actionability of discrimination based on gender-variance. Flynn, supra note 37, at 404. Such protection, in my view, would only be available to those who fail to conform to male or female stereotypes and who project the mannerisms and appearance of stereotypes in the gay community, such as the effeminate man, the drag queen or the butch. Protection would not be provided under the Price Waterhouse line of reasoning to those gay men and lesbians whose mannerisms and appearance either conform to male and female stereotypes or whose experience of discrimination has no direct connection to their appearance and mannerisms but to the mere fact of their sexual orientation.

78. In the pre-Price Waterhouse decision of DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327 (1979), the Ninth Circuit held that Title VII does not protect from discrimination men who fail to be "real men" in that they exhibit traditionally feminine characteristics. The plaintiff was a nursery school teacher who was fired for wearing an earring to work before the school term had commenced. He argued, unsuccessfully, that the school's reliance on a stereotype—that a male should have a virile rather than effeminate appearance—violated Title VII.

In the case of Higgins v. New Balance Athletic Shoe, Inc., 195 F.3d 252 (1st Cir. 1999), the plaintiff, who had suffered the mockery of his fellow workers in regards to his sexuality and effeminacy, attempted to mount a claim of impermissible stereotyping but failed due to the fact that the First Circuit perceived it as a "eleventh hour attempt" to present a new theory of sex discrimination. However, the court noted, drawing on Oncale and Price Waterhouse, that it was now possible to confirm that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." Id. at 261, n4. See also Simonton v. Runyon, 232 F.2d 33 (2nd Cir. 2000).

Most recently, the Ninth Circuit held in Nichols v. Azteca Restaurant Enterprises Inc., 256 F.3d 864 (9th Cir. 2001), that the Price Waterhouse sex stereotyping approach did apply to the male plaintiff who suffered harassment by his male co-workers and supervisor for failing to meet their views of a male stereotype. In particular, the court held that Price Waterhouse had effectively overruled the decision in De Santis.

Note that a plaintiff is able to argue that s/he suffered both discrimination on the basis of gender and discrimination on the basis of sexual orientation. The Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (1994)), allows claims to be based on a "mixed motive." According to Price Waterhouse, this can be a mixture of legitimate and illegitimate considerations. Price Waterhouse, 490 U.S., at 240; see Centola v. Potter, 183 F.Supp. 2d 403 (D. Mass. 2002).

lower courts thus far have followed the circuit decisions of *Rosa* and *Schwenk*, neither of which were Title VII cases.

B. Jurisprudence in the European Community

The courts of the European Community have an uneven record in their approach to discrimination against transgender people. Generally, the approach has been one of formal equality reached through broad principles of equality and non-discrimination.

In the right-to-privacy and right-to-family cases of *Rees v. United Kingdom*, *Cossey v. United Kingdom*, *Sheffield and Horsham v. United Kingdom*, and *X, Y and Z v. United Kingdom* the European Court of Human Rights sanctioned the United Kingdom’s strict biological approach to the question of sex for the purposes of marriage and paternity law. According to this approach, a person’s birth sex is determinative for the purposes of marriage and paternity law with the consequence that a person’s gender reassignment or “gender identity” has no bearing on their legal sex status in family law. Thus sex and gender have effectively been set up as distinct concepts. Despite this approach, the European Court of Justice (ECJ), in *P. v. S. & Cornwall County Council*—one of the most applauded judgments dealing with transgenderrism and equality—held that gender reassignment surgery is a matter of “sex” and hence any discrimination in the workplace in relation to such reassignment surgery would constitute prohibited sex discrimination. This case can be seen as adhering to a substantive notion of equality.

In this section, I first examine the court’s approach in *P. v. S.* I then compare this case with the approach taken in the subsequent case of *Grant v. South West Trains* which involved a lesbian complainant. While *P. v. S.*

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82. *Sheffield v. United Kingdom*, 27 Eur. Ct. H.R Rep. 163 (1998). In these three cases the transsexual applicants were arguing that the United Kingdom had violated Articles 8 and 12 of the European Convention of Human Rights, which respectively protect the right to respect for privacy and the right to marry. The applicants, Rees, Cossey, Sheffield and Horsham, sought amendment of their birth certificates to reflect their post-operative identities and the right to marry a person of the same biological sex. They argued unsuccessfully that the United Kingdom violated these Articles of the Convention due to its adherence to the *Corbett* (i.e. biology equals sex) approach that refused to recognize their post-operative identity. See the most recent transsexual case of *Goodwin v. United Kingdom*, [2002] 35 E.H.R.R. 18, where the court unanimously held that the United Kingdom was in breach of Articles 8 and 12. However, the House of Lords has recently upheld the *Corbett* approach in *Bellinger v. Bellinger*, [2003] U.K.H.L. 21, judgment delivered Apr. 10, 2003.
83. *X, Y, and Z v. United Kingdom*, II Eur. Ct. H.R. 619 (1997). Here the applicant was appealing the extension of the *Corbett* approach into the realm of paternity law. X, a FTM transsexual, claimed paternity under the Human Fertility and Embryology Act of his partner’s child, which had been conceived by means of artificial insemination donor. X unsuccessfully argued that the United Kingdom’s refusal to give him the same recognition as is given to biological men under the Act violated his right to respect for family life under Article 8.
opened up the possibility of arguing broader gender discrimination under provisions regarding sex, this option was blocked by the court in *Grant*, which reverted to a strict legalistic approach, possibly due to its perception of economic and moral concerns. I argue that despite the progressive decision in *P. v. S.*, this case did not set any pattern in the European Community’s (EC) jurisprudence and is therefore of minimal jurisprudential value. It does, however, provide a useful point from which to compare the European approach with those in the United States and Canada.

The facts in *P. v. S.* were that after working for a year for the defendant, P, a MTF transsexual, informed her superior of her intention to undergo gender reassignment. This would involve a “life test” where P would “dress and behave as a woman” for a period followed by surgery. Before undergoing final surgery P was informed of her dismissal. P claimed discrimination on the basis of sex.

The English Industrial Tribunal initially heard the matter and held that such a situation was not covered by the United Kingdom’s Sex Discrimination Act (as it then was). The Act applied only to cases in which a man or a woman is treated differently because of their biological sex. Under English law, P had not changed her sex—she was still deemed to be male. The Tribunal held that P would have received the same treatment if she were a woman.

The question before the European Court of Human Rights was whether P’s dismissal was contrary to Article 5(1) of Directive 76/207/EEC, which provides that “[a]plication of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.” The United Kingdom argued that it did not constitute sex discrimination to dismiss a person because they are a transsexual or because they have undergone gender reassignment surgery. Furthermore, it asserted that P’s “similarly situated” comparator should be a FTM transsexual and that

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85. After *P. v. S.* the U.K. introduced the Sex Discrimination (Gender Reassignment) Regulations 1999 (No. 1102 of 1999) pursuant to §2(2) of the European Communities Act 1972. They are intended to extend the Sex Discrimination Act 1975 (SDA) to cover discrimination on grounds of gender reassignment. They provide an exception where a person’s sex is a genuine occupational qualification for that job and the employer can show that his/her treatment is reasonable. See Employment Appeal Tribunal decision, *Chief Constable of West Yorkshire Police v. A.* (No. 2); *Chief Constable of West Yorkshire Police v. Secretary of State for Education and Employment* [2002] Industrial Relations Law Reports 103, Lindsay J. (President), Employment Appeal Tribunal (holding that there was no inconsistency between the Equal Treatment Directive and the supplementary exceptions to the sex discrimination prohibition embodied in §7B(2)(a) of the SDA as introduced by the regulations). This appeal dealt with the question of whether the latter provision (which made an exemption where the job holder was “liable to be called upon to perform intimate physical searches”) operated to constitute an absolute ban upon the recruitment of transsexuals into the police force and was therefore inconsistent with the Directive. The EAT held that the provision should be read in a purposive way and therefore, as constables were not in practice “liable to be called upon to perform intimate physical searches,” the provision could not be read as barring transsexuals.

the test should be whether the employer would have equally dismissed P if she had previously been a woman.

The court responded by interpreting the Directive broadly as “simply the expression . . . of the principle of equality, which is one of the fundamental principles of EC law.” It held that “the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the court has a duty to observe.” The court considered the scope of the Directive and found that it was not confined to discrimination based on the fact of one sex or another, but also applied to discrimination arising from the gender reassignment of the person concerned. Critically, it stated: “Such discrimination is based, essentially if not exclusively, on the sex of the person concerned.”

The court held that for the purpose of equality law a transsexual’s treatment must be compared with that of persons of the sex to which he or she is deemed to belong before undergoing gender reassignment, which in P’s case would have been the male sex. Thus it rejected the submission that P should be compared with a FTM transsexual and held that P had a claim for sex discrimination. In its view, to tolerate such discrimination “would be tantamount . . . to a failure to respect the dignity and freedom” of a transsexual. Thus “sex” discrimination was interpreted as covering discrimination against transitional transsexuals.

Significantly, the term “gender” was never used or discussed by the court. While the court referred to the broader principle of equality as an underlying principle of EC law, its judgment was nevertheless cautious, extending the Directive’s “sex discrimination” prohibition only to the

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. The problem of finding a comparator was encountered in *Sheffield v. United Kingdom*, 27 Eur. Ct. H.R. Rep. 163 (1998). Here two post-operative transsexuals unsuccessfully argued before the European Court of Human Rights that they were victims of sex discrimination under Articles 8 and 12. Article 12 protects against discrimination with respect to rights and freedoms set out only in the Convention. In arguing that the U.K.’s refusal to allow the amendment of transsexuals’ birth certificates violated their right to respect for privacy under Article 8, the applicants pointed out that while they were considered males under English law, unlike other males, they were required to disclose their pre-operative sex to employers. They were thus arguing that they should be compared with non-transsexual men. The U.K. submitted that the correct comparator here should be other transsexuals rather than non-transsexual men. The court stated that the test was whether a person in an analogous or relevantly similar situation enjoys preferential treatment. Critically, the court failed to elaborate as to which persons were in this situation. *Id.* at 2031-2032. It failed to address the question of whether a transsexual should be compared with a person of their biological or psychological sex—or a person who wishes to have their birth certificate amended etc.
94. Campbell and Lardy argue that P.’s argument “threw into sharp relief the question of the distinction between sex and gender to analysis of claims of unlawful discrimination.” However, in finding that the facts constituted an instance of sex discrimination, the court did not need to answer this question directly. Angus Campbell & Heather Lardy, *Discrimination Against Transsexuals in Employment*, 21 EUR. L REV. 412, 416 (1996).
"dismissal of a transsexual for a reason related to a gender reassignment." The decision was praised universally, with some commentators suggesting that it had broader implications. For example, Campbell and Lardy praised the decision as a "significant contribution to the developments of EC law on fundamental rights." They asserted that "the phrase 'on the grounds of sex' now carries a much more expansive meaning than that previously attributed to it." They reasoned that:

[by] ruling that it is unlawful for individuals to act on the basis of their stereotypical prejudices regarding transsexualism, or their ignorance about the phenomenon, the Court effectively reinforced the idea that all individuals should be legally protected in their search for and expression of a fitting sexual identity.

They suggested that the decision "will also prove a very useful precedent for those arguing legal protection against discrimination on the grounds of sexual orientation." The English Industrial Tribunal observed this possibility in a subsequent case where it stated that P. v. S. was "persuasive authority for the proposition that discrimination on the ground of sexual orientation [was] unlawful."

The opinion of Advocate General Tesauro, who took a more broad and philosophical approach than that of the court, may have encouraged such comments. The Advocate General began his analysis by noting that the wording of the relevant principle of equal treatment refers to the traditional man/woman dichotomy. He then considered the strong support in medical and scientific circles for sex to be understood as existing on a continuum where there is recognition of "a range of characteristics, behavior and roles shared by men and women." He compared this liberal trend with the law's approach:

95. P. v. S., 1996 E.C.R. I-2143 at 2165. Note that the term "sex reassignment" was not used either by the court nor in the U.K.'s submissions as summarized by the court, id. at 2164. In my view, this would have been a strategic use of the term by the latter.
96. Campbell & Lardy, supra note 93, at 418.
97. Id. at 415.
98. Id. at 417 (emphasis added).
99. In a footnote Campbell and Lardy state that it, "looks likely [to] have important implications for those arguing for protection against discrimination on grounds of homosexuality." Id. at 417 n.25. See also Leo Flynn, Case Note: P. v. S., COMMON MKT. L. REV., 367, 387 (1997).
100. The Tribunal made this observation when referring the case of Grant to the European Court of Justice. See Case C-144/97, Grant v. South West Trains, 1998 E.C.R. I-620, 641 (E.C.J.), infra.
101. Under Article 166 of the EC Treaty, the duty of Advocates General is to assist the court by making reasoned and completely partial submissions on cases before the court. The Advocate General sits with the judges and delivers his or her opinion once the parties have addressed the court and after an adjournment. The opinion is printed alongside the court's judgment in the law reports. Lawyers often use it to divine the likely decision of the court but, as seen in Grant discussed in text below, the court does not always follow the opinion.
Embracing Law’s Categories

its dislike for ambiguities and its desire “to think in terms of Adam and Eve.”\(^{103}\) While he did not propose that the law follow this more liberal trend, he did urge the law not to deny protection to those who are “discriminated against . . . by reason of sex, merely because they fall outside the traditional man/woman classification.”\(^{104}\) This traditional approach, he noted, is “taken too much for granted” in courts in the United Kingdom and the United States.\(^{105}\) In his view it constitutes “a quibbling formalistic interpretation and a betrayal of the true essence of that fundamental and inalienable value that is equality.”\(^{106}\) Such an approach would imply that transsexuals constituted a “third sex.”\(^{107}\)

The Advocate General suggested that for the purposes of this case, “sex is important as a convention, a social parameter.”\(^{108}\) He continued by explaining his view that women are frequently the subject of discrimination not due to their physical differences but “rather to their role, to the image which society has of women.”\(^{109}\) In other words, sex is a social convention or construction that requires women to play certain social roles that are not necessarily connected to their physical characteristics. In the same way, “the unfavorable treatment suffered by transsexuals is most often linked to a negative image, a moral judgment that has nothing to do with their abilities in the sphere of employment.”\(^{110}\) These views echo and elaborate on those of the recent U.S. sex stereotyping approach.

The Advocate General also discussed the general operation of the prohibition of discrimination on grounds of sex, which is part of the principle of equality. He stated that for individuals to be treated alike, the principle requires that no account be taken of distinguishing factors such as sex “so as to influence, in one way or another the treatment afforded, for example, to workers.”\(^{111}\) He concluded by articulating his “profound conviction that what is at stake is a universal fundamental value, indelibly etched in modern legal traditions and in the constitutions of the more advanced countries: the irrelevance of a person’s sex with regard to the rules relegating relations in society.”\(^{112}\)

Critically, like the court, the Advocate General did not make any explicit reference to the term gender. However, it can be argued that it was implicit in his discussion of sex roles and of sex as a socio-cultural construct.

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103. Id.
104. Id.
105. Id.
106. Id. at 2154.
108. Id. at 2154-2155.
109. Id. at 2155.
110. Id.
111. Id. at 2154.
In the case that followed, *Grant v. South West Trains*,\(^{113}\) the court was asked to extend sex discrimination to discrimination on the basis of sexual orientation. In this case the complainant Lisa Grant challenged the refusal by her employer to allow travel concessions to her same sex partner when such concessions were allowed to other workers' (non-marital) partners of the opposite sex. She argued that this constituted discrimination prohibited by Article 119 of the Treaty or by Directive 75/117.\(^{114}\)

The first question was whether the condition in the relevant regulations, which required a spouse to be of the opposite sex in order to obtain travel concessions, constituted sex discrimination. Grant submitted that her comparator ought to be a man, pointing to the fact that the predecessor to her job was a man whose female spouse was eligible for the concessions. She argued that she was the victim of sex discrimination; as a female worker she was not receiving the same benefits as a male worker. Grant asserted that she be considered foremost as a woman rather than as a lesbian woman. By taking this strategy Grant hoped that her case would be viewed as one of sex discrimination rather than sexual orientation discrimination. Grant submitted that, following *P. v. S.*, discrimination “on the grounds of sex” should extend to “differences in treatment based on sexual orientation [that] originate in prejudices regarding the sexual and emotional behavior or persons of a particular sex, and are in fact based on those persons’ sex.”\(^{115}\) Effectively, however, she was arguing a case of *gender* discrimination,\(^{116}\) asserting that the social norm of “appropriate feminine behavior” determined that women should be sexually attracted to men. The court completely rejected this logic and decided to consider Grant as a lesbian woman, comparing her treatment with that of a gay male employee, and thus making her case one of sexual orientation discrimination.

The court emphasized that *P. v. S.* was confined to the case of a worker’s gender reassignment.\(^{117}\) It refused to see Grant’s case as one of sex discrimination and it stated that the scope of Article 119 was to be determined “only by having regard to its wording and purpose, its place in the scheme of the Treaty and its legal context.”\(^{118}\) The court thus rejected Grant’s claim,

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116. There is a commonly understood distinction between these terms, to which I do not subscribe. In the debate as to the meaning of the terms sex and gender I subscribe to the view, expounded by Judith Butler and Katherine Franke among others, that both sex and gender are culturally constructed concepts. It follows that the two terms can be collapsed into one concept. See Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990); Franke, *supra* note 8.
118. Id. at 651. Note that at the time of *Grant*, discrimination on the basis of sexual orientation was not forbidden in any legally binding measure of the EC then in force. The Treaty of Amsterdam—
finding that she had suffered the same treatment as would be suffered by a gay male worker.\textsuperscript{119}

In contrast, the Advocate General’s opinion in \textit{Grant} held that “the essential point” in \textit{P. v. S.} was “that the discrimination was based exclusively, or essentially, on \textit{gender}.”\textsuperscript{120} He construed Article 119 of the Treaty as “covering all cases where \textit{gender} is objectively the factor causing an employee to be paid less.”\textsuperscript{121} Furthermore, he viewed the discrimination in the relevant Regulation as “exclusively gender-based. Gender is simply the only decisive criterion in the provision.”\textsuperscript{122} These views were clearly rejected by the court.

The Advocate General’s use of the term “gender discrimination” should not be understood as a matter of semantics but as a deliberate strategy to broaden the traditional understanding of the term “\textit{sex}.”\textsuperscript{123} By constantly using the term “gender discrimination” in his opinion, Advocate General Elmer was attempting to argue that the term is interchangeable with “\textit{sex discrimination}.” He presumably recognized that the term is potentially broad enough to cover male and female sex discrimination, discrimination against transsexuals, as well as discrimination on the basis of sexual orientation. All of these forms of discrimination involve societal assumptions or stereotypes as to how gender and sex should be performed. Like Advocate General Tesauro in \textit{P. v. S.}, he appears to be more willing to address some of the more complex issues at hand.

These two decisions of the court demonstrate its acute sense of caution, not shared by the Advocates General, when addressing the question of sex discrimination in equality jurisprudence. However, the approaches taken in the two cases are quite different. In the later judgment, the court follows a very narrow legalistic approach, focusing closely on the words, purpose and position of the relevant Article rather than the broader issues of equality at stake. In contrast, the court in \textit{P. v. S.} took an unusual step, in terms of its own jurisprudence, in considering the broader principles of equality before examining the provisions and purposes of the Directives.

Before the judgment in \textit{Grant}, it was argued by a number of optimistic commentators that \textit{P. v. S.} represented a shift away from the Aristotelian formal

\textsuperscript{119} See Nicholos Bamforth, \textit{Sexual Orientation Discrimination after Grant v. South-West Trains}, 63 MOD. L. REV. 694 (2000), arguing that the scope of \textit{Grant} has been qualified by the European Court of Human Rights decision in \textit{Smith v. United Kingdom} [2000] 29 E.H.R.R. 493. Here, the court held that the dismissal of gay and lesbian military personnel because of their sexual orientation violated Article 8 of the European Convention on Human Rights.

\textsuperscript{120} Case C-144/97, Grant, 1998 E.C.R.1-620 at 627.

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.} at 629.

\textsuperscript{123} See BUTLER, supra note 116.
approach to equality and the requirement that a comparator of the opposite sex be used. Commentators asserted that this shift indicated the court's move towards a substantive equality approach based on disadvantage and detriment, as used in Canadian jurisprudence.

An explanation for court's judgment in Grant lies in the economic purpose of the EC. The EC's Directives are intended to enable market integration; the objective of ensuring social progress is of secondary importance. In this respect, some commentators have noted that in ECJ jurisprudence, social ideals are always subject to economic ideals. For example, Ian Ward suggests that ideals of social justice are rationalized as desirable if they will make the market more productive. This economic rationalist view can perhaps explain the court's unwillingness to expand the definition of "sex" to cover sexual orientation and its willingness to expand it to include transsexualism. As the Advocate General's opinion in P. v. S. emphasized, transsexuals are statistically an insignificant minority, and therefore the expansion of protection would be unlikely to have a significant economic impact on employers in the EC. However, it was noted in Advocate General Elmer's opinion in Grant that gays and lesbians are a significant thirty-five million of the EC's population. It is possible that the court in Grant considered that a possible negative economic effect would result from requiring employers to provide partner benefits to homosexuals. Thus the court did not believe it was at liberty to further expand the term "sex." This explanation for the different approaches employed by the ECJ leads to the conclusion that P. v. S. should be considered as something of an anomaly in ECJ jurisprudence, and thus cannot be seen as striking a new path. This is partly evidenced in the EC's "trans" case law by the fact that it made little impression on the European Court of Human Rights in its subsequent decision in Sheffield and Horsham v. United Kingdom. Here the court insisted on following the formal equality approach set out in Cossey v. United Kingdom and Rees v. United Kingdom and made no reference to P. v. S. or its comparator test, despite the fact that it was argued by the applicants.

Neither decision of the court gives an indication as to its understanding of the aim of sex discrimination law in the EC. The court appears to prefer dealing with discrimination questions in very simplistic categories as if social identity were not a complex issue. For example, it refused to understand Lisa Grant as both a female worker and a lesbian worker; she must be in one

125. IAN WARD, A CRITICAL INTRODUCTION TO EUROPEAN LAW 166 (1996).
category or the other. Despite its praiseworthy decision in *P. v. S.*, the court’s sex equality jurisprudence is clearly at an embryonic stage.

C. Canadian Jurisprudence

The Canadian jurisprudence is similarly limited to a handful of decisions. However, unlike the European Court of Justice, Canadian courts and tribunals appear more willing to engage in issues involving the complexity of social identity presented by transsexual claims of discrimination. Overall, Canadian courts and tribunals are more prepared to consider and analyze how other jurisdictions approach the same issues. For example, in the case of *M.L. v. Maison Des Jeunes* the Quebec Human Rights Tribunal undertook a comprehensive comparative analysis, examining the recognition of transsexualism in relevant sex discrimination law in Quebec, the rest of Canada, the United States, Europe, as well as international human rights law, in deciding whether transsexuals’ claims should be recognized under the term “sex.” In this case, the Tribunal was also ready to address some of the

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129. For a summary and critique of Australian transgender discrimination law, see Andrew Sharpe, *Transgender Performance and the Discriminating Gaze: A Critique of Anti-Discrimination Regulatory Regimes*, 8 SOC. & LEGAL STUD. 5 (1999). Sharpe notes that the regulation of transgender persons in Australia varies significantly. A slim majority of states have legislation which prohibits discrimination on the ground of transgender. He notes that in some states, there are provisions prohibiting discrimination on the belief that a person is of a particular sex. He argues that here the law seems to be concerned primarily with the regulation of appearances. He asserts that the latter type of provision marks a shift from an interrogative to a performative mode of regulation and that the central tension appears to be between the legal desire to fix categories and the legal desire to regulate positively beyond those categories. *Id.* at 15. Case law in Australia is confined to Menzies v. Waycott (2001) E.O.C 93-129 at 75, 272. Here the Victorian Civil and Administrative Tribunal looked at the Equal Opportunity Act 1995 (Vic) before it was amended in 2000 to include protection on the ground of “gender identity.” At paragraph 199 the Tribunal read the term “sex” narrowly to find that it did not cover the condition of transsexualism.

130. (No. 2) [1998] 33 C.H.R.R. D/263 (Trib. Qué). Here, ML, the complainant, was employed as a youth street worker. She alleged a violation of her right to be treated as “fully equal, without distinction, exclusion or preference based on her sex or civil status” under the Quebec Charter of Human Rights and Freedoms when her employment was terminated upon informing her superior of her decision to undergo a sex change. This was despite the fact that until this point she had received good work evaluations. The defendant employer argued that it acted in the interest of the youth for which it cared, and for financial reasons in that possible negative public reaction could end funding for the public community group employer. It argued that the terms “sex” and “civil status” do not cover transsexualism or the process of changing one’s sex.

131. Here the court briefly referred to the case of *Quebec Human Rts. Commission v. Anglsberger*, [1982] 3 C.H.R.R. D/892 where a MTF transsexual successfully sued a restaurateur for refusing her service due to her belief that the complainant was a prostitute. The Quebec Provincial Court found that the complainant had suffered discrimination contrary to Art. 10 of the Charter because the respondent has refused to recognize her civil status as a woman although she had all the characteristics of a person of the female sex.

132. In construing “sex” under § 10 of the Quebec Charter, the Tribunal considered the jurisprudence of the Supreme Court of Canada in relation to § 15(1) of the Canadian Charter. For example, it drew on the judgment of Judge McLachlin in *Miron v. Trudel*, [1995] 2 S.C.R. 418, 490-91, where she affirmed the need to go beyond biological differences and examine social and economic contexts in order to determine whether an impugned distinction “perpetuates the undesirable stereotyping which § 15(1) aims to eradicate.” The Commission found that, under § 15(1) of the
theoretical issues surrounding transsexualism, sex, and sexual identity, opining that it is "precisely in these areas that we can see the most tension between what is known as 'sex and gender.'" It stated that the relativity of these concepts must be accepted before the condition of transsexuals can be understood.

An interesting and illustrative stream of trans-litigation cases in Canada has flowed from province of British Columbia. The first case in this stream was Tawni Sheridan v. Sanctuary Investments Ltd. (d.b.a. B.J.s Lounge), where the British Columbia Human Rights Tribunal ("the Tribunal") heard a sex discrimination complaint made by a MTF transsexual who had been undergoing the required "life test" to appear and behave like a woman, when she was refused entry to a bar because her photo identity did not match her attire and appearance. In addition, she claimed that on another occasion she had suffered harassment by the bar's management regarding her choice of washroom because she was not a "real woman." There was evidence that some female customers of this lesbian bar expressed displeasure to management about her choice of washroom. Sheridan claimed she had been discriminated against because of "her sex (gender) and/or physical or mental disability."

In determining whether "sex" can be interpreted to include transsexualism, the Tribunal examined P. v. S., M.L., and several U.S. decisions. The Tribunal concluded that given the nature of the statute as a human rights statute, it should be construed liberally so as to ensure that its objects are attained. It stated:

Whether the discrimination is regarded as differential treatment because the transsexual falls outside the traditional man/woman dichotomy (as in P. v. S.), or because male-to-female transsexuals are regarded a subgroup of females (and vice versa) (as in Maffei), the

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Canadian Charter and § 10 of the Quebec Charter, the term 'sex' should be given a broad interpretation and that its scope covered the plaintiff. It found that the plaintiff's rights had been infringed, (§ 4 and § 16 of the Quebec Charter) and it asserted: "it is not clear how discrimination based on transsexualism or on the process of transsexualism could be anything other than sex based" (para. 115). The plaintiff was awarded $4000 in compensation for moral injuries as well as damages for lost wages.

134. Id. at para. 99.
136. Id. at 464. Contrary to § 3 of the Human Rights Act, 1984 (now § 8 of the Human Rights Code). Note that Sheridan applied to have her complaint amended to allege discrimination because of her "gender identity," a ground not enumerated under the Code. Her claim was that the ground should be read into the Code to bring it into compliance with the Canadian Charter of Rights and Freedoms. As authority she referred to Vriend v. Alberta, [1998] 1 S.C.R. 493 and Cooper, [1996] 3 S.C.R. at 854. This argument was rejected by the Tribunal on the ground that it does not have jurisdiction to deal with such complaints on grounds not included in the Commission's enabling legislation. Sheridan, 18 B.C.H.R.T.D. at 464.
result is the same: transsexuals experience discrimination because of the lack of congruence between the criteria which determine sex.\textsuperscript{138}

The Tribunal thus found that transsexualism should be covered under the ground of “sex.”\textsuperscript{139} It considered the bar’s “neutral” washroom policy and held that it had an adverse effect on transsexuals in transition and therefore that Sheridan had suffered discrimination on the ground of sex in relation to the washroom incident.\textsuperscript{140} It found that the respondent’s bar had “a duty to accommodate transsexuals in general, and the complainant in particular, to the point of undue hardship.”\textsuperscript{141} However, the Tribunal rejected Sheridan’s claim of discrimination in relation to management’s refusal of her photo identification. It accepted that the refusal of her identification was made upon a reasonable basis and that transsexuals were not being singled out for different treatment in this respect. It held that, in regard to this matter, it was not reasonable to expect that the complainant be accommodated given that she had ample time to obtain new identification papers.\textsuperscript{142} Interestingly, the Tribunal skirted the question posed by the respondent as to whether sex and gender are synonymous terms.

This decision that the ground of “sex” includes transsexualism was subsequently followed in \textit{Mamela v. Vancouver Lesbian Connection}\textsuperscript{143} and \textit{Ferris v. Office and Technical Employees Union, Local 15}\textsuperscript{144} and challenged

\textsuperscript{138}. \textit{Id.} at para. 93. Clearly these criteria “which determine sex” were understood as comprising more than biological factors (unlike \textit{Corbett}). The Tribunal stated that for the purposes of human rights legislation, transsexuals in transition who are living as members of the opposite sex should be considered to be members of that sex. However, this does not mean that the same result will hold for the purposes of other legislation (\textit{id. at paras. 107-108}).

\textsuperscript{139}. \textit{Id.} at para. 117.

\textsuperscript{140}. \textit{Id.} at paras. 102-111. Sheridan was awarded $2000 compensation in relation to the washroom incident for injury to dignity, feelings and self-respect. Note that the defense argued “maintenance of public decency” as a justification for its policy and submitted that a change of policy would create undue hardship on customers. These arguments were rejected. The Tribunal held that the preference of patrons was not a defense and further, that Sheridan’s use of the women’s washrooms did not interfere with the “maintenance of public decency.”

\textsuperscript{141}. \textit{Id.} at para. 102 (emphasis added).

\textsuperscript{142}. \textit{Id.} at paras. 112-117.

\textsuperscript{143}. \textit{Mamela v. Vancouver Lesbian Connection,} [1999] B.C.H.R.T.D. No. 51, 36 C.H.R.R. D/318, 2000 C.L.L.C. 230-008. In this case the pre-operative MTF transsexual complainant who identified as a “lesbian female” successfully claimed that she was the victim of sex discrimination when she was asked to leave the Vancouver Lesbian Connection (“VLC”), a women’s only public organization whose membership policy was based on self-identification. She was suspended from the VLC and prohibited from entering its premises, ostensibly as a result of her disrespectful behavior and her stance, published in a local paper, that “woman” is a socio-cultural construct that is offensive to all female persons. The VLC did not make any submissions to explain the reasons for the suspension, as the organization was no longer in operation. Tribunal Member Iyer found that the complainant had been treated adversely and that sex was a factor in this differential treatment. \textit{Id.} at paras. 95-96. Iyer held that there was evidence that members of the VLC disapproved of the complainant’s self-identification as “female” and that this was a factor in her suspension. Iyer ordered the VLC to pay the complainant $3,000 in compensation, should it resume operation.

before the British Columbia Supreme Court in the case of *Vancouver Rape Relief Soc'y v. British Columbia Human Rights Comm'n*.145

In this last case, judicial review was sought by the Vancouver Rape Relief Society ("the Society") to challenge the Tribunal's jurisdiction to hear a sex discrimination complaint brought against the Society by a post-operative MTF transsexual, Kimberly Nixon. In this application, the Society argued before the British Columbia Supreme Court that the legislature had intended sex discrimination to mean "an unjustified refusal of a benefit or the imposition of a burden because one is a man or a woman, or because of social, economic or political disadvantage associated with maleness or femaleness."146 It asserted that this intention to limit "sex" to male/female was partly evidenced by the legislature's failure to include gender identity or transsexualism as enumerated grounds of discrimination. The court rejected both of these arguments, stating that there was no discernible pattern in the legislation that rebutted the court's conclusion that the words "sex" and "gender" were used either randomly or interchangeably.147 It also rejected the idea that the legislature intended to redress only male/female social, economic, and political issues. It stated that it is settled law that such legislation should be approached purposively, with a large and liberal interpretation so as to advance its objects. It declared:

To limit discrimination on the basis of sex to male/female issues places a far too narrow limit upon the purpose and intent of the [Act]. . . . While Canadian courts have indeed looked to issues which concerned the social, economic and political disadvantage of women in assessing what conduct may amount to discrimination on the basis of sex, many cases also reflect the less specific principle that *human rights legislation is intended to preclude and rectify the wrongful oppression of the weak by the strong and the disadvantaged by the advantaged in society.*148

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146. *Id.* at 186.
147. *Id.* at 187.
In concluding, the court held that the Tribunal had jurisdiction to hear Nixon’s complaint, and affirmed, in obiter, a liberal and extensive interpretation of the term “sex.”

Nixon’s complaint of sex discrimination was subsequently heard by the Tribunal amidst much public interest. Nixon specifically alleged that she had suffered discrimination on the basis of sex when the Vancouver Rape Relief Society refused to employ her (as a volunteer rape counselor) and had denied her a service customarily available to the public because of her sex. The facts were that the Society had asked Nixon to leave a volunteer training session to be a rape counselor when Nixon’s transsexual status became apparent. They believed that all counselors should have the experience of oppression as a woman since birth, and that Nixon’s presence conflicted with its “women-only” policy. They disputed whether their exclusion of Nixon had a discriminatory effect and pointed out that not all distinctions in treatment made on the basis of difference constitute discrimination.

The Tribunal held that Nixon had established a prima facie case of discrimination under the relevant code and that it was unnecessary for Nixon to prove injury to her dignity. In reaching its decision, the Society examined the relevant Code and its purposes, and the applicable principles to be drawn from the jurisprudence of the Supreme Court of Canada in its interpretation of § 15(1) of the Charter, the equality provision. It restated the general rule that the same basic principles and definition of discrimination that apply under § 15(1) of the Charter, apply equally under human rights codes. The Tribunal referred to Judge McIntyre’s definition of discrimination in Andrews v. Law Society of British Columbia as still holding sway. He said:

Discrimination may be described as a distinction... which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or

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150. Nixon alleged that the Vancouver Rape Relief Society’s action was contrary to the Human Rights Code, R.S.B.C., ch. 210, §§ 8 and 13 (1996).
151. Note that following her gender reassignment surgery, Nixon’s birth certificate was amended pursuant to the Vital Statistics Act, R.S.B.C., ch. 479, § 27(1) (1996), to record her gender as female.
152. The Vancouver Rape Relief Society argued that in the case of Law v. Canada (Minister for Employment and Immigration), [1999] S.C.R. 497, the Supreme Court extended the test for discrimination to include a consideration of whether the differential treatment impinged on the complainant’s dignity. The Tribunal rejected this submission, holding that the court in Law did not intend to alter or shift away from its twenty years of jurisprudence under human rights legislation, Nixon v. Vancouver Rape Relief Society, 2002 C.L.L.C. 230-009 at paras. 109-24.
153. Section 15(1) of the Charter provides: “Every individual is equal before and under the law and has the right to protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.”
limits access to opportunities, benefits and advantages available to other members of society.\textsuperscript{155}

Furthermore, the determination of whether a distinction involves prejudice or disadvantage and thus amounts to discrimination is to be analyzed in a contextual and purposive way. A purposive approach, according to the Tribunal, takes into account “the full social, political and legal context of the claim,”\textsuperscript{156} and aims to remedy “such ills as prejudice, stereotyping, and historical disadvantage.”\textsuperscript{157}

In the Tribunal’s view, it was “self-evident” that the type of exclusion imposed on Nixon was prima facie discriminatory.\textsuperscript{158} The Tribunal also, however, pointed to the evidence presented of Nixon’s history of marginalization and discrimination in the workplace and unemployment market.\textsuperscript{159} It concluded that Nixon’s exclusion by the Society denied her the opportunity to participate fully and freely in the [province’s] economic, social, political and cultural life\textsuperscript{160} and that the Society’s decision to exclude her failed to take into account her already disadvantaged position within Canadian society. It said, “They applied their stereotypical view that, despite her self-identification as a woman, and her legal status as one, she was not a woman . . . [The Society] made an assumption about Ms. Nixon that was not based on any assessment of her individual capabilities or her life experience.”\textsuperscript{161}

The Society was then required to prove that, upon a balance of probabilities, its treatment of Nixon was justified in that it related to a bona fide occupational requirement. Furthermore, it had the burden of proving that it could not accommodate individual or group differences without experiencing undue hardship.\textsuperscript{162} Here the Tribunal examined the standards and policies used by the Society and found evidence demonstrating that the Society’s standards assumed all its employees and service-users to have a “homogenous common life experience.”\textsuperscript{163} The Tribunal held that the Society failed to make any gesture towards meeting its obligation of accommodating Nixon’s difference to the point of undue hardship.\textsuperscript{164} Nixon was subsequently awarded the highest

\begin{itemize}
\item \textsuperscript{155} Id. at 147 (emphasis added).
\item \textsuperscript{156} Id. at 103.
\item \textsuperscript{157} Law v. Canada (Minister for Employment and Immigration) [1999] 1 S.C.R. 497, 524 (quoting the Supreme Court of Canada).
\item \textsuperscript{158} Id. at para. 133.
\item \textsuperscript{159} Id. at para. 134.
\item \textsuperscript{160} Id. at para. 143.
\item \textsuperscript{161} Id. at para. 144.
\item \textsuperscript{162} This is part of the three-step test for justification set out by the Supreme Court of Canada in its “unified approach” to all cases of discrimination under human rights legislation; see British Columbia (Public Service Relations Commission) v. B.C.G.S.E.U. [1999] 3 S.C.R. 3 (“Meiorin”); British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) [1999] 3 S.C.R. 868.
\item \textsuperscript{163} Id. at para. 202.
\item \textsuperscript{164} Id. at paras. 204-07.
\end{itemize}
sum of compensation for "injury to dignity, feelings and self-respect" by a human rights tribunal in British Columbia.\textsuperscript{165} In addition, the Society was ordered to cease denying transgender women access to its services and employment programs.

From these cases it is clear that Canadian jurisprudence follows a purposive approach to human rights legislation, similar to that used by the ECJ in Europe. However, it is distinguished from this other approach by its focus on broader questions of disadvantage—i.e. addressing the underlying reasons why some groups do not currently enjoy equality and the effects caused by certain acts (and legislation) on different groups. These reasons include social, political, and economic issues. This is clearly a substantive equality analysis in that the courts and tribunals look beyond the two-dimensional categories of discrimination to consider the operation and effect of discrimination upon the claimant in its dynamic context. In these cases it is also apparent that Canada's human rights courts and tribunals do not use the "similarly situated" comparator test.\textsuperscript{166}

While a similar approach to this was arguably taken in \textit{P. v. S.}, it appears from \textit{Grant} that the ECJ generally approaches questions of discrimination by making vague espousals of equality and construing provisions strictly with a view to their economic impact. In \textit{Grant} it used a narrow comparator test that failed to address whether gays and lesbians occupy a social position of disadvantage when they are the subject of rules and standards set up for heterosexual workers. To be treated "the same" under these standards is clearly meaningless unless some account is taken of difference. It is clear that this "sameness" approach of the ECJ demands conformity to norms defined by the characteristics of members of the dominant groups in society.

Like the Canadian approach, the recent sex stereotyping approach in the United States also looks to the reasons for sex discrimination. It locates these reasons in the non-conformity of gender performance: the failure to perform the norms of how to behave or look like a "real woman" or a "real man." This sex stereotyping approach, however, is limited in that it looks at claimants only as individuals and not as members of a broader group which embodies differences that challenge conventional gender norms. Moreover, it fails to consider or address the claimant's history of social marginalization and economic disadvantage. In other words, it stops short of addressing broader questions of systematic and economic discrimination that would make the approach more generally useful to other groups suffering from discrimination as such. Despite the limitations of this approach, it is undoubtedly useful to transgender claimants and the present nature of their claims. It is arguable that, out of the

\textsuperscript{165} The sum of $7,500 was awarded as compensation. The sum no doubt looks insubstantial to lawyers in the United States and is in fact less than what other Canadian jurisdictions are awarding.

\textsuperscript{166} See the next section for more discussion.
above approaches, the sex stereotyping approach used recently in the U.S. courts best caters to such claims because it goes straight to the specific causes of this type of gender discrimination.

However, before fully assessing and embracing any single approach to anti-discrimination law as providing the best avenue for transgender discrimination claims, it is important to consider the general aims, operation and effect of each approach to anti-discrimination law. This consideration, which I undertake in the next part of this paper, will enable a better understanding of these varying approaches to discrimination.

II. THE AIMS, OPERATION, AND EFFECTS OF ANTI-DISCRIMINATION LAW

A. The Aim of Anti-Discrimination Law?

In Price Waterhouse Justice Brennan stated that the words “because of sex” in Title VII should be “taken to mean that gender must be irrelevant to employment decisions.” He explained:

In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection evaluation, or compensation of employees. Yet the statute does not purport to limit the other qualities and characteristics that employers may take into account in making employment decisions.

Justice Brennan illuminated the fact that anti-discrimination law sought a balance between employee rights and employer prerogatives. Anti-discrimination law aims to make qualifications and work performance the controlling factors. Thus the test is to measure the person against the job requirements, not the person in the abstract. This aim is motivated by a liberal view of equality that posits that all persons inhere the same degree of human dignity and therefore deserve equal respect, regardless of their particular characteristics. This is also spelled out by a New Jersey court: “Distinctions must be made on the basis of merit, rather than skin color, age, sex or gender, or any other measure that obscures a person’s individual humanity and worth. This case represents another step toward achieving what has thus far been an elusive goal.”

Effectively, therefore, United States anti-discrimination law aims to make certain signs of difference irrelevant in specific circumstances, such as treatment in the workplace. It aims to protect difference by demanding that employers be blind to such differences.

168. Id. at 239.
This description of the aims of United States anti-discrimination law appears to mirror the aims of European Community Equality Directives concerning sex discrimination. As discussed above, these Directives stipulate "the irrelevance of a person's sex with regard to the rules relegating relations in society" and, in particular, the treatment afforded to workers.\textsuperscript{170} Both share the same approach of making certain signs of difference irrelevant.

The ideal of eliminating difference is certainly one that has been immensely important in the history of emancipatory politics. It has been crucial in the struggle of women and racial minorities, for example, against exclusion and status differentiation.\textsuperscript{171} However, this ideal carries certain dangers in its desire to eliminate difference rather than positively to affirm difference. This approach encourages assimilation in that formerly excluded groups must prove themselves according to rules and standards that have already been set.\textsuperscript{172}

The Canadian approach takes a slightly different tack. It aims to eliminate the disadvantage suffered by oppressed groups through the accommodation of their differences, rather than the elimination of the differences embodied by these groups. Canadian anti-discrimination law draws its principles from the Canadian Charter of Rights and Freedoms, in particular § 15(1). The dominant interpretation of § 15(1) by the Supreme Court of Canada rejects the "similarly situated" test used by the E.C.J. as frequently producing serious inequality.\textsuperscript{173} It holds that § 15(1) does not intend to eliminate all distinctions and points out that certain sections of the Charter are designed to safeguard certain distinctions.\textsuperscript{174} It is arguable that the purpose of the section is similar to that of Title VII. For example, the court in \textit{Miron v. Trudel} stated that the equality provision aims: "to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity or circumstance."\textsuperscript{175} Nevertheless, the means employed to prevent such disadvantage are different. The court has critically stated that "the accommodation of difference... is the essence of true equality."\textsuperscript{176}

This approach to equality arguably allows an oppressed group to assert a positive sense of group difference as a means to emancipation. This approach is preferable from a theoretical point of view in that it does not have an assimilationist drive to treat everyone the same according to the same


\textsuperscript{171} \textsc{Iris Marion Young, Justice and the Politics of Difference} 159 (1990).

\textsuperscript{172} \textit{Id.} at 164.


\textsuperscript{174} \textit{Id.} at 171.


\textsuperscript{176} Andrews, 1 S.C.R. at 169.
principles, rules, and standards. Instead its focus on disadvantage and
difference appears to preserve the conditions in which individuals and groups
can assert and express their differences.

This alternative Canadian approach raises the question whether the best
strategy is to protect difference—such as gender non-conformity—through its
conceptual elimination. How far should American anti-discrimination law
pursue this aim of transcending and erasing difference in the name of equality
in the workplace? A further question is whether such law is in fact able to truly
transcend difference. One legal theorist, Robert Post, addresses these very
questions.\(^7\)

In the next section I consider Post’s observations and suggestions regarding
the aims and potential of American discrimination law. This is with a view to
exploring specifically the problems with the United States’ approach to
discrimination law, and more broadly, how the law constructs identity in
relation to difference. Does it, for example, entrench stereotypes when it
produces identity categories? Are gender norms in fact reinforced by such anti-
discrimination discourses?

1. Is Anti-Discrimination Law Able Truly to Transcend Difference?

To examine the implications of the American approach, Post takes as an
example a Santa Cruz discrimination ordinance that, among other things,
prohibits discrimination in employment on the basis of personal appearance.
The ordinance, dubbed by the media as the “ugly ordinance,” refers to
appearance by using the term “physical characteristic” which is defined as
including “a bodily condition or bodily characteristic of any person which is
from birth, accident, or disease, or from any natural physical development, or
any other event outside the control of that person including individual physical
mannerisms.” In this definition the ordinance significantly omits clothing, hair
color, and tattoos, and allows an exception in circumstances where appearance
is proven to be relevant to job performance. Supporters of the ordinance assert
that it merely forbids superficial judgments upon stereotypes and emphasize
that it is aimed at equal opportunity as well as personal autonomy, self-
expression, and fairness.

Post is critical of this ordinance because it attempts to eliminate or
transcend parts of one’s personhood, such as appearance, which, in his view,
cannot be transcended. He argues: “the Santa Cruz ordinance demands that
employers interact with their employees in ways that are blind to almost
everything that is normally salient in everyday social life.”\(^8\) He finds such

\(^7\) Robert Post, Prejudicial Appearances: The Logic of American Antidiscrimination Law, 88
\(^8\) Id. at 11.
ordinances unsettling because “they seem to preclude any ordinary form of human interaction.” In his view, such ordinances abstract away so much from the employee that “with respect to the employer, the employee is transported into something like what John Rawls has called an ‘original position’ behind a ‘veil of ignorance.’” In other words, Post rejects a disembodied view of the person. Given anti-discrimination law’s liberal impulse, he finds it ironic that it should ultimately “unfold itself according to the logic that points unmistakably toward the instrumentalization of persons.” By this he means that persons would be valued solely for their capacity; ontology would be collapsed into capacity.

Post believes that this instrumentalization of persons is part of the dominant conception of anti-discrimination law. He is skeptical of its claim that it is possible to truly eliminate or transcend certain characteristics. Claims to such power he finds unrealistic and misleading. More critically, however, he suggests that this dominant conception operates to undermine “the law’s coherence and usefulness as a tool of transformative social policy.”

2. Post’s Proposal of a Sociological View of Anti-Discrimination Law

Post argues that a “sociological” view should be taken of anti-discrimination law. Anti-discrimination should understand persons as social beings and not as persons who can be stripped of their embodiment to become an instrumental capacity. In contrast, the dominant approach assumes that the person ontologically pre-exists the social, and that it is thus possible to deny the social. The sociological view is that the social, including appearance, is central to personhood. The person is, for example, fundamentally defined by his or her appearance; the concrete way in which a person appears in the world is central to their value and meaning as persons. Thus difference (in appearance, behavior, etc.) is not a superficial layer, but is critical to identity.

In arguing for a sociological view, Post advocates that anti-discrimination law should be understood not as a practice that is capable of transcending and denying the salient factors of one’s social existence, but as “a social practice which regulates other social practices.” These “other social practices” are, for example, those of gender and race. These are the social practices that the dominant conception aims and purports to eliminate. Post recognizes that anti-discrimination law is a critical site where the meaning of social practices such as gender become contested. For this reason, he argues, anti-discrimination law can be used as a site to reshape these practices and meanings “in ways that

179. Id.
180. Id. at 15.
181. Id. at 16.
182. Id. supra note 177, at 16.
183. Id. at 17.
reflect the purposes of the law." Post’s sociological approach does not seek to eliminate these social practices but focuses instead on how the law reconstructs them. It asks how the law could “alter” and “modify” such conventions and practices.

To exemplify his argument that anti-discrimination law has the potential to alter and modify conventions and practices, Post examines some of the Title VII cases dealing with gender and appearance, specifically the grooming and dress code cases. In his view these are important cases because the norms of appearance are “pervasive” in the constitution of gender. Absent a knowledge or display of genitalia, it is generally one’s appearance and behavior that establishes one’s sex in society. In the dress code cases Post finds that courts generally hold that there is no discrimination “because of sex” when male and female employees are made to conform to different dress codes or where the required dress standards conform to community accepted dress standards. But discrimination is found where, for example, women are required to wear uniforms while men are allowed to wear business suits. In the grooming cases he finds that the courts condone employers’ imposition of sex-based stereotypes so long as these stereotypes conform to traditional gender conventions. Those persons who present themselves in ways that violate established gender grooming and dress conventions are framed as asserting a “personal preference” to flout accepted standards. He states: “Courts therefore read claims for protection by those who deviate from gendered appearance norms as ultimately asserting a right autonomously to present oneself ‘in a self-determined manner,’ rather than a right to fair and equal treatment.”

In his view, these cases nicely illustrate law’s negotiation and shaping of gender norms, and demonstrate that “courts are continuously re-evaluating which stereotypes should be permitted, in what contexts, and for what reasons.” However, he argues, under the dominant conception of anti-discrimination law, this negotiation and acceptance of explicit gender categories is not acknowledged.

Post argues that it is implausible to read Title VII as mandating that the social practice of gender be eliminated. He argues that it can instead be used to alter the meaning of various conventions of the social practice of gender, such as the connection between women and physical weakness. He states that if it were thus interpreted:

[It] would in the context of employment require us to sever the connection between gender and some capacities, such as strength, but

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184. Id. at 16.
185. Id. at 26.
186. Id. at 34-35.
187. Post, supra note 177, at 34-35.
188. Id. at 37-38.
not to eliminate gender as such. In contrast to the dominant conception, this way of conceptualizing the statute would not require us to imagine a world of sexless individuals, but would instead challenge us to explore the precise ways in which Title VII should alter the norms by which sex is given social meaning.\(^{189}\)

Post’s “sociological” argument is very engaging and appealing. Post’s proposed sociological view recognizes the complexity of identity—the fact that differences cannot be eliminated as if taking off layers of clothing. It is useful in confirming that the aims of the U.S. approach suffer from fundamental flaws and in recognizing that anti-discrimination law is a site where the meaning of differences is contested. However, his proposal that it can be used to reshape the meaning of these differences and other social convention presents an overly idealistic view of the social practice of the law.

This skepticism of the operation of the law is shared by Judith Butler, who writes a direct response to Post’s argument. While she acknowledges that anti-discrimination law is ideally “a social practice that seeks to disrupt and transform another set of discriminatory social practices,” she cautions that it “can become an instrument of discrimination in the sense that it must reiterate—and entrench—the stereotypical or discriminatory version of the social category it seeks to eliminate.”\(^{190}\)

3. Butler: Does Anti-Discrimination Law also Entrench Stereotypes?

Butler’s comments allude to the possibility that Post places too much faith in the institutional instrument of the law to effect positive transformation. As Post himself points out, “Law is made by the very persons who participate in the social practices that constitute race, gender, and beauty.”\(^{191}\) As we saw from the case law in the United States, anti-discrimination is just as able to regulate social practices that sustain group inequality as equality. Should feminists and transgender people put their energy and hope in the law to reconstruct and redetermine the social practice of gender? Is there not a danger that the law will continue to reiterate and entrench stereotypical views of the social practice of gender? For example, the enforcement of gender specific dress and grooming codes using anti-discrimination law is highly selective and inconsistently applied (like transgender case law), a fact acknowledged by Post in his survey of the dress and grooming case law. Anti-discrimination law only

\(^{189}\) Id. at 20. This interpretation of Title VII and its transformative potential is partly shared by Mary Anne Case who recommends that the next “generation” of stereotyping cases should target the stereotyping of jobs and job requirements, rather than the stereotyping of job applicants. See Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L. J. 1, 76 (1995).


\(^{191}\) Post, supra note 177, at 17.
constrains and de-legitimates some social practices of gender that are based on sex stereotypes.\footnote{Reva Siegel, Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification, 88 CAL. L. REV. 77, 78 (2000).}

Reva Siegel is also doubtful of the law’s willingness to transform or disrupt. In her response to Post, she points out that “even if the ‘dominant approach’ masks the actual operations of anti-discrimination law, judges and other legal decision makers may not necessarily wish to divest themselves of some of their status privileges.” In her view, anti-discrimination law is “a story told by members of relatively privileged groups explaining why they are prepared voluntarily to divest themselves of some of their status privileges.”\footnote{Id. at 115.} Critically, Post fails to clarify what “the purposes of the law” are, in his nebulous assertion that anti-discrimination law can be used as a site to reshape these practices and meanings “in ways that reflect the purposes of the law.” Post also fails to recognize that some feminists, for example, may believe that it is better to aim for the elimination of socially constructed differences, such as stereotypes and generalizations, rather than their “alteration” and “modification” by the law. It is possible that the outcome of such alteration could be more dangerous.

Post also comes under fire for his view of the social practice of gender. In the following section I consider the comparison between his view of gender and that of Catherine MacKinnon. This leads to an examination of the space that transgender difference symbolically occupies in this social practice and why it is important that transgender difference be affirmed rather than conceptually eliminated within discrimination law. I then argue that whatever approach to transgender discrimination law is embraced, whether it be the U.S. approach or the Canadian approach, it will be encumbered by the law’s demand that differences conform to law categories, and law’s insistence on defining difference according to its own fictions. In explicating this last point I discuss the attempt by MacKinnon to encode “women’s collective experience” into the law. With the assistance of Wendy Brown’s insights, I argue that this effort highlights the dangers in placing confidence in the law and its categories to reflect difference as experienced by individuals and groups such as transgender people.


Butler takes issue with Post’s view of the social practice of gender, which he explains thus:
“Generalizations” and “stereotypes” of this kind [i.e. about real and fictional differences between men and women] are, of course, the conventions that underwrite the social practice of gender. To eliminate all such generalizations and stereotypes would be to eliminate the practice. This ambition reflects the goal of the dominant conception, which is to disestablish the category of sex and to replace it with the imperatives of functional rationality.194

Butler reads Post as asserting that to eliminate all gender generalizations and stereotypes would be to eliminate the practice of gender. In her view, he confuses some basic issues. For example, Butler’s own political project, broadly speaking, could be described as aiming to shift current gender norms and stereotypes from their dominant and normalizing position in the social practice of gender, through the process of denaturalizing and disempowering them. This does not mean, however, that she is necessarily an advocate for the elimination of gender as a social practice altogether. Butler therefore criticizes Post’s conflation of these two projects.195

Butler also takes Post to task for implying, in the above quotation, that the practice of gender is “underwritten” by generalizations and stereotypes and that it is thus exhausted by them.196 She questions whether the practice of gender must be coextensive with its stereotype. In her opinion, such views of gender are limiting in that they do not account for the existing deviations from the norm. Such views are espoused by feminist theorists such as Catherine MacKinnon.

MacKinnon, for example, sees gender as a social construct totally constituted by male power and domination. In Towards a Feminist Theory of the State she describes gender roles as thoroughly imbued with male power and she conflates gender with sexuality in that sexuality, expressed in the male/female relation, is the stuff of gender. Discussing the “content of gender roles” she states:

All the social requirements for male sexual arousal and satisfaction are identical with the gender definition of “female.” All the essentials of the male gender role are also the qualities sexualized as “male” in male dominant sexuality.

... Gender and sexuality, in this view, become two different shapes taken by the single social equation of male with dominance and female

194. Post, supra note 177, at 18.
195. Post responds that it depends on your understanding of “stereotype”—in his view they do not exhaust the practice of gender, because any given stereotype is susceptible to change and transformation, in exactly the same way that the meanings of words are susceptible to change. But then he says that altering a stereotype merely revises it rather than eliminates it. See Robert Post, Response to Commentators, 88 CAL. L. REV. 119, 121 (2000).
196. Butler, supra note 190, at 61.
with submission. Feeling this as identity, acting it as role, inhabiting
and presenting it as self, is the domain of gender.\textsuperscript{197}

Gender is thus not constituted by a set of norms, some of which are
unconsciously negotiated by the individual in order to deviate from the above
model. Instead, gender, in MacKinnon’s view, is a form of power that is all-
enveloping—it allows one model, that of dominance and submission, which the
individual feels, acts, inhabits, and presents—but never negotiates, disrupts, or
transforms. In the context of “societies pervaded by pornography,” which she
sees as the matrix of women’s subordination in sexuality-gender relations, she
states that “all women are defined by it: this is what a woman wants: this is
what a woman is.”\textsuperscript{198} Furthermore, she rejects the idea that there can be any
true subversions or deviations from this dominance/submission model. She
asserts that “the capacity of gender reversals (dominatrixes) and inversions
(homosexuality) to stimulate sexual excitement is derived precisely from their
mimicry or parody or negation or reversal of the standard arrangement.”\textsuperscript{199}
Lesbian sex, therefore, is a mere imitation of heterosexuality; it does not
transcend the dominance/submission model associated with masculinity and
femininity.

As one commentator points out, MacKinnon’s theory of gender “mirrors,”
rather than deconstructs, the subjects of male heterosexual pornography by
basing itself on the dominance/submission model. It thus encodes into the law
the dominance/submission model used by pornography “as the truth rather than
the hyperbole of gender production.”\textsuperscript{200} In other words, MacKinnon’s theory
of gender appears to reiterate and entrench the same sex stereotypes that the
heterosexual male pornography industry produces. More critically, however,
her theory forecloses on the idea that there is space in which these
dominance/submission model stereotypes can be transcended. Only through
the instrument of the law and rights discourse can inequalities be exposed and
redressed in MacKinnon’s view. Her theory is that law can be an instrument of
emancipation for women.

Not surprisingly then, MacKinnon has no interest in questions of gender
identity and gender fluidity and dismisses them as a worthless avenue for
feminism to pursue. This avenue, she argues, “situates women’s problem in the
wrong place” in that it impliedly fails to provide “access to the reality of our
collective experience in order to understand and change it for all of us in our

\textsuperscript{197} MacKinnon, Toward A Feminist Theory of the State 143 (1989).
\textsuperscript{198} Id. at 247.
\textsuperscript{199} Id. at 144.
\textsuperscript{200} Wendy Brown, States of Injury: Power and Freedom in Late Modernity 87-88
own lifetimes." MacKinnon's project for change appears to involve encoding the law with "the reality of [women's] experience."

In Butler's view there is more to gender than stereotypes and generalizations. She asks: "is there a dimension of gender that is not only anti-stereotypical... but is astereotypical...? How do we account for the transformation of the stereotype within the practice of gender if there were not something else in gender, as it were, that is not immediately co-opted or foreclosed by the stereotype?" It is critical for Butler that a space is understood to exist in the social practice of gender for the "astereotypical." Butler locates this space by looking at anti-discrimination law, which she notes is often invoked by those who suffer specific forms of gender discrimination because of their non-stereotypical expressions of gender. Butler sees the transitional transsexual, for whom sex is not precisely a stable or systematic social category, as the disruptive element in the social practice of gender norms. For her, the transitional transsexual embodies the space or fissure outside the stereotypes and generalizations that dominate the social practice of gender. She sees their "asystematic appearance" as having "a transformative effect on the norm itself" such that gender is "never the same again."

Arguably, under the transgender discrimination case law, the "astereotypical"—the "disruptive element" and its "asystematic appearance"—can now be protected by anti-discrimination law in that transgender persons may no longer be required to conform their appearance, conduct, and behavior to gender stereotypes under the recent U.S. stereotyping approach discussed above. Under Title VII, those individuals who deviate from stereotypical expectations must be treated the same as those who fulfill stereotypical expectations. But what does this "victory" mean? What happens when such anti-discrimination law regulates the "astereotypical"? Butler sees the astereotypical as having the potential to transform the stereotypical, but at the same time she cautions, as mentioned above, that anti-discrimination law "can become an instrument of discrimination in the sense that it must reiterate—and entrench—the stereotypical or discriminatory version of the social category it seeks to eliminate." Butler is here referring to the implications of law's regulation and recognition of difference and identity.

A critical question is whether in fact the "astereotypical" is protected under U.S. sex discrimination law. Butler's work helps to highlight some of the possible dangers in the sex stereotyping approach, which Post and others should consider. First, in 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 as

203. Id.
ostensibly disempowering them. The reiteration of these stereotypes enforces the idea that a "real woman" or a "real man" exists, rather than being a historical and cultural fiction (such as in MacKinnon’s work). Furthermore, courts do not always reiterate such stereotypes to negate them. They are selective in the stereotypes they seek to transform or eliminate and often effectively empower them. However, the main problem in this approach’s regulation of the "astereotypical" is that it ultimately aims to eliminate it. This aim to eliminate differences such as gender non-conformity is a concern, even if such an aim may be an impossible ideal. More confidence can be placed in an approach that aims to accommodate and affirm differences such as gender non-conformity. Such an affirmation may allow a desired shift in gender norms and stereotypes and the possibility of broader transformation.

Before concluding that we ought to embrace a legal approach that accommodates and affirms difference—possibly presented by the Canadian approach—it is critical to examine the inherent dangers in installing identity and difference in the law. Groups and individuals seeking emancipation through discrimination law must be aware of the possible effects when law and its categories are encoded with their difference.

**CONCLUSION: THE DANGERS OF INSTALLING IDENTITY AND DIFFERENCE IN THE LAW**

The work of Wendy Brown assists in illuminating these dangers. Influenced by Foucaultian analyses, Brown advises caution to those, such as transgender people, women, and Post, who turn to the state for emancipation. She poses the question: "How does the nature of the political state transform one’s social identity when one turns to the state for political resolution of one’s subordination, exclusion, or suffering?" The problem, in her view, is that such law attempts to transform the astereotypical into the normal, into something “normativizable through law.” This has the effect of reducing persons to observable social attributes “as if they were intrinsic and factual, rather than effects of discursive and institutional power.” These attributes then become written into the law, which ensures that those who fit their description will from then on become regulated through them and fixed by them. Thus differences, which are in fact the effects of social power, become neutralized and depoliticized. In other words, they are stripped of their subversive power.

Some transsexual theorists, such as Jay Prosser, may assert that this is precisely what transitional transsexuals desire—for their social difference to be

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204. BROWN, supra note 200, at 100.
205. Id. at 66.
206. Id.
Embracing Law’s Categories

socially neutralized. Prosser is not interested in subverting the dominant paradigm, but in finding recognition for his “right to a gender home” within that paradigm. In the neutralization of difference, transitional transsexuals are given the right to protection from discrimination in the workplace, and hence the ideal of assimilation becomes part of their road to emancipation. But some commentators, such as Post, doubt that such neutralization or elimination of difference ever truly takes place, or is in fact possible. Brown is also skeptical of this process, although she questions the position given to rights discourse, and hence anti-discrimination law per se, in emancipatory politics. She refers to the historical emergence of rights and points out that they arose both as a means of protection against sovereign and social power and “as a mode of securing and naturalizing dominant social powers—class, gender, and so forth.” This view that rights and discrimination discourse is also about the maintenance of privilege is shared by Siegel as mentioned above. Both Brown and Siegel suggest that rights “cut two or more ways” and thus believe that it is necessary to query “incessantly” their place in emancipatory politics rather than blindly assume that their place is predetermined.

As an illustration of the need for caution, Brown refers to MacKinnon’s attempt to encode “women’s collective experience” into the law. As discussed above, MacKinnon’s project is to employ rights discourse to seek equality for women. She believes this will happen if the law is employed “to confront... the inequalities in women’s condition in order to change them.” MacKinnon asserts that equality law “provides a peculiar jurisprudential opportunity, a crack in the wall between law and society.” And the “first step” in realizing this opportunity “is to claim women’s concrete reality.” MacKinnon argues that once equality law exposes that obscenity law, for example, is “based on the point of view of male dominance,” then the urgent issue for women is not the avoidance of state intervention but the getting of access to speech. As many critics have pointed out, one critical problem with this project is that MacKinnon’s view of “women’s concrete reality” is not one shared by all women. A number of feminists have argued that their experiences do not correlate with MacKinnon’s view of gender and sexuality as sexual violation. They argue that she is attempting to encode law with a culturally and historically specific view of women’s experience. If MacKinnon understands the definition and ontology of “women” as being determined by

208. Id. at 99. Note that the debate about rights is a considerable field which is beyond the scope of this paper.
209. BROWN, supra note 200, at 121.
210. MACKINNON, supra note 197, at 242.
211. Id. at 244.
212. Id.
pornography, is it emancipatory for women to have such a definition encoded into the law?\textsuperscript{214} By asking the law to regulate subjects according to such definitions, the law will effectively produce such subjects. In Brown’s view, MacKinnon’s attempt to install a particular fiction of women in the law produces a “potent mode of juridical-disciplinary domination” and a potential intensification of the regulation of gender and sexuality.\textsuperscript{215}

Brown asserts that MacKinnon’s “failed effort” stands as a general caution against installing identity in the law because the law operates to naturalize such “inevitably totalized formulations of identity” through regulating them.\textsuperscript{216} She concludes by suggesting that “the specifications of identity in late twentieth century rights discourse may be equally problematic for the social powers they discursively renaturalize. . . . [R]ights must not be confused with equality nor legal recognition with emancipation.”\textsuperscript{217}

So what does this advice of caution mean for transgender litigation? Brown is saying that newly politicized identities, such as transgender people, must think through their assertion of identity strategically so as to be able to imagine a future free of present injury. In other words, they 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.

Newly politicized identities can learn from feminism that strategy is an important consideration at every step. For example, it is important to query “incessantly” the step of embracing either the U.S. sex stereotyping approach or the Canadian approach in relation to transgender discrimination law. Like MacKinnon’s approach, both of these approaches use historical and cultural fictions of identity as if they truly represented these identities. Ultimately, I agree with Brown that caution is advisable either before entrusting the law with the task of transforming stereotypes or before embracing the law’s affirmation and accommodation of astereotypical identities as an emancipatory approach.

In this paper I have endeavored to show that discrimination law can be used by transgender claimants to seek protection and redress for the daily harassment and discrimination they experience as a result of their non-conforming appearance and behavior. However, I have also attempted to demonstrate that discrimination law is not an avenue entirely free of danger. This danger is posed by the operation of discrimination law and the categories it employs to understand difference and identity. I have delineated the approaches used in different jurisdictions and come to the conclusion that the best approach is one that aims to accommodate and affirm such difference,

\textsuperscript{214} BROWN, supra note 200, at 131
\textsuperscript{215} Id. at 133.
\textsuperscript{216} MACKINNON, supra note 197, at 133.
\textsuperscript{217} Id.
rather than to eliminate it. This ideal appears to be that of the Canadian approach, which systematically examines the social, economic, legal, and historical context in which discrimination takes place and in which the legal subject exists. This path has the potential to yield results for those seeking the transformation of gender norms so long as law’s impulses and limitations are strategically considered.

In conclusion, I believe it is critical to emphasize that transgender people and others should continue posing a disruption to the law’s categories. It is only through the painful process of confronting and disrupting law’s categorical approach that rigid gender norms embedded in the law can be shifted and transformed.