

**DISRUPTING LAW'S CATEGORIES:  
TRANSGENDERISM, FEMINISM, AND IDENTITY**

**LAURA GRENFELL**

**A THESIS SUBMITTED IN CONFORMITY WITH THE REQUIREMENTS  
FOR THE DEGREE OF MASTER OF LAWS  
GRADUATE DEPARTMENT OF LAW  
UNIVERSITY OF TORONTO**

**© COPYRIGHT BY LAURA GRENFELL 2001**



**National Library  
of Canada**

**Acquisitions and  
Bibliographic Services**

**395 Wellington Street  
Ottawa ON K1A 0N4  
Canada**

**Bibliothèque nationale  
du Canada**

**Acquisitions et  
services bibliographiques**

**395, rue Wellington  
Ottawa ON K1A 0N4  
Canada**

*Your file Votre référence*

*Our file Notre référence*

**The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.**

**The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.**

**L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.**

**L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.**

**0-612-63079-X**

**Canada**

## ***Acknowledgments***

I would like to thank my supervisor Professor Cossman for her constructive criticism and encouragement.

I would also like to thank everyone who has made this Masters year in Toronto enjoyable.

**DISRUPTING LAW'S CATEGORIES: TRANSGENDERISM, FEMINISM, AND IDENTITY**

Master of Laws 2001  
Laura Grenfell  
Graduate Department of Law, University of Toronto

**ABSTRACT**

This thesis considers the question of how law understands identity and the question of how law *should* understand identity. Specifically it considers the effects when legal narratives categorise. To explore these abstract questions I use the concrete example of an identity which disrupts law's process of categorisation – transgenderism. I examine how the law categorises transsexuals and transgendered people in the areas of family law, administrative law and anti-discrimination law. Integral to this exploration is a comparative analysis of how feminist narratives view and construct transgenderism. I argue that some feminist narratives mirror law's rigid and simplistic approach to the complexity of social identity. This thesis rejects such accounts and advocates that a more salient account of gender identity can be reached through a consideration of the work of poststructuralist feminist thinkers such as Judith Butler. Through understanding gender identity in less rigid terms it becomes possible to shift and transform present oppressive gender norms.

## TABLE OF CONTENTS

<b>INTRODUCTION.....</b>	<b>1</b>
<b>CHAPTER ONE .....</b>	<b>8</b>
1.1. INTRODUCTION .....	8
1.1.1 <i>Biological Determinist view of sex</i> .....	10
1.1.2 <i>Social constructionist view of sex</i> .....	11
1.2. 'WHAT IS SEX?' – LEGAL NARRATIVE NO.1 .....	12
1.2.1 <i>The United Kingdom</i> .....	12
2.2 <i>The European Community</i> .....	16
1.2.3 <i>Common Law Countries</i> .....	18
1.2.4 <i>The United States</i> .....	20
1.3. 'WHAT IS SEX?' - LEGAL NARRATIVE NO.2 .....	24
1.3.1 <i>The United States</i> .....	24
1.3.2 <i>The European Community and the United Kingdom</i> .....	28
1.3.3 <i>Australia and New Zealand</i> .....	30
1.4. THE IMPLICATIONS OF THE <i>MT v JT</i> APPROACH .....	33
1.4.1 <i>The Effects of Emphasising Anatomy</i> .....	34
1.4.2 <i>Will the alternative approach become ascendant?</i> .....	38
1.5. THE SEX/GENDER DISTINCTION .....	38
1.6. FEMINISM AND THE SEX/GENDER DISTINCTION .....	40
1.6.1 <i>'First Wave' Feminism</i> .....	40
1.6.2 <i>'Second Wave' Feminism</i> .....	41
1.6.3 <i>'Third Wave' Feminism</i> .....	42
1.6.4 <i>Contestation of Butler's Critique of the Sex/Gender Distinction</i> .....	47
1.6.5 <i>Franke and Case</i> .....	48
1.6.6 <i>Moi's position</i> .....	50
1.7 CONCLUSION: IS BUTLER'S CRITIQUE POTENTIALLY USEFUL?.....	53
<b>CHAPTER TWO .....</b>	<b>55</b>
2.1.1 <i>The Carousel of Reality and Fantasy</i> .....	55
2.1.2 <i>The Map of This Narrative</i> .....	59
2.2 THE FRAME OF TRUE/ARTIFICIAL IN LEGAL NARRATIVES.....	60
2.2.1 <i>"Imitation cannot be equated with transformation"</i> .....	60
2.2.2 <i>Gender Fraud and Deception</i> .....	63
2.3.FEMINISM AND NARRATIVES OF THE 'REAL WOMAN' .....	65
2.3.1 <i>Raymond and The Transsexual Empire</i> .....	66
2.3.2 <i>Butler and the Category of 'Woman'</i> .....	70
<i>and Norms</i> .....	72
2.4.TRANSSEXUAL NARRATIVES ABOUT 'PROPER' AND 'WRONG' GENDER: .....	75
IS GENDER A HOME OR A CLOSET? .....	75
2.4.1 <i>Felski and Prosser's Critique of Butler's model of radical instability</i> .....	75
2.4.2 <i>Prosser's dream of a 'real' gender home</i> .....	77
2.4.3 <i>Halberstam: Is a 'Gender Home' an exclusionary fantasy?</i> .....	78
2.4.4 <i>Stone and Bornstein: Claiming a Space Outside the Binary 'Gender Home'</i> .....	79

2.4.5 <i>Califia: Categories Remain Useful</i> .....	83
2.5. CONTESTATIONS OF THE 'REAL' WOMAN IN COURT: THE VANCOUVER RAPE RELIEF SOCIETY CASE .....	85
2.5.1 <i>Before the British Columbia Human Rights Tribunal</i> .....	87
2.6. CONCLUSION: STRATEGY AND CATEGORY .....	87
<b>CHAPTER THREE</b> .....	<b>90</b>
3.1. INTRODUCTION .....	90
3.1.1 <i>Sex or Gender Discrimination?</i> .....	92
3.2. JURISPRUDENCE IN THE UNITED STATES .....	93
3.2.1 <i>Traditional Jurisprudence</i> .....	93
3.2.2 <i>New Jurisprudence</i> .....	98
3.2.3 <i>A "Canary in the Sartorial Coal Mine"?</i> .....	103
3.2.4 <i>The Applicability of the Price Waterhouse approach</i> .....	106
3.3 JURISPRUDENCE IN THE EUROPEAN COMMUNITY .....	107
3.4. CANADIAN JURISPRUDENCE .....	115
3.5. THE AIM OF ANTI-DISCRIMINATION LAW? .....	122
3.5.1 <i>Is anti-discrimination law able to truly transcend difference?</i> .....	124
3.5.2 <i>Post's proposal of a sociological view of anti-discrimination law</i> .....	125
3.5.3 <i>Butler: Does anti-discrimination law also entrench stereotypes?</i> .....	128
3.5.4 <i>Butler, Post and MacKinnon: Stereotyping and the Social Practice of Gender</i> .....	129
3.6. CONCLUSION: THE DANGERS OF INSTALLING IDENTITY AND DIFFERENCE IN THE LAW .....	133
<b>CONCLUSION</b> .....	<b>137</b>
<b>BIBLIOGRAPHY</b> .....	<b>140</b>

## 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.<sup>1</sup>

*How does law understand identity?* Law has an impulse to use categories to understand and simplify concepts. This includes complex concepts such as social identity. Law understands identity in a two dimensional manner: it recognises difference but sometimes fails to acknowledge the context of these differences, that is, relationships. Instead, law understands identity through the categorisation of differences.

*What are the effects when legal narratives categorise?* When legal narratives categorise, they assert power: this is the power of definition.<sup>2</sup> This power subordinates the agency of the subject. The subject is denied the possibility of self-definition – for example, the agency to assert whether one is female or male or neither. This power also operates to define one's identity. It effectively produces this identity: the category becomes constitutive of one's identity (eg not male=female, not white=black, not middle(-or-upper)-class=poor). Through the process of making one's identity concrete according to certain categories, the law seeks to make one's identity stable. One of the effects of categorisation is therefore to make these differences concrete rather than fluid. Thus differences become abstracted away from their context of shifting social relationships.

There are many other effects of establishing and maintaining categories of difference and identity. While one effect is to make identities static, another is to make these identities appear natural and immutable. Categories create boundaries and borders between identities. These borders are inhabited by identities which fail or refuse categorisation due to their fluidity, or other reasons.

- 
- 1 Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 169.
  - 2 Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1994) 19 *Queens Law Journal* 179 at 185. For an applied critique of the usefulness of legal categories, see Audrey Macklin, "Refugee Women and the Imperative of Categories" (1995) 17 *Human Rights Quarterly* 213.

In order to explore the practical and theoretical implications of these abstract questions, I propose to focus on an identity which disrupts the law's process of categorisation. This identity inhabits the borders of identity categories and problematises the concept of identity itself. It is transgenderism.

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".

In concrete terms, the law's categories affect the lives of transgendered people in countless ways. Due to their perceived gender non-conformity, transgendered people face harassment, violence and discrimination. In most states of the United States, and many common law jurisdictions, transgendered people are unable to marry a person of their former sex, and unable to have their psychological gender recorded on their birth certificates, even if they have been living that gender for more than twenty years and undergone expensive and painful surgery. This is because the law generally refuses to reassign categories, such as sex, once they have been assigned. Up until recently transgendered people have also been denied protection from discrimination when undergoing transition. The law refuses to recognise that discrimination does not always occur because one fits into a certain category, such as male or female, but sometimes occurs because one does not fit into any category.

Law's failure to protect transgendered people from discrimination highlights its inability to understand the complexity of social identity. It is the transgendered subject's embodiment of fluid gender that refuses to conform to the legal notion of the subject as unified, stable and coherent. This fluidity problematises and disrupts law's categorical approaches to subjectivity and identity. The law's attempt to categorise the liminal transgendered subject reveals that such categorisation is a limiting and harmful process. Thus the transgendered subject illuminates the problems in the law's impulse to categorise.

Transgenderism also disrupts and challenges the categorical impulse in those feminist narratives which seek a stable category of women. The stability of categories, in particular gender categories, is a highly contested issue in feminism. Feminisms which advocate identity politics, such as Radical feminism, conceive the category of woman as unproblematic. Radical feminists generally see this category as naturally stable and understand the stability of this category as being *the* precondition for effective political action.<sup>3</sup> These assumptions are not shared by poststructuralist feminisms. The approaches of poststructuralist feminists and some Queer theorists call into question the extent to which the category of woman is a natural or stable category.<sup>4</sup> They challenge the universality and fixity of the category of woman and argue that it is a social construct which privileges whiteness, heterosexuality and the middle class. In their view the category of woman, as well as notions of sex and gender, are concepts which shift and differ over time and between cultures. They thus dispute the foundational position given to the category of woman in emancipatory feminist politics.

This poststructuralist approach to the category of the subject has been criticised by some feminists as undermining the possibility of subjecthood.<sup>5</sup> Feminist theorists who advocate identity politics question whether poststructuralist accounts allow for female agency and subjectivity. In this thesis I examine the work of poststructuralist feminists such as Judith Butler and Katherine Franke who have been heavily influenced by Foucault. Such theorists do not understand subjectivity and agency as fixed prior to language and discourse. Instead they conceive subjectivity and agency as produced by discursive practices such as law, medicine, feminism etc. This does not mean that the material subject does not exist before language and discourse. Rather, discursive practices produce the *meaning* of the material subject.<sup>6</sup> Thus the meaning of gender and the category of woman are for example constructed according to these discursive practices. Critically, however, meaning produced by these discursive practices is structured by a process of difference between hierarchical binary oppositions, such as male/female, white/black etc. Like law's categories, these oppositions purport to be expressions

---

3 See for eg, Mary Daly, *Gyn/Ecology* (London: The Women's Press, 1979); Catherine A. MacKinnon, *Toward A Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989).

4 See for eg Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (NY: Routledge, 1990); Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (London: Free Association Books Ltd, 1991).

5 Susan Williams, "Feminist Legal Epistemologies" (1993) 8 Berkeley Women's Law Journal 63 at 89-91.

6 Chris Weedon, *Feminism, Theory and the Politics of Difference* (Oxford, Blackwell Publishers, 1999) at 107.

of the natural order. However, their meanings shift as discursive practices shift over time and between cultures.

In this way, both legal and feminist narratives come to define what is a 'real' woman or a 'real' man, as well as the range of appropriate feminine or masculine behaviour for these subjects. However, the fact that discursive practices such as the law and feminism produce the subject does not mean that the subject is no more than a passive effect of discourses. The individual can act in the world by assuming a form of subjectivity which includes the possibility of agency.<sup>7</sup> The project of many poststructuralist feminists such as Butler is to explore the conditions for such female subjectivity. Butler seeks this possibility of female agency partly through challenging the notion of the 'real' woman.

In this thesis I use the approaches of poststructuralist feminism and Queer theory to examine law's categorical modes. I employ these approaches to complicate and deconstruct these categories of the law: in order to question their status as natural and immutable. Through these approaches I explore the concrete application of categories which demonstrates the problems that inhere in the operation of categories.

The aim of this thesis is to examine the complexities of invoking categories in relation to subjectivity and identity. It aims to show how categories, such as gender categories, are risky to embrace without considering the regulatory and coercive effects that these categories import. At times, categories can be useful but those who use them for emancipatory purposes must be mindful of the baggage they carry. Thus caution is particularly advisable when using categories as the foundation for emancipatory politics.

In Chapter One I examine how the law *establishes identity categories*. Specifically I look at the relatively recent tests construed by the law to divine a person's legal sex for the purposes of marriage. Two tests, or modes of categorisation, have arisen in different jurisdictions, which enable the law to categorise a person's sex. The dominant mode of categorisation uses strictly biological criteria which verges into biological determinism. This approach deploys and emphasises a distinction between sex and gender. In family law contexts, it is an approach which allows the subject's agency to be completely subordinated to the definitional power of the law/state. These family law transgender cases demonstrate that the

---

7 *Ibid* at 104.

discourse of biological determinism is a driving force behind legal norms which construct a liberal humanist notion of the subject. This notion of the subject is constructed through the law's process of fixing and essentialising subjects into identity categories. In my view this biological approach fails to account for the complexity of social and sexual identity.

I then examine the less dominant mode which takes a dual test approach of matching anatomy and psychology. It allows the subject a degree of agency but, like the dominant mode, it also posits a general distinction between sex and gender. In my view, this approach is preferable to the dominant mode as it takes into account more salient factors of identity.

The delineation of the two main modes of categorizing sex and their understandings of sex and gender leads to a consideration of the sex/gender debate. Whether sex and gender should be understood as distinct categories is a point of contention in feminism. To conflate gender with sex is to invest in the view that social and cultural gender characteristics are determined by biological sex. But to understand sex and gender as distinct is to accept the assumption that the meaning of biological sex can be accessed as beyond or before cultural meaning. In exploring this debate I examine the meaning and power of these categories and what significance they have for transgendered people and feminisms.

I conclude Chapter One by arguing that the law ought to consider a third test for sex, based on the subject's psychology and self-identification. In my view this approach avoids the pitfalls of biological determinism as well as the problem of encouraging the surgical mutilation of transgendered bodies which results from the less dominant dual test approach of anatomy and psychology. While my approach arguably suffers from the same simplification of complex identity as the two main approaches, it has the advantage of allowing the subject a greater degree of agency.

Chapter Two traces and analyses the *mechanisms the law employs to maintain and enforce the boundaries of these identity categories* it creates. These mechanisms are the dichotomies it establishes, reiterates and superimposes on its subjects, between reality and fantasy, natural and artificial, and real and false. The process of superimposing these dichotomies on subjects is evident on a closer examination of the transgendered cases introduced in Chapter One, as well as cases dealing with applications to change sex status

details on identification documents. In my view these dichotomies are employed to ensure the stability of the categories of man and woman in which these legal narratives invest.

I then demonstrate that various strands of feminism have also invested in these same dichotomies in the name of ‘safeguarding’ the category of woman. Specifically, these strands of feminisms believe that the category of women ought to be guarded from the intrusion of transgendered women whom they depict as threatening the borders of feminism. This view of transgenderism as a threat to feminism is contrasted with the poststructuralist feminist celebration of the potentialities of transgenderism’s liminal identity position. Poststructuralist feminists such as Butler point to transgenderism’s potential to disrupt law’s categories and its ability to highlight law’s modes of categorisation. Poststructuralist feminism sees danger inhering in the identity category of woman, rather than threatening the category itself. I then discuss the responses to this poststructuralist celebration of transgenderism that assert that it constitutes a romanticisation which has the effect of minimising the reality of those living these differences on the borders. This leads to a consideration of the usefulness of categories to gender politics.

I conclude Chapter Two by considering the implications of contesting in court the position of transgendered women in the women’s community. Specifically I analyse the submissions made before the British Columbia Human Rights Tribunal in the *Vancouver Rape Relief Society Case* where a transgendered woman is arguing that she suffered discrimination when she was denied participation as a volunteer rape counsellor in the Rape Relief Society, which is a ‘women only’ organisation.

In Chapter Three I chart the *use of law’s categories by transgender claimants* in the United States, the European Community and Canada. These claimants seek equality and emancipation through *anti-discrimination law*. I compare the different approaches to anti-discrimination law in these jurisdictions. I argue that before embracing any approach, it is important to consider the operation of anti-discrimination law in relation to identities. I examine the position of Butler who cautions that anti-discrimination law in particular operates to enforce and entrench gender norms and categorical stereotypes as natural and biological. This means for example that masculinity becomes naturalised as the ‘truth’ of male subjectivity and femininity becomes naturalised as the ‘truth’ of female subjectivity. I compare this position with that of Robert Post who contends that anti-discrimination law can be used to disrupt and

transform the contents of these identity categories. I argue that this assertion is overly idealistic and that there is a potential danger in using this strategy. Transgender cases demonstrate that this danger lies in the very nature of the law's process of categorisation which demands that subjects simplify their social identity, and does not allow these categories to be revised once established.

In my view the examination of transgender cases in the areas of family law, administrative law and anti-discrimination law is illuminating in that it demonstrates how transgender subjects undermine the fixity of the sex binary categories. Transgendered subjects are critical to the poststructuralist goal of heterogeneity in that, in their multiple nonconformist manifestations of gender, they subvert and challenge the law's homogenising tendencies.

## CHAPTER ONE

### AND WHAT IS SEX ANYWAY?: NARRATIVES OF SEX, GENDER, IDENTITY AND THE LAW

One is not born a woman, but rather one becomes one.

Simone de Beauvoir, *The Second Sex*

Once a man, always a man

Hardberger CJ, Texas Court of Appeals,  
*Littleton v Prange*

#### 1.1. INTRODUCTION

Beauvoir's well known phrase represents the later twentieth century's attempt to understand sex, gender and identity. How do we understand sex and how should we determine it? Should it be determined according to biology? According to anatomy? According to psychology? A combination of these factors, or other factors? Is it fixed at birth or is it something over which some agency can be exercised? What is the role of sex in society and in the operation of the law? Has sex had the same meaning throughout history? Or has the meaning of sex changed over time in relation to different political and cultural paradigms? What does it mean to be categorised as of the male sex or of the female sex? What is the relation between sex and gender?

There are two main views of sex: The first, the dominant approach, is the biological determinist view that biology is destiny and that its meaning is universal. This view is exemplified by the above quotation of Chief Justice Hardberger of the Texas Court of Appeals. The second is the social constructionist view of sex, which challenges biological determinist notion of sex as apolitical and ahistorical. Which view of sex (and gender) is the prevailing and driving force in the law? What are law's responses to the above questions? How does law establish and use categories to determine a person's sex?

The aim of this chapter is to show how law establishes and uses identity categories. The following outline of transsexual cases shows how, from the 1970s onwards, legal narratives established two modes of categorising complex social identity in relation to sex and gender. These narratives responded to complex identity questions by attempting to simplify identity by limiting it to biological or anatomical and psychological factors. Feminisms, too, have attempted to grapple with the same questions, often opting for the same simple solutions to

understanding gender, sex and identity. However, I aim to show that feminist theory can produce a more sophisticated account of gender, sex and identity, which leads to a more progressive means of determining sex.

I begin this chapter by outlining the two main views of sex. I then identify and examine the two main legal narratives which have established modes of categorising a person's sex for the purposes of marriage. The first *legal* narrative categorises sex according to strictly biological factors; the second legal narrative categorises sex according to the conformity of anatomical and psychological factors. I argue that the first legal narrative currently enjoys a dominant position in courts in common law jurisdictions particularly when it comes to the question of what the law sanctions in relation to sexed bodies – specifically transsexuals in the areas of family law and criminal law. This biological narrative enjoys dominance despite widespread criticism of the rigidity of its categorising approach. The second, less dominant, legal narrative is identifiable in a more recent stream of cases, which, in my view, consider the relevant issues more broadly. This approach comes under criticism for its emphasis on anatomy, which arguably has the effect of sanctioning the surgical mutilation of transgender bodies.

After outlining the two main categorising narratives and their weaknesses, I will consider the possibility of a third narrative which categorises sex by giving primacy to behaviour and psychology. Thus far there appears to be no court which is prepared to uphold such a narrative. This is despite widely accepted psychological evidence in the area of transsexuality that psychology is generally less mutable than anatomy.<sup>8</sup> This is perhaps due to law's traditional view of biology as immutable in contrast to psychology, which is viewed as less reliable and less stable. Unlike psychology, biology is projected by both approaches, to differing degrees, as a stable body of knowledge which exists outside cultural discourse. In examining the two legal narratives, and the possibility of a third, I trace the tension evident in the law's desire to establish stable categories of social and sexual identity (either through biology or anatomy). The law desires this stability in the face of the fluidity of gender (literally embodied in transgender subjects) which refuses traditional modes of categorisation. This

---

8 See for example the report of Jaap Doek: "Literature and research indicate that the prevailing opinion among professionals working with transsexuals is that a person's gender identity cannot be changed because this identity has been definitively formed during the early years (between 2-4 years of age)": *Transsexualism, Medicine and Law – Proceedings of the Twenty-Third Colloquy on European Law* (The Netherlands: Council of Europe Publishing, 1995) 203 at 210

tension demonstrates the falsity of law's projection of the legal subject as stable, unified and capable of categorisation.

In the second part of this chapter I demonstrate that despite the different approaches of the two legal narratives, they share a similar underlying conception of sex and gender in their modes of categorising identity. I then argue that the cases evidence that both the categories of sex and gender are culturally constructed and historically specific. Furthermore, I contend that the sex/gender distinction is indeterminate and has the potential to lead to the problems of essentialism and ultimately, biological determinism. To elaborate this argument I discuss varying feminist conceptions of the sex/gender distinction and their implications. In my view a poststructuralist understanding of sex and gender has positive implications for the legal question of sex and identity for transsexuals.

### 1.1.1 Biological Determinist view of sex

The dominant view of sex is the discourse of biological determinism. Generally it posits that sex is biological, and gender is an effect of sex. In other words, social norms are, or ought to be, grounded on biological facts. No amount of social change will alter the fundamental biological nature of human beings. This is because biology is understood as a relatively fixed and unchanging given. This theory extends to the belief that biological facts express themselves in the social roles prevalent in their own society.<sup>9</sup> This means that gender roles – behaviour and self-identity – are understood as products of underlying biology.

Since the eighteenth century, these ideas were used as a tool to fix women's social roles in the private sphere as natural, universal and essential. In the nineteenth century scientific narratives posited that intellectual, emotional, and sexual qualities could be ascribed to persons according to their biology. For example, medical narratives exhorted women not to engage in higher education study, as the exertion would irreparably damage women's menstrual and reproductive systems.<sup>10</sup> Any such change in social roles would lead, it was argued, to a

---

9 See for a contemporary example the discourses of the gene. According to Nelkin and Lindee, these discourses "conform to and complement existing beliefs about identity, family, gender and race": *The DNA Mystique: The Gene as Icon* (New York: Freeman, 1995) p197.

10 Carroll Smith-Rosenberg,, "The Hysterical Woman: Sex Roles and Role Conflict in Nineteenth Century America" (1972) 39 *Social Research* 652.

disastrous incapacity to reproduce which would spell disaster for the entire race.<sup>11</sup> Such biological determinist arguments happened to reach their peak just as women increasingly began to fight for change and for a role in the public sphere. But biological arguments have been used both against and in support of women's liberation: social theories have looked to biological science for proof of women's 'natural' inferiority, superiority or, most often in the late twentieth century, women's equality in difference.<sup>12</sup> A contemporary example is the assertion of biological differences by Cultural feminists in the 1970s. Conservative groups subsequently harnessed these assertions in order to justify their employment policies which discriminated against women on 'biological' grounds.<sup>13</sup> What is shared by these arguments is the central and unquestioned position of biology as the harbour and root of both the 'natural' and social norms.

### 1.1.2 Social constructionist view of sex

A social constructionist view of sex basically posits that the meaning of sex is historically and politically specific. Its meaning shifts across time and cultures according to particular political impulses. It therefore has no universal or ahistorical meaning.

One version of this theory is articulated by Thomas Laqueur who claims that sex as we know it today was invented sometime in the eighteenth century.<sup>14</sup> Perhaps it was the rise of the social contract state that caused women's sexual *difference* to become accentuated in political discourse. Rousseau for example stated: "The male is only male now and again, the woman is always a female ... everything reminds her of her sex".<sup>15</sup> Laqueur points out that at this time, anatomical differences between men and women were suddenly given fresh political significance, presumably to justify women's exclusion from the public sphere of the social contract state.

According to Laqueur, until this time of political re-ordering, a hierarchical model of the body had held sway which was represented as the "one sexed" body. The male anatomy had been projected as *the body model* and all other bodies were interpreted on a hierarchical plane as

---

11 Toril Moi, *What is a Woman? And Other Essays* (Oxford: Oxford University Press, 2000) 369-370 (hereinafter, Moi).

12 Chris Weedon, *Feminist Practice and Poststructuralist Theory* (London: Blackwell, 2nd ed 1996) at 128.

13 *EEOC v Sears, Roebuck and Co* 628 F Supp 1264 (ND Ill. 1986).

14 *Making Sex: Body and Gender from the Greeks to Freud* (Cambridge, Mass: Harvard University Press, 1990); T. Laqueur & L. Gallagher, eds. *The Making of the Modern Body: Sexuality and Society in the Nineteenth Century* (Berkeley: University of California Press, 1987).

15 Jean Jacques Rousseau, *Emile* (London: Dent & Sons, 1972) at 324.

its inferior versions.<sup>16</sup> The ‘inferior’ female anatomy, for example, was thought to be an inverted version of the perfect male anatomy as her reproductive organs were interpreted as underdeveloped and inverted versions of the male genital organs. Thus, at this time, women’s anatomy was not seen as inherently different from men’s. The new anatomical ‘discoveries’ of the eighteenth century (which were ostensibly sparked by examinations of the female skeleton which found that women had weaker and different frames) led to the theory that women were not only anatomically inferior but they were also opposite and complementarily different. Anatomically the sexes were seen as asymmetrical and thus they were asserted to belong to opposite spheres – private and public.

Thus, according to the social constructionist theory, biology became historically portrayed and understood in knowledges as being determinative of one’s destiny. This view of the relationship between biology and sex, called biological determinism, proceeded to assert itself as the natural and only possible view of sex. This was despite the fact that it was only in the nineteenth century that it became congealed by a panoply of scientific discourses, such as evolutionism, into a discourse of itself.

But where does the concept of ‘gender’ fit into the social constructionist view of sex? I will return to this question once I have identified and discussed the two main legal narratives which directly address the question ‘what is sex’.

## 1.2. ‘WHAT IS SEX?’ – LEGAL NARRATIVE NO.1

### 1.2.1 The United Kingdom

The first legal narrative to establish a legal mode of categorising a person’s sex for the purposes of marriage law was the English case of *Corbett v Corbett* (1970).<sup>17</sup> This mode of categorising sex became *the* common law definition. The basic issue was the status of the marriage between the petitioner, Arthur Corbett, and the respondent, April Ashley, a post-operative male-to female (“MTF”) transsexual. The Court was aided by the expert opinions of nine doctors as to Ashley’s sex, as well as the testimony of Ashley herself. These conflicting

---

16 For example, Aristotle asserted that “as between male and female, the former is by nature superior and ruler, the latter is inferior and subject”: Aristotle, *Politics*, trans. Sinclair (Harmondsworth: Penguin, 1962) 33.

17 [1971] P 83.

opinions were fairly general in nature, addressing the question of what is sex in relation to a male-to-female transsexual generally. Four factors were identified by these doctors in common as integral to sex (although the weight of each factor was a point of contention): chromosomes, genitals, gonads and psychology. Ormrod J used these general medical opinions to determine sex strictly for the purposes of the heterosexual institution of marriage (and “for no other purpose”). He rejected the respondent’s submission that her sex for the purposes of national insurance, and other forms of social legal identity, should have any bearing on the determination of her sex for the purposes of marriage. To Ormrod J, there were “fundamental” differences between marriage and national insurance identity.<sup>18</sup> In his view there is no illogicality in one person being legally classified as two different sexes for different legal purposes. This is because, in his view, there is something unique about marriage. He stated: “Marriage is a relationship which depends on sex and not on gender”.<sup>19</sup>

Ormrod J decided that sex is a biological matter: it is determined at birth if a person’s chromosomes, gonads and genitals are congruent. A person’s psychological view of their identity is one related to gender and not sex. While sex relates to one’s genitals, it is only the genitals one is born with. The removal of a person’s genitals and reconstruction of other genitals affects their gender, but not their sex. For this reason Ormrod J saw the term “sex change” as “redundant” because it is impossible to change one’s sex.<sup>20</sup> In addition, he asserted that the word ‘assign’ is “apt to mislead since, in fact, it means no more than that the doctors decide the gender, rather than the sex, in which such patients can best be managed and advise accordingly.”<sup>21</sup> Gender in his view is not biological: it is psychological and social. Thus Ormrod J explained the significance of sex, not gender, to marriage:

... sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for *natural* heterosexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex.<sup>22</sup>

---

18 *Ibid* at 107.

19 *Ibid*.

20 *Ibid* at 104.

21 *Ibid*.

22 *Ibid* at 105-106; emphasis added.

So sex, according to Ormrod J, is “an essential determinant” of marriage because marriage critically involves the capacity for “natural” heterosexual intercourse. What is *unnatural* heterosexual intercourse? Presumably Ormrod J uses the adjective “natural” to counter the evidence given by the Court’s medical inspectors’ that there is “no impediment on ‘her part’ [April’s] to sexual intercourse.”<sup>23</sup> As Ashley no longer has a penis, the reference to “her part” must be to a female sex role which means that she would be capable of heterosexual intercourse. But according to Ormrod J’s biological test, this would not be “natural” heterosexual intercourse because Ashley was not born with the relevant ‘natural’ body parts and therefore cannot be considered a woman. Sexual intercourse between the Corbetts would thus constitute “natural” *homosexual* intercourse in Ormrod J’s view (although it is debateable whether he would consider such intercourse to be ‘natural’).<sup>24</sup>

The issue of whether the Corbetts’ marriage was consummated was a contested one. Ormrod J rejected Ashley’s evidence that consummation took place and instead accepted the petitioner’s evidence that no consummation occurred. He went on to say that in any event, he would be prepared to hold that April was physically incapable of consummating a marriage because sexual intercourse in the “true sense” was not possible given Ashley’s “completely artificial cavity”.<sup>25</sup> This ruling appears to directly contradict the medical evidence of the Court’s medical inspectors.

In my view, the following quotation from the judgment implicitly explains Ormrod J’s view as to what is ‘natural heterosexual intercourse’ and why purely biological sex is an essential criteria of marriage. He stated:

Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and

---

23 *Ibid* at 96.

24 See Andrew Sharpe, “Transgender Jurisprudence and the Spectre of Homosexuality” (2000) 14 Australian Feminist Law Journal 23. Sharpe interprets “natural heterosexual intercourse” as referring to Ashley’s (in)capacity for heterosexual sex given that Ormrod J characterises Ashley and Corbett’s relationship as a same sex relationship and thus not as a natural heterosexual relationship. He draws attention to the following words of Ormrod J: “The mischief is that by over-refining and over-defining the limits of “normal” one may, in the end, produce a situation in which consummation may come to mean something altogether different from normal sexual intercourse.” (*ibid* at 108). In my view, this interpretation is persuasive but fails to explain Ormrod J’s statement regarding the “essential role of a woman in marriage”. See below.

25 *Ibid* at 107.

male genitalia cannot reproduce a person who is *naturally* capable of performing the essential role of a woman in marriage.<sup>26</sup>

Ormrod J does not make clear what is “the essential role of a woman in marriage” but he implies, without quite spelling out, that sex and marriage are about procreation. This explains why, in his view, ‘natural’ sex is essential. ‘Unnatural’ heterosexual sex is “unnatural” because in his view it does not hold the potential for procreation. Here we see the centrality of procreation in the meaning of sex which is a view consistent with the discourse of biological determinism.

In the United Kingdom, the *Corbett* approach has also been extended into English criminal law, almost as if the test were uncontroversial.<sup>27</sup> It currently retains ascendancy, as indicated by the Court of Appeal decisions in *ST (formerly J) v J*<sup>28</sup> and *Bellinger v Bellinger*.<sup>29</sup> In the very recent case of *Bellinger*, the Court of Appeal considered a petition for a declaration that the marriage celebrated between the post-operative MTF transsexual appellant and her husband was valid. Here the Court considered current medical views of transsexuality to assess whether the *Corbett* approach was still appropriate in determining the gender of a person after the initial assignment at birth.<sup>30</sup> The majority held that the evidence demonstrated “the

26 *Ibid* at 106; emphasis added.

27 See *R v Tan* [1983] QB 1053 where the Court decided to extend *Corbett*'s application because "common sense and the desirability of certainty and consistency demand" it so (*ibid* at 1064). In this case, Gloria Greaves, a post-operative MTF transsexual, appealed her conviction of living on the earnings of prostitution and her husband's conviction of living on the earnings of the prostitution of another man, on the ground that she was a woman. Although Greaves had been living as a woman for eighteen years and had undergone a sex change operation, the court deemed her to be a man for the purposes of the *Sexual Offences Act* 1967. The Court dismissed her appeal and applied the *Corbett* test “without hesitation” (*ibid* at 1064). In the Court's view, consistency was desirable. Ironically, this need for consistency was not considered to be desirable by Ormrod J in the case of *Corbett*. Critically, the Court in *Tan* made no attempt to demonstrate any similarities between family law and criminal law or to show that sex was an ‘essential determinant’ of the relevant crime or of criminal law in general. Furthermore, it did not consider the inconsistency between Greaves’ national insurance identity and her identity for the purposes of the criminal law to be a problem. It appears that no argument was submitted as to an alternative definition of sex and that the submissions were limited to whether the *Corbett* test should apply in criminal law. This it appears that the *Corbett* test was considered by the Courts and counsel alike as uncontroversial.

28 [1998] Fam 103. In this case a pre-operative FTM transsexual defendant sought ancillary relief after his marriage with the plaintiff was declared void by reason that the defendant was not male at the time of the ceremony. The plaintiff challenged the defendant's claim for relief on the ground that it was against public policy as the defendant had committed perjury at the marriage ceremony by declaring he was a bachelor. The defendant failed to inform the plaintiff of his birth sex before or during their eighteen year marriage. The Court held that a claim for ancillary relief should be considered on its merits. The Court found that the defendant failed in his claim.

29 [2001] EWCA Civ 1140 (July 17, 2001).

30 The majority held that the *Corbett* test was the only basis upon which to decide upon the gender of a child at birth. They were more equivocal as to whether the assignment made at birth is immutable given the medical evidence of the possibility that transsexualism is a medical condition with a biological basis by reason of sexual differentiation of the brain after birth. However, the majority decided that such findings

enormously increased recognition of .. the psychological factors” in current assessments of transsexuality.<sup>31</sup> However, it decided that it was for Parliament and not the Court to recognise such social and medical changes. In the view of the majority this was appropriate given the special position of marriage in society: “[it] is a matter of status .. It affects society and is a question of public policy. .. Status is not conferred only by a person upon himself; it has to be recognised by society.”<sup>32</sup> For a court to decide such public policy questions would be an “imposition” on the public.<sup>33</sup> The *Corbett* test was thus applied, with the result that the appellant’s twenty year marriage was declared invalid.

The extension of the *Corbett* test to intersex persons was, however, recently rejected in *W v W*.<sup>34</sup> Here the Family Division Court was asked to determine whether an intersex respondent was male or female at the date of marriage on a petition for nullity by the petitioner. Charles J held that the case did not concern a transsexual and therefore the *Corbett* test was not appropriate.

## 2.2 The European Community

The *Corbett* approach to sex was unquestioningly accepted by the European Court of Human Rights in the cases of *Rees v The UK*,<sup>35</sup> *Cossey v The UK*,<sup>36</sup> *Sheffield and Horsham v*

---

were “at such an early state that .. a court could not accept them as clear indications” (*ibid* at para 55). Thorpe LJ dissented, finding that the evidence was sufficient for the *Corbett* approach to be rejected.

31 *Ibid* at para 98.

32 *Ibid* at para 99.

33 *Ibid* at para 104. The Court held that if the post-operative gender of transsexuals were recognised, then the preconditions of recognition would be questions of public policy that a court could not decide. This contrasts with the *MT v JT* approach. See *infra* note 71.

The Court decided to leave these matters to Parliament despite the Government’s failure to act on the Report of the Inter-Departmental Working Group on Transsexual People and its “failure to recognise the increasing concerns and changing attitudes across Western Europe” (*ibid* at para 96).

34 [2001] Fam 111. In this case Charles J distinguished ‘inter-sex’ persons from transsexuals, a distinction also advocated by Ormrod J in *Corbett*. Charles J described the former as suffering partial androgen sensitivity which is caused by mutations of the androgen receptors so that the male body is unable to ‘see’ testosterone. In this case the respondent had male chromosomes, ambiguous gonadal sex, ambiguous external genital appearance, no female internal sex organs, female body habitus (eg little body hair) and female gender identity (*ibid* at 683-684).

35 (1986) 8 EHRR 56, Series A No 106. See also *Van Oosterwijck v Belgium* (1980) Series A No 4 which is the earliest case before the European Commission of Human Rights. Here a post-operative FTM transsexual brought a case against the Government of Belgium for its refusal to alter her birth certificate to reflect her altered sex. The matter was not heard by the European Court of Human Rights due to the claimant’s failure to exhaust local remedies.

36 (1990) 3 EHRR 622, Series A No 184. This case was chronologically followed by *B v France* [1992] 2 FLR 249, Series A No 232 where a post-surgical MTF transsexual successfully complained under Article 8 of the Convention that the French Court’s refusal to order the rectification of her birth certificate or to

*The UK*,<sup>37</sup> and *X, Y and Z v The UK*.<sup>38</sup> In the first three cases the transsexual applicants were arguing that the United Kingdom had violated Articles 8 and 12 of the *European Convention on 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 identity 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* approach which refused to recognise their post-operative identity. In *X, Y and Z v the UK*, 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.

In *Rees* and *Cossey* the majority of the Courts read Article 12 of the Convention, "Men and women of marriageable age have the right to marry and found a family..", as referring to marriage between persons of the opposite sex, and unquestioningly assumed that "sex" meant biological sex.<sup>39</sup> The Court in *Cossey*, for example, said that "the [biological] criteria adopted by English law" was "in conformity with the concept of marriage to which the right guaranteed by Article 12 refers".<sup>40</sup> It continued: ".. attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of the biological criteria for determining a person's sex for the purposes of marriage".<sup>41</sup> The assumption that sex denotes only biological sex was integral to the majority's interpretation of Article 12 in *Cossey* as being about protection of marriage as the basis of the family. From this it was assumed by some judges that Article 12 encompassed the physical capacity to procreate. This assumption was articulated by

---

allow her to have a female forename violated her right to respect for privacy. The decision appears to have turned on particularities of the French civil registration system.

37 (1998) 27 EHRR 163.

38 22 April 1997, Reports of Judgments and Decisions 1997-II.

39 *Rees* (1986) 8 EHRR 56 at para 49; *Cossey* (1990) 3 EHRR 622 at paras 45-46.

40 *Ibid* at paras 45-46.

41 *Ibid*.

some of the Commission judges in *Rees* and described as the ‘obvious intention’ and “social purpose” of Article 12.<sup>42</sup>

### 1.2.3 Common Law Countries

The *Corbett* narrative is the dominant approach in most common law countries, particularly in the area of marriage law. It was followed in South Africa in the case of *W v W*<sup>43</sup> where the MTF transsexual plaintiff filed for divorce on the grounds of adultery, causing the validity of her marriage to the defendant to come under question. Unlike in *Corbett*, it was an uncontested fact that the marriage had been successfully consummated. The plaintiff contended unsuccessfully that the marriage was valid given that she had had her birth certificate altered to reflect her post-surgical sex, and the fact that the marriage had been consummated. In this respect the Court accepted that “the parties had normal sexual relations”.<sup>44</sup> But it further stated, “[t]he breakdown of the marriage was not due to any inadequacy as a woman on the part of the plaintiff. She is not able to bear children.”<sup>45</sup> In my view, these last two sentences are telling. On the one hand, they explicitly state that the plaintiff was at no fault while, on the other hand, they imply that her inability to procreate as a woman is somehow significant to the question of her legal sex status.

In this case the Court applied the same biological criteria as in *Corbett* but without any direct medical evidence and with minimal examination of the issues. The Court acknowledged that the wife had breasts and a “vagina-like cavity”, she looked like a woman, was accepted in society as a woman, and was capable of having sex with a male “( .. despite her inability to procreate)”.<sup>46</sup> It recognised that psychologically the plaintiff regarded herself as a woman and yet it concluded that there was “no evidence (nor, one imagines, could there be) to justify a finding that merely on this basis the plaintiff was a woman”.<sup>47</sup> Thus the Court held that the plaintiff was a man and the marriage was void.

---

42 *Rees* (1986) 8 EHRR 56 at para 28. Of course, if in fact the right to marry in Article 12 is intended to be about procreation (which is spurious in my view), then this explains the significance of a biological interpretation of sex. But such an assumption is never explicitly stated in *Corbett*.

43 [1976] 2 SALR 308.

44 *Ibid* at 310.

45 *Ibid*.

46 *Ibid* at 313.

47 *Ibid* at 312.

In its reasons the Court failed to explain the significance or role of the biological criteria of gonads, genitals and chromosomes in the institution of marriage. Clearly they do not affect “normal sexual relations” between the parties. The Court never explicitly stated that these biological criteria were necessary for the purposes of procreation, nor that procreation was an essential part of marriage. But it is arguably the only explanation for the Court’s use of such limited criteria in circumstances where consummation and “normal sexual relations” took place.

In Australia the *Corbett* approach was adopted in the area of family law in the case of *The Marriage of C & D*.<sup>48</sup> In a strict sense this case did not concern transsexualism. The respondent husband was a hermaphrodite/intersex who had been born with the sexual organs of both sexes, had female hormones, and had undergone operations to alter his external sex organs to become a male. In her application for a declaration of nullity, the wife asserted that the husband was unable to consummate the marriage. Ostensibly applying *Corbett*, the Court declared that as the husband was “neither man nor woman but a combination of both” he was incapable of entering a valid marriage.<sup>49</sup> Some argue that *Corbett* was misapplied in this case as the respondent’s genitals, gonads and chromosomes were not in fact congruent at birth.<sup>50</sup>

In New Zealand the *Corbett* approach appears to have been initially followed. In *Re T*<sup>51</sup> the Court refused the application of a MTF transsexual applicant for an order to change the registration of her birth details. Although this was not a family law case, the Supreme Court here examined the applicant’s breasts and vagina and the fact that she was “capable of playing the part of a female in sexual intercourse”.<sup>52</sup> It stated:

The texture of the applicant’s skin, the width of the hips, the pitch and timbre of the voice, movements, gestures and gait and his total psychological outlook are female. Reputable medical practitioners from a variety of specialities are of the view that the applicant can be regarded as female in all respects except his genetic sex and his lack of uterus and ovaries.<sup>53</sup>

---

48 (1979) 35 FLR 340.

49 *Ibid* at 345.

50 Bailey-Harris argues that the test was misapplied in this case as the *Corbett* test stipulates that the three criteria must be congruent at birth which was not the case with the respondent who was born with two sets of genitals: Bailey-Harris, “Family Law - Decree of Nullity of Marriage of True hermaphrodite Who Has Undergone Sex-Change Surgery” (1979) 53 Australian Law Journal 659.

51 (1975) 2 NZLR 449. But see discussion below of the present approach in New Zealand, as held in *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603.

52 *Ibid* at 450

53 *Ibid*.

Despite this detailed (and invasive) analysis, the Court failed to explain the significance of this “lack”. Why are the uterus and ovaries (ie. gonads) important in the determination of sex? What role do they play? Why is genetic sex so critical to the determination of sex? Instead the Court stated that it had no jurisdiction to entertain the proceedings and that there was no statute which could be invoked by the applicant. The Court concluded by saying that it is for the Legislature “to say whether genuine transsexuals .. should be given the opportunity .. to obtain legal recognition of a state which reflects both their own inborn psychological make-up and the medical and surgical changes which they have undergone to make that state more certain.”<sup>54</sup> In other words, the Court viewed the biological approach to sex as the natural and uncontentious approach that could only be changed by parliament. But no justification or authority, apart from *Corbett*, was given for taking this approach.

#### 1.2.4 The United States

In the United States the 1971 case of *Anonymous v Anonymous*<sup>55</sup> followed the same biological approach but did not refer to the *Corbett* decision. In this case the plaintiff sought a declaration as to his marital status with the defendant who was a pre-operative MTF transsexual at the time of the marriage ceremony. The marriage lasted less than two days before the plaintiff deserted the defendant upon discovering her biological sex. There was no issue as to whether the marriage had been consummated. Here the Court did not hear any evidence from medical witnesses, or even from the defendant herself, as to her sex. The Court found that “as a fact” the defendant was not a female at the time of the ceremony. It gave no test for the determination of sex but quoted the following passage from a case in relation to marriage:

The mere fact that the law provides that physical incapacity for sexual relationship shall be ground for annulling a marriage is of itself *sufficient indication of the public policy that such relationship shall exist with the result and for the purpose of begetting offspring.*<sup>56</sup>

Here a court finally made explicit that what lies behind the requirement for physical capacity for heterosexual intercourse in marriage and, moreover, what lies implicit in the biological view of sex is *procreation*.

---

54 *Ibid* at 453.

55 325 NYS 2d 499 (1971).

56 *Ibid* at 500; emphasis added. Quoting from *Mirizio v Mirizio* 242 NY 74 at 81.

The 1974 case of *B v B*<sup>57</sup> evidences even greater influence of the biological approach. In this case the applicant wife sought an annulment of her marriage with the defendant on the ground that he was female. For this purpose she sought to have her husband physically examined by the court. The Court held that the marriage was invalid as the post-operative FTM transsexual husband had no male sexual organs. The Court reasoned thus:

Assuming, as urged, that defendant was a male entrapped in the body of a female, the record does not show that the entrapped male successfully escaped to enable the *defendant to perform male functions in a marriage*. ... defendant cannot function as a husband by assuming male duties and obligations inherent in the marriage relationship. ... Apparently, hormone treatments and surgery have not succeeded in supplying the necessary apparatus to enable defendant to *function as a man for purposes of procreation*.<sup>58</sup>

From this quotation it appears that the defendant's failure is not only that he has no penis for "normal" heterosexual intercourse but also his related failure to be able to procreate. From this it appears that sex is determined according to the requirement for heterosexual intercourse and also the requirement for procreation.

The biological approach has most recently been followed in the US by the Texas Court of Appeals in *Littleton v Prange*.<sup>59</sup> In this case, Christie Littleton, a MTF transsexual sued a doctor for medical malpractice, which resulted in the death of her husband. She sued in the capacity of his surviving spouse. The doctor filed a motion for summary judgment, challenging Christie's status, asserting that Christie was a man, and that a biological man cannot be the surviving spouse of another man. Christie had been married to the deceased for seven years and had also amended her birth certificate to reflect her reassigned sex.<sup>60</sup> At the outset Hardberger CJ, writing the majority decision,<sup>61</sup> phrased the legal question as: "can a physician change the gender of a person with a scalpel, drugs and counselling, or is a person's gender immutably fixed by our Creator at birth?"<sup>62</sup> He then approached the issue as a question of whether there can be a valid marriage between a man and a person born as a man, but who has the physical characteristics of a woman through surgery. Hardberger CJ proceeded to examine the

---

57 355 NYS 2d 712 (1974)

58 *Ibid* at 717; emphasis added.

59 9 SW 3d 223 (Tex App 1999).

60 Note that this amendment was made when litigation was proceeding. See *infra* note 70.

61 Justice Karen Angelini wrote a concurring opinion. See the dissent of Justice Alam Lopez. In her view a transsexual's self-identify can be a criteria in the determination of sex. She held that a fact-finder should determine whether a transsexual's sex is reflected by their original or amended birth certificate.

62 9 SW 3d 223 (Tex App 1999) at 224.

preponderance of same sex marriage laws, and “public antipathy” towards such marriages, before addressing the question of whether Christie was a man or woman. In addressing this question, which in my view should have been the primary question given its complexity, he briefly noted the fact that Christie’s “self-identity”, her “outward physical characteristics”, her appearance and her psychological view all pointed to her being a woman. In drawing his conclusions later on, Hardberger CJ considered other factors, giving more weight to the fact that sex reassignment surgery “does not create the internal sexual organs of a woman”, such as those used for procreation, and the fact that Christie was still chromosomally male: “Biologically a post-operative female transsexual is still a male”.<sup>63</sup> He also discussed a handful of cases, including *Anonymous v Anonymous* and *Corbett*, concluding from the latter that “once a man, always a man”.<sup>64</sup>

Hardberger CJ stated that there were no legislative guidelines addressing the question of whether the legislature intended to recognise transsexuals as surviving spouses under the relevant statute.<sup>65</sup> He concluded that in these circumstances the Court could not act. Hardberger CJ stated: “this court has no authority to fashion a new law on transsexuals .. We cannot make law when no law exists: we can only interpret the written word of our sister branch of government, the legislature.”<sup>66</sup> He went on to note that there were “many fine metaphysical arguments” but

courts are wise not to wander too far into the misty fields of sociological philosophy. Matters of the heart do not always fit neatly within the narrowly defined perimeters of statutes, or even existing social mores. Such matters though are beyond this court’s consideration. Our mandate is .. to interpret the statutes of the state and prior judicial decisions.<sup>67</sup>

Hardberger CJ then stated that Christie was “created and born a male. .. There are some things we cannot will into being. They just are.”<sup>68</sup> He effectively held that the biological approach was the only possible, natural and appropriate approach in the absence of legislative guidance.<sup>69</sup>

---

63 *Ibid* at 230.

64 *Ibid* at 227.

65 Part of the question was whether there were any guidelines which would enable a jury, as a fact-finder, to determine the legality of a marriage such as that of Christie. It held that a jury could not make such a determination in the absence of legislative guidelines.

66 *Ibid* at 230.

67 *Ibid* at 231.

68 *Ibid* at 231.

69 This effectively means that gay and lesbian transsexuals can marry their partners. There are reports that lesbian couples (involving a post-operative transsexual) have already married in a number of states: see

It appears that neither medicine nor law (through the birth certificate amendment provisions) could change the work of “our Creator”.

Thus Christie lost her suit, as well as her legal status as a widow and woman despite her amended birth certificate.<sup>70</sup> In this case the Court clearly refused to address the complexity of Christie’s social identity. While it could have turned to other disciplines such as science and medicine for assistance, it instead looked for a simple solution, searching for it in the (non-existent) intentions of the legislature and even the intentions of “our Creator”. The Court refused to accept that social identity may be a fluid concept. Its view reiterates the rigidity of *Corbett*: “once a man, always a man”. But it is evident from the above quotation that the Court at least subconsciously recognised the limitations of its own approach of searching for a solution in “the narrowly defined perimeters of statutes”.

In my view the *Corbett* approach can be described as a biological determinist approach to the question of sex and gender in its acceptance of the notion that destiny is determined by biology and in its refusal to recognise the social and psychological aspects of sex as being material to the determination to sex. It is evident in the above cases that under this approach, sex is defined as biological sex and hence it is fixed and immutable. Marriage is understood as being about the ability to procreate and the ability to achieve penetrative heterosexual intercourse. The approach allows no room for agency in relation to the category of sex.

Critically, the above decisions fail to analyse or articulate why a biological interpretation of sex is necessary in either family law or criminal law. If the ability to procreate were a requirement for both contracting parties to a marriage, then a biological test would understandably be necessary. But such is not the law in any common law jurisdiction discussed above. Furthermore, the biological test does not in fact establish that a person has the capacity to procreate – a person may be biologically a woman (ie. have a uterus, ovaries, female chromosomes, a vagina etc) and yet still be unable to procreate. These cases form part of a

---

Taylor Flynn, “*Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*” (2001) 101 Columbia LR 392 at 418. Ironically, the prevention of same sex marriages was the main policy issue that concerned Hardberger J in following a biological approach.

70 Note, however, that Littleton’s birth certificate was amended after the death of her partner and once litigation was already proceeding. In the view of Katrina Rose, the timing of this amendment means that Littleton’s marriage was legally a same sex marriage and Littleton therefore “deserved to lose” her action: “The Transsexual and the Damage Done: The Fourth Court of Appeals Opens Pandoma’s Box by Closing the Door on Transsexuals’ Right to Marry” (2000) 9 Law and Sexuality 41 at 74.

biological discourse which tends to emphasise a woman's role in marriage and society generally as being one of procreation.

### 1.3. 'WHAT IS SEX?' - LEGAL NARRATIVE NO.2

#### 1.3.1 The United States

The following cases demonstrate that there are other legal narratives regarding the question of what is sex which do not unquestioningly assume that there is, and can be, only one view. These cases demonstrate that the assumption that the biological approach is the natural and only possible approach is flawed.

An alternative, second approach to the question of determining and categorising sex was articulated by the Appellate Division of the Superior Court of New Jersey in *MT v JT* (1976).<sup>71</sup> In this case the MTF transsexual plaintiff sought support and maintenance from her former husband with whom she had been married for over two years and with whom she had lived for over eight years prior to marriage. The defendant husband contended that the plaintiff was a male and that their marriage was void. Unlike in *Corbett*, the couple had had a significant relationship and had indisputably had "intercourse" over the period of their marriage.

In this case the Court rejected the *Corbett* idea that "sex is somehow irrevocably cast at the moment of birth" and that "sex in its biological sense should be the exclusive standard".<sup>72</sup> The Court's departure from the *Corbett* view of sex stemmed from "a fundamentally different understanding of what is meant by 'sex' for marital purposes".<sup>73</sup> It concluded that "a person's sex or sexuality embraces an individual's *gender*, that is, one's self-image, the deep *psychological* or emotional sense of sexual identity and character".<sup>74</sup> The Court was of the view that the *Corbett* case had wrongly treated sex and gender as disparate phenomena. To the Court's mind, such "disharmony" between sex and gender was only evident in pre-operative transsexuals whose sex and gender are not 'harmonised'. In its opinion, only the sex of *pre-operative* transsexuals should be classified according to biological criteria.<sup>75</sup> But for post-

---

71 335 A 2d 204 (1976).

72 *Ibid* at 209.

73 *Ibid*.

74 *Ibid*; emphasis added.

75 *Ibid*.

operative transsexuals, “the dual tests of anatomy and gender are more significant”.<sup>76</sup> For marital purposes, “identity by sex must be governed by the congruence of these standards”.<sup>77</sup> Thus sex for the purposes of marriage was defined as the congruence of anatomy and psychology.

As to this dual test of anatomy and psychology, the Court stated: “It is the opinion of the court that if the psychological choice of a person is medically sound, not a mere whim, and irreversible sex reassignment surgery has been performed, society has no right to prohibit the transsexual from leading a normal life.”<sup>78</sup> Thus the Court effectively implied that the law can invest in this dual test because a degree of stability can be established if there is an *irreversible* anatomical change and if there is sound psychological evidence.

The Court here did not refer to or discuss how other areas of the law classified post-operative transsexuals. It also did not discuss the ‘essential determinants’ of the institution of marriage but it did acknowledge that implicit in its reasoning was the assumption that for the purposes of marriage, “the sexual capacity of the individual must be scrutinised”.<sup>79</sup> But the scrutiny of this capacity is not in regard to procreation. In the Court’s view, if a post-operative transsexual is by virtue of medical treatment possessed of the “full capacity to function sexually as a male or female”, then there are no legal barriers.<sup>80</sup> In ruling that the plaintiff was a woman, the Court declared it was doing no more than giving “legal effect to a *fait accompli*, based upon medical judgment and action which are irreversible.”<sup>81</sup>

While this dual test approach was most articulately expressed in *MT v JT*, it was effectively used in the prior case of *In the Matter of Anonymous*.<sup>82</sup> In this 1968 case, the Civil Court of the City of New York decided that a post-operative MTF transsexual was entitled to change her name from a male name to a female name. Pecora J went straight to the heart of the question ‘what is sex’ by recognising that the applicant’s surgery meant that she would never again be able to function procreatively or sexually but that she would be capable of sexual relations as a woman. In his view, anatomical sex (“social sex” as he called it), is only

---

76 *Ibid.*

77 *Ibid.*

78 *Ibid* at 207.

79 *Ibid* at 209.

80 *Ibid* at 210.

81 *Ibid* at 211.

82 57 Misc 2d 813 (1968).

determinative where anatomical sex and psychological sex are not harmonised.<sup>83</sup> He posed the following questions:

Is the gender of a given individual that which society says it is, or is it, rather, that which the individual claims to be? The answer is not easily arrived at. ... Should the question of a person's identity be limited by the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, the organ responsible for most functions and reactions..? I think not.<sup>84</sup>

He stated that the difficulty in this matter lay “not so much in the nature of the problem itself, but in trying to apply, perhaps inadequately, static rules of law to situations such as presented herein, which perhaps merit new rules and/or progressive legislation”.<sup>85</sup> In this statement he articulated the tension in law's desire for the formulation and application of static and stable rules even where such static rules are clearly inadequate and inappropriate. While static rules and categories may be appropriate in some areas of the law, say taxation, they are less appropriate when dealing with questions of complex social identity.

The narrow biological approach was also rejected in the US case of *Richards v US Tennis Association*.<sup>86</sup> In this case, Richards, a post-operative MTF transsexual tennis player, sought an injunction against the Association's requirement that she pass a sex-chromatin test in order to be eligible to participate in a women's tournament on the grounds that it was grossly unfair and discriminatory. The Court heard evidence from various eminent doctors in this area to the effect that chromosomal tests are not by themselves entirely reliable in determining a person's sex. The evidence also included the opinion of Dr Richard Money whose view was as follows:

The Barr test would work an injustice since by all other known indicators of sex, Dr Richards is a female, ie. External genital appearance is that of a female; her internal sex is that of a female who has been hysterectomised and ovariectomised; Dr Richards is psychologically a woman; endocrinologically female; somatically (muscular tone, height, weight, breasts, physique) Dr Richards is female ... socially Dr Richards is female; Dr Richards' gonadal status is that of an ovariectomised female.<sup>87</sup>

---

83 *Ibid* at 837.

84 *Ibid* at 836-8.

85 *Ibid* at 836; emphasis added.

86 400 NYS 2d 267 (1977).

87 *Ibid* at 272.

On the basis of such evidence the Supreme Court of New York County held that the chromosomal test should not be the sole criterion, where the circumstances warrant consideration of other factors.<sup>88</sup> While effectively rejecting the strict biological test in this case, the Court did not suggest any other test but implied that the test should depend on the particular circumstances. This case demonstrates a less rigid approach which considers multiple factors and circumstances.

The *MT v JT* approach was explicitly followed more recently in the US by the Kansas Court of Appeals in *In the Matter of the Estate of Gardiner*.<sup>89</sup> Here a MTF transsexual appealed the decision of a district court that held that she was legally a man and that therefore her marriage to the deceased was void and she had no right to his estate as his surviving spouse. The appellant had had her birth certificate amended after surgery in 1994, before marrying the deceased in 1999. Her sex was challenged by the deceased's estranged son, who attempted to argue that there was an element of fraud in the marriage. The Court dismissed this argument, finding evidence that the deceased knew of the appellant's transsexual nature and that they had enjoyed a "consummated marriage relationship".

The Court considered in some depth the legal and scientific literature regarding transsexuality, as well as the relevant case law. It questioned the precedential value of *Corbett*, pointing to its unusual facts and the brevity of the Corbetts' relationship. It also rejected the reasoning in *Littleton*, stating that it was a "rigid and simplistic approach to issues that are far more complex than addressed in that opinion".<sup>90</sup> In its view, chromosomes should not be the exclusive factor in determining a person's sex. In reversing and remanding the matter back to the trial court, it directed the court to consider other factors including "gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity" as well as "other criteria as science advances".<sup>91</sup> The Court preferred the reasoning and language of *MT v JT*, pointing to its critical inclusion of 'gender' in the legal determination of sex. The Court concluded by quoting the following words: "In the end it is only the children themselves who can and must identify who and what

---

88 *Ibid* at 273.

89 22 P 3d 1086 (Kan App 2001).

90 *Ibid* at 1110.

91 Note that this was the criteria suggested by Julie Greenberg, "Defining Male and Female: Intersexuality and the Collision between Law and Biology" (1999) 41 Arizona LR 265.

they are. ... the organ that appears to be critical to psychosexual development and adaption is not the external genitalia, but the brain.”<sup>92</sup>

This case is significant in its evident recognition of the complexity of the issues involved in the legal determination of a person’s sex. At the opening of its decision, the Court stated:

Some cases lend themselves to precise definitions, categories, and classifications. On occasion, issues or individuals come before a court which do not fit into a bilateral set of classifications. Questions of this nature highlight the tension which sometimes exists between the legal system, on the one hand, and the medical and scientific communities, on the other. Add to those concerns those whose focus is ethics, religions, lifestyle, or human rights, and the significance of a single decision is amplified.<sup>93</sup>

This quotation evidences the Court’s understanding of the limiting nature of categories when dealing with questions of complex social identity.

### 1.3.2 The European Community and the United Kingdom

In the European Court of Human Rights Martens J in *R v Cossey* gave a forceful dissenting judgment which rejected a strictly biological approach to sex. In *Cossey*, as discussed above, the appellant was challenging the United Kingdom’s adherence to the *Corbett* approach, arguing that it violated both her right to private life and her right to marry under the Convention. In the view of Martens J, the “essential question” in the case was whether maintaining (or not changing the maintenance of) the biological approach was compatible under Article 8 of the Convention which guarantees protection of the individual’s right to respect for private life. In his view the maintenance of the biological approach continuously and directly affected transsexuals’ private life and should be deemed a continuing interference.<sup>94</sup> He questioned why the determination of sex should not include some psychological and social factors if the person has changed their physical sex. He asked why chromosomes should carry so much legal significance. Judge Martens’ stated:

---

92 22 P3d 1086 (Kan App 2001) at 1110, quoting the conclusion of William Reiner, MD, a researcher of The John Hopkins Hospital.

93 *Ibid* at 1090.

94 Martens J was specifically referring to the example of Mark Rees who was the applicant in the decision preceding *Cossey*, *Rees v UK*. In Martens J view, this case was wrongly decided in regards to Rees’ claim under Article 8.

To attach so much weight to the chromosomal factor requires further explanation. That explanation, moreover, should be based on at least one relevant characteristic of marriage, for only then could it serve as a legal justification.<sup>95</sup>

In his view the majority's judgment, which held that marriage means procreation, is flawed for a number of reasons. First, it is unlikely that the Court would allow Member state laws to prohibit sterile couples from marrying or to prohibit the marriage of couples who have no intention to procreate. Secondly, such a condition of marriage would mean that all transsexuals would be unable to marry either a man or a woman because gender reassignment makes a person sterile. The result would be that all transsexuals would be completely excluded from the right to marry. But if the capacity to procreate is not a necessary requirement of Article 12, what then justifies biological/chromosomal sex as being determinative? Judge Martens' concluded in *Cossey* that it is "arbitrary and unreasonable" for the majority of the Court to ignore gender reassignment and to retain the criterion of biological sex.<sup>96</sup>

In the recent English Court of Appeal case of *Bellinger* (discussed earlier), Thorpe LJ dissented, taking an approach with equates with the dual test in *MT v JT*. Thorpe LJ held that the *Corbett* test was "wrong" in light of subsequent medical findings in the past thirty years which evidence that there are post natal developments that effect one's sex.<sup>97</sup> These developments, which relate to brain sexual differentiation, demonstrate the significance of psychological factors in the determination of one's sex for the purpose of marriage. Thorpe LJ commented that whilst the *Corbett* test is "attractive for its simplicity and apparent certainty of outcome, [it] is manifestly incomplete. There is no logic in excluding one vital component of personality, the psyche."<sup>98</sup> He acknowledged that the admission of psychology as a criteria would probably result in difficulties in application and potentially less certain outcomes. However, he stated, "we should prefer complexity to superficiality".<sup>99</sup>

---

95 (1990) 3 EHHR 622at para 33.

96 *Ibid.*

97 [2001] EWCA Civ 1140 (July 17, 2001) at para 155. This is in contrast to the *pre*-natal developments of gonads, genitals and chromosomes.

98 *Ibid* at para 132.

99 *Ibid.* Thorpe LJ also questioned that validity of Ormrod J's proposition that "Marriage is a relationship which depends on sex not gender". He stated: "The proposition seems to me to be now of very doubtful validity. The scientific changes to which I have referred have diminished the once cardinal role of procreative sex." (*ibid* at para 130).

### 1.3.3 Australia and New Zealand

In Australia the case of *R v Harris and McGuiness*<sup>100</sup> refused to extend the *Corbett* approach to the question of sex in the criminal law. In that case, two MTF transsexual respondents appealed their convictions of “being a male person” attempting to procure the commission of an indecent act. Both had considered themselves women for over fifteen years but their difference lay in the fact that McGuiness was a *pre-operative* transsexual while Harris was a *post-operative* transsexual. According to the two different approaches, this operative status could mean nothing or everything for Harris. The majority decided to reject the application of *Corbett* to the criminal law and to follow the *MT v JT* approach in recognising Harris' operative intervention.

Mathews J described transsexuals as suffering “a *disharmony between their anatomical sex and their gender identification*”.<sup>101</sup> In her majority decision, she questioned why the capacity to procreate should be determinative of one's sex given that it has not traditionally been afforded any significance in law, even in the context of marriage.<sup>102</sup> She also rejected the presence or absence of female sex organs as being decisive of sex: “Is a woman who has undergone a total hysterectomy to be deprived of her status as a female? ... And I cannot see that the state of a person's chromosomes can or should be a relevant circumstance in the determination of his or her criminal liability.”<sup>103</sup> But Mathews J rejected the submission that biological factors should be treated as entirely secondary to psychological ones. She said that this approach “creates enormous difficulties of proof, and would be vulnerable to abuse by people who were not true transsexuals”.<sup>104</sup> Thus the decision of the majority gave recognition to only *post-operative* transsexuals.

In the minority, Carruthers J declared that the consequence of such an approach that treats sex as mutable and gender as subjective “would be that a person could change sex from

---

100 (1988) 35 A Crim R 146. Note that this case was followed by *R v Cogley* [1989] VR 799 where the Full Court of the Supreme Court of Victoria decided that the question of a victim's sex (for example in a case of attempted rape of a post-operative transsexual such as this) is a question of fact and should be decided by a jury rather than a trial judge. The Court distinguished *Harris* on the ground that it did not involve a jury trial. In my view, leaving the question of a victim's sex/gender provides a transsexual with too much legal uncertainty.

101 *Ibid* at 161; emphasis added.

102 *Ibid* at 180.

103 *Ibid*.

104 *Ibid* at 181.

year to year".<sup>105</sup> He stated that "the law could never countenance" such a view of sex which is dependent on a person's subjective view of "gender".<sup>106</sup> The test for sex should be, according to Carruthers J, strictly biological. Carruthers J saw a clear distinction between sex and gender – the former is biological and objectively assessed whereas the latter is purely subjective. He described the *MT v JT* approach as "a distortion of the Common Law".<sup>107</sup> For sex to be anything other than biology, it is for the legislative process. Here the effect of his judgment is to attempt to naturalise the biological definition of sex as the natural definition. In this judgment Carruthers J's tone evinces his fear that the Common law is threatened by such 'unstable' determinations of sex. His judgment implies that the alternative approach gives the legal subject too much agency which can be abused.

In New Zealand the biological approach was rejected in cases subsequent to *Re T*, discussed above. In *M v M*,<sup>108</sup> a post-operative MTF transsexual applicant sought a declaration that her marriage was invalid on the ground that she was a biological male at the time of the ceremony. Aubin J examined whether, for the purposes of family law, other factors can override the chromosomal test in the case of a post-operative transsexual. In his view, the effect of preventing a post-operative transsexual from being legally able to enter in a valid marriage, was to produce "a kind of hermaphroditic mutant", "a sexual twilight zone".<sup>109</sup>

Aubin J commented that Ormrod J's conclusion in *Corbett* "seems to flow not so much from the medical evidence which was given in the case as from His Lordship's own finding that certain biological features should be determinative of a person's sex".<sup>110</sup> He described the legal determination of sex to be "a very subjective procedure, where one need not be surprised to find a male English High Court Judge in 1970 approaching the issues in quite a different way from a female Australian Judge in 1989."<sup>111</sup>

Aubin J gave no clear test for sex but concluded, in regard to the post-operative MTF transsexual applicant, that, "however elusive the definition of 'woman' may be, the applicant

---

105 *Ibid* at 158.

106 *Ibid*.

107 *Ibid* at 159.

108 1991 NZFLR LEXIS 133; [1991] NZFLR 337.

109 *Ibid* LEXIS at 12, 11.

110 *Ibid* at 10.

111 *Ibid* at 12. Here Aubin J was referring respectively to Ormrod J and Mathews J of the New South Wales Criminal Court of Appeal.

came within it for the purposes of and at the time of the ceremony of marriage”.<sup>112</sup> Thus he declared the marriage in issue to be valid and held that the applicant wife was a woman at the time of the ceremony.

*M v M* prompted the New Zealand Attorney General to apply to the High Court for a declaration as to whether two persons of the same genetic sex could enter a valid marriage where one party has undergone sex reassignment surgery. This application, which became *Attorney General v Family Court of Otahuhu*,<sup>113</sup> was possibly prompted by the somewhat vague and indeterminate nature of Aubin J’s judgment in *M v M*. In examining this question the Court noted in *Otahuhu* that the law of New Zealand “has changed to recognise a shift away from sexual activity and more emphasis being placed on *psychological and social aspects of sex, sometimes referred to as gender issues*.”<sup>114</sup>

The Court first considered the *Corbett* decision. It examined the decision’s emphasis on procreation and sexual intercourse, specifically stating that it is no longer the law that the ability to have sexual intercourse is essential.<sup>115</sup> Nor was the “ability to procreate .. ever required” in common law or ecclesiastical law.<sup>116</sup> The Court rejected the *Corbett* approach, finding it to be unacceptable, and turned to the alternative approach in the cases *M v M*, *MT v JT* and *Harris*, declaring them to be “compelling”. The Court held that the genital *appearance* of a man or a woman was necessary for marriage, but that a valid marriage did not require the capacity to procreate or achieve penetrative sexual intercourse. Ellis J noted that if procreation were to be found an essential factor, this would mean that all transsexuals would be unable to marry given that sex reassignment surgery involves the removal of procreative organs.<sup>117</sup>

The Court then addressed the question of same sex marriages. Ellis J examined the implications of the *Corbett* approach in regards to this question. He stated: “If the law insists that genetic sex is the pre-determinant for entry into a valid marriage, then a male to female transsexual can contract a valid marriage with a woman and a female to male transsexual can

---

112 *Ibid* at 36.

113 [1995] 1 NZLR 603.

114 *Ibid* at 606; emphasis added.

115 *Ibid*. According to para 4.7 of the submissions which form part of the Court’s judgment, there is now in New Zealand no legal means of ending a marriage merely for non-consummation. “Prior to the passing of the *Family Proceedings Act 1980* a person could obtain a decree of nullity in respect of a marriage which was not consummated, but non-consummation did not render a marriage void but only voidable.”

116 *Ibid*.

117 *Ibid* at 607.

contract a valid marriage with a man. To all outward appearances, such would be same sex marriages.”<sup>118</sup> In his view, there were “no socially adverse effects” from allowing transsexuals to marry in their adopted sex. In the Court’s reasoning, it is the *appearance* of heterosexuality, and the *appearance* of a particular sex, that is essential to marriage and the determination of a person’s sex. Thus the decision gave primacy to anatomy, with the result that it excluded *pre-operative* transsexuals from being able to marry partners of the same biological sex.

#### 1.4 THE IMPLICATIONS OF THE *MT v JT* APPROACH

The second narrative differs from *Corbett* in that it makes the external body, the anatomical body, constructed or otherwise, determinative. The approach has both advantages and disadvantages. Generally it is considered to be the more progressive approach because it recognises that sex is changeable. For example, it has been described as reflecting “a compassionate and humane approach to the sensitivities of human sexuality balanced against the need for reasonable certainty..”.<sup>119</sup> It has been praised for the fact that it recognises a degree of agency in the subject over their sex.<sup>120</sup> As demonstrated above, in a number of jurisdictions the adherence to the approach means that post-operative transsexuals are treated as their assigned sex for the purposes of family law, criminal law, and also in administrative law (for example for the purposes of receiving a ‘wife’s pension’).<sup>121</sup>

The disadvantage of this approach is that it has the effect of encouraging the surgical ‘mutilation’ of transsexual bodies<sup>122</sup> and it invests in the law a critical categorical distinction between pre-operative and post-operative transsexuals. The words “conform”, “harmonise” and “correct” are evidence of the push by this narrative for transsexuals to undergo surgery which generally proves very expensive and painful. These words illustrate the law’s impulse to categorise all persons as either male or female by requiring that bodies conform and assimilate to fit these categories. In its privileging of post-operative transsexuals, it effectively leaves pre-operative or non-operative transsexuals unprotected and it sanctions forms of discrimination against them.

---

118 *Ibid.*

119 Lockhart J in *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467 at 493.

120 See for eg. Martens J in *Cossey v The UK* (1990) 3 EHHR 622, Series A No 184 at para 2.7.

121 See *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467.

122 See *Hartin v Director of the Bureau of Records* 347 NYS 2d 515 at 518 where the court describes sex reassignment surgery as “an experimental form of psychotherapy .. mutilating surgery”.

Criticism of the *MT v JT* approach was voiced by Carruthers J's dissent in *Harris*. In his view the approach is flawed by an inherent instability. His fear was that a person could change sex from year to year. Carruthers J feared that the inclusion of psychological factors would make the approach too unstable. In my view, Carruthers J failed to recognise the investment by this approach in the relative stability of anatomy and the unlikelihood that a person could or would change their anatomical sex from year to year. Arguably, however, this desire to establish stability has led to an over emphasis on anatomy. In the next few pages I examine a few cases which illustrate the consequence of this emphasis. They accentuate the primacy given to anatomy.

#### 1.4.1 The Effects of Emphasising Anatomy

Both *MT v JT* and *In the Matter of Anonymous* did not provide later courts with guidance as to the level of anatomical conformity required. In *MT v JT* the Court merely stated that sex reassignment surgery must be "irreversible". Furthermore, these decisions failed to explain why the irreversible change to anatomy should be given primacy. The following decisions demonstrate some of the consequences of this vagueness.

In the 1993 case of *Department of Social Security v SRA*<sup>123</sup> the MTF pre-operative transsexual respondent argued before the Federal Court of Australia that full sex reassignment surgery might be dispensed with for reasonable cause such as cost, unavailability or age. In this case the respondent sought to receive a wife's pension as (being a woman who is) the wife of an invalid pensioner. She had not undergone sex reassignment surgery due to its prohibitive cost. Evidence was submitted that although she was anatomically male, "she dresses, and behaves as a woman" and "considers herself a woman".<sup>124</sup> The respondent submitted that the Court should uphold the decisions made by two prior tribunals which held that psychology, as opposed to anatomy, should have primacy in the determination of sex.

The Court partly approached the question as one of statutory interpretation. In its view, "ordinary English usage words such as 'male' and 'female', 'man' and 'woman' and the word 'sex' relate to anatomical and physiological differences rather than psychological ones".<sup>125</sup> But

---

123 (1993) 118 ALR 467.

124 *Ibid* at 468.

125 *Ibid* at 469. In this case the Court noted that the Oxford English Dictionary defines "female" according to a procreative capacity. While this definition was only noted by the Court, it was followed as a determinative definition by the English Industrial Tribunal in the first English case dealing with a

the Court also attempted to justify the primacy given to anatomy on the ground that anatomy is the test used by society generally. It noted that the respondent still had male genitals. It stated that in these cases, a balance must be sought between the interests of society and the individual. “Irreversible” surgery, in its view, confirmed a person’s psychological attitude. The interests of society demanded conformity between anatomy and psychology. More critically, society needs to be protected from the “dangers in a male capable, or giving the appearance of being *capable, of procreation* being classified by the law as a female”.<sup>126</sup> The Court emphasised that it is only the *pre-operative* transsexual that poses these “dangers”, as the *post-operative* transsexual “is no longer procreatively of his original sex”.<sup>127</sup> Thus the Court refused to recognise pre-operative transsexuals as members of their adopted sex for the purposes of administrative law on the grounds that their procreative capability is potentially dangerous and deceptive. It therefore rejected the respondent’s submission that it take a psychological view.

These concerns regarding ‘dangerous’ procreativity and the interests of society seem somewhat unusual given that this was an administrative law decision and not a criminal law decision. The Court did, however, note the need to apply the law consistently. In my view, these “dangers” do not provide a persuasive ground to distinguish all pre-operative transsexuals in other areas of law. Furthermore, it should not apply equally to FTM transsexuals who do not pose such “dangers” to society. Thus the reasons for giving such general primacy to anatomy, and for distinguishing between pre-operative and post-operative transsexuals on the grounds of anatomy appear less powerful.

There is a certain irony, too, in the fact that these “dangers” regarding pre-operative transsexuals’ procreativity was used by the Court to deny them legal recognition for the purposes of administrative law when, at the same time, the inability to procreate is used in the *Corbett* approach to deny post-operative transsexuals legal recognition for the purposes of marriage. It is also ironic and perplexing that the anatomical approach employs biological

---

transsexual discrimination claim made under the UK’s *Sex Discrimination Act 1975*: *White v British Sugar Corporation* [1977] IRLR 121. In this case the complainant was a non-operative FTM transsexual whose employment as an electrician’s mate was terminated when her biological sex became known. The Court stated: “[the OED] defines male as of or belonging to the sex which begets offspring or performs the fecundating function. The same dictionary defines female as belonging to the sex which bears offspring. On her own evidence the applicant, whatever her physiological make up may be, does not have male reproductive organs and there was no evidence that she could not bear children.” The Court thus used these simplistic definitions to determine that the complainant was a woman (*ibid* at para 7) and held that she had not been discriminated against on the basis of her sex.

126 (1993) 118 ALR 467 at 495; emphasis added.

127 *Ibid.*

factors such as procreativity to justify its refusal to give legal recognition to pre-operative transsexuals. Thus it appears that to a certain extent, both approaches use the ability to procreate to categorise a person's sex for various purposes of the law.

In the more recent Australian Administrative Appeals Tribunal case of *Re SRDD v Department of Family and Community Services*<sup>128</sup> a MTF transsexual, who had lived as a female for twenty years, was seeking to receive the female old age pension, which can be obtained five years before a male old age pension. In 1987 the applicant had undergone an orchidectomy (removal of the testicles which triggers the development of female muscle/fat ratio and the development of breasts) but she still retained a penis. This she intended to have removed as soon as it could be arranged. The applicant's submission was that precedent was not explicit in requiring that the surgery intended to harmonise psychological and anatomical sex should extend beyond an orchidectomy. She argued that she had satisfied the necessary criterion as the procedure that she had already undergone was "irreversible". She pointed out that if she applied for a job she would be treated as an elderly female.

While the Tribunal confirmed that "irreversibility" was a criterion, it also held that this irreversible procedure had three essential steps, consisting of the removal of the penis, the removal of the testicles and the construction of an artificial vagina.<sup>129</sup> It said that external genital features must be harmonised and in this formulation the Tribunal included the vagina as an external genital feature. The Tribunal described this three step test as "an objective test to ensure certainty and practicality in administration".<sup>130</sup> The Tribunal therefore categorised the applicant as a 'pre-operative' transsexual as her operation constituted only "partial reassignment surgery"<sup>131</sup> despite its irreversibility. In concluding the Tribunal expressed its "regret that the law in this context has determined that primacy should be accorded to anatomy".<sup>132</sup> Thus the Court effectively established a test whereby transgendered people are categorised as pre-operative or post-operative according to the degree of surgical reconstruction of the anatomy they have undergone.

---

128 [1999] AATA 626.

129 *Ibid* at para 20.

130 *Ibid* at para 27.

131 *Ibid* at paras 30, 32.

132 *Ibid* at para 33.

Notably, both *MT v JT* and *In the Matter of Anonymous* concerned MTF transsexuals and thus failed to provide guidance as to what constitutes irreversible surgery for a FTM transsexual.<sup>133</sup> This is demonstrated by the Canadian case of *B v A*<sup>134</sup> which does not strictly follow the dual test of anatomy and psychology. Here a FTM transsexual, B, sought support under the *Family Law Act* after being in a defacto relationship with the respondent A for over 20 years. B started taking testosterone hormone therapy in 1972 and in the following two years underwent gender reassignment surgery. This consisted of a bilateral mastectomy and a subsequent reconstruction of a male chest contour and a nipple transplantation. Thereafter he had a pan-hysterectomy with the removal of the fallopian tubes and ovaries. In 1990 B applied under s. 32 of the *Vital Statistics Act 1990*,<sup>135</sup> to have his birth certificate amended from female to male. This application was accompanied by doctors certificates to the effect that B's sex should be changed. In order to be entitled to support under the Act, it was necessary for B to be read under the definition of a "man".

In this case Master Cork acknowledged that there was "no direct, totally pertinent authority as to what precisely is the definition of a man under these circumstances".<sup>136</sup> He therefore looked to the "purpose" of s 32 which he believed involved "the intent that there be some *radical and irreversible surgical intervention with all the fundamental reproductive organs, more than their simple removal*, before the legislature anticipated the necessity of changing the initial birth documentation from female to male."<sup>137</sup>(emphasis added) Critically, he held that the section did not have within it any concept of psychological tendency and that it dealt strictly and only with the "anatomical sex structure of a person".<sup>138</sup>

Master Cork rejected B's medical reports and held that B did not come under the definition of a man under the Act because B had not undergone "irrevocable" surgery. He emphasised the possibility that if B discontinued injecting hormones, "B will revert back to a female appearance".<sup>139</sup> Interestingly, this statement is subsequently qualified one page later with the words "at least to some degree". This qualifier is evidence that Master Cork was aware

---

133 Arguably there should be a different test for what constitutes "irreversible" surgery for FTM transsexuals given the wide recognition of the acute difficulty and cost of male genital reconstruction.

134 [1990] 29 RFL (3d) 258.

135 RSO 1980 c 524.

136 [1990] 29 RFL (3d) 258 at 264.

137 *Ibid* at 266.

138 *Ibid*.

139 *Ibid* at 263.

that B could never completely ‘revert’ to being a woman. Underlying Master Cork’s requirement that surgery be “irrevocable” is his manifest fear that if surgery is not “irrevocable”, homosexuals could use both surgical intervention and section 32 to circumvent the prohibition against homosexual marriage. To his mind, this appears to be a real possibility.<sup>140</sup> Thus the requirement for “radical and irreversible surgical intervention” appears to be motivated, at least in this case, by homophobia.

#### 1.4.2 Will the alternative approach become ascendant?

Despite the problems with the *MT v JT* approach, in my view, it nevertheless remains the preferable approach of the two legal narratives because of the degree of agency and recognition it confers to transsexuals. However, *MT v JT* is not the dominant common law approach in the US or elsewhere. It potentially applies to only fifteen US states which have legislation allowing persons to change the sex on their birth certificates after gender reassignment surgery. But, as the cases of *Littleton* and *Gardiner* evidence, courts do not consider the amendment of a transsexual’s birth certificate determinative, or even necessarily relevant.

In the United Kingdom the *Corbett* approach is still in ascendancy although in the cases of *ST v J*,<sup>141</sup> and *Bellinger*<sup>142</sup> mentioned above, there is some indication that the tide may be turning. In *ST v J*, Ward LJ noted that there is a “discernible tendency in some jurisdictions to grant transsexuals freedom to marry in cases where their psychological sex and their anatomical sex are in harmony”.<sup>143</sup> He quoted at length from the New Zealand judgments of *M v M* and *AG v Family Court of Otahuhu* and noted that there had been considerable medical advances since *Corbett*. Critically, he stated that it “may be” that the *Corbett* case “would bear re-examination at some appropriate time”.<sup>144</sup>

### 1.5. THE SEX/GENDER DISTINCTION

In their judgments in *ST v J*, both Ward and Neill LJ were careful in their use of language. They both commented that the wording of section 11 of the *Matrimonial Causes Act*

140 Diana Marjory points out that this “feared spectre” of homosexual marriages “reflects a remarkably stereotypic understanding of who and what lesbians are: Annotation for *B v A* [1990] 29 RFL (3d) 258.

141 [1998] Fam 103.

142 [2001] EWCA Civ 1140. See in particular the dissent of Thorpe LJ at paras 110ff.

143 [1998] Fam 103 at 142.

144 *Ibid* at 120. Ward LJ pointed out that in the New Zealand authorities were of no assistance to the transsexual defendant in *ST v J* because his anatomy was not in “conformation” with his psychology as he had not undergone a penis construction.

1973, which states that a marriage would be void if “the parties are not respectively male and female”, could be read to “indicate a test of gender rather than sex”.<sup>145</sup> Ward and Neill LJ were here referring to the view that the Act, by using the words ‘male’ and ‘female’ rather than ‘man’ and ‘woman’, literally specifies parties’ gender rather than sex. Apparently at the time of the Act’s enactment in 1971 it was stated that the use of such neutral terminology left the way “open for a future court, relying on future medical knowledge, to place greater emphasis upon gender in determining whether a person was to be regarded as male or female”.<sup>146</sup> Theoretically, *Corbett* would then only be persuasive, rather than binding, given that it was decided before the introduction of the Act. But this has not been the case so far.

Critics of *Corbett* have referred to the above statement of intention in arguing that Ormrod J was wrong in finding that marriage is about sex, not gender. Bradney is one such critic who says: “whilst sex is a biological matter, gender is a question of social status. Marriage thus seems a creature of gender rather than sex”.<sup>147</sup> Like Ormrod J himself, Bradney appears to think that this distinction between sex and gender is critical.

I would like, at this point, to examine the distinction used by both the courts and critics alike between sex and gender. As we have seen, the *Corbett* approach holds sex to be strictly biological while gender is impliedly everything that is not biological, such as psychology. The *MT v JT* approach holds that sex *for the purposes of marriage* consists of both sex and gender. But sex *generally* is impliedly understood as anatomical, if not biological, while gender is defined by the Court as “one’s self-image, the deep *psychological* or emotional sense of sexual identity and character”.<sup>148</sup> In *Harris*, Mathews J held that sex *for the purposes of criminal law* was both sex and gender but she generally described transsexuality as a “disharmony between [transsexuals’] anatomical *sex* and their *gender* identification”.<sup>149</sup>

Interestingly, both these approaches share the same understanding of the general meaning of sex and gender. Both approaches see sex and gender as distinct concepts and both

---

145 *Ibid* at 122, 153. This argument was accepted by Charles J in *W v W* [2001] 2 WLR 674 at 708 where he stated that “on the true construction of the [Act] greater emphasis can be place on gender rather than sex”. The argument was rejected by the majority and Thorpe LJ in dissent in *Bellinger* [2001] EWCA Civ 1140 at paras 18-23, 148. The majority distinguished Charles J’s judgment as dealing specifically with a different disorder within gender dysphoria and not with transsexuality (*ibid* at para 64).

146 Poulter, “The Definition of Marriage in English Law” (1979) 42 Mod LR 409 at 424.

147 Anthony Bradney, “Transsexuals and the Law” (1987) 17 Family Law 350 at 353.

148 355 A 2d 204 (1976) at 209.

149 (1988) 35 A Crim R 146 at 161; emphasis added. This pre-operative and no-operative transsexuals embody the disharmony of sex and gender.

see gender as relatively subjective. The fact that no court has held that gender in itself is sufficiently determinative also points to the unarticulated assumption that gender is not stable and therefore is unreliable as a criteria. It is subject to change, as Carruthers J said. The implication here is that biology, in contrast, is stable and hence is a relatively reliable indicator of sex. The general view is that gender is a social manifestation or a construction.

This sex/gender distinction which grounds both approaches was apparently first fully articulated by the medical profession in the 1950s in its attempt to explain transsexuality as a separation between sex (the body/the physical/biology) and gender (the mind/the social/psychology).<sup>150</sup> In medical discourse, sex reassignment surgery is commonly described as the harmonisation of sex and gender. Indeed, in this part of medical science it is often portrayed as the telos. The distinction has also become central in feminist debate. For example, the distinction has been useful in feminists' struggle against biological determinist views which are used to confine women to 'natural' biological roles in the private sphere – in particular to the role of procreation.<sup>151</sup>

In the next part of this chapter I explore the history of the sex/gender debate and its current manifestations. This is with a view to examining the usefulness of this sex/gender distinction to an understanding of transsexuality in the law and to feminist politics generally.<sup>152</sup>

## 1.6. FEMINISM AND THE SEX/GENDER DISTINCTION

### 1.6.1 'First Wave' Feminism

In feminism's 'first wave', feminists influenced by liberal-humanist thought, such as Wollstonecraft, generally tried to negate all signs of sex which evidenced women's difference. Liberal feminists argue that biological differences are minimal and do not limit women's

---

150 See for example the work of Dr John Money and Drs J and J Hampson in the 1950s at the John Hopkins University: "Hermaphroditism: Recommendations concerning assignment of sex, change of sex and psychologic management" (1955) 97 *Bulletin of John Hopkins Hospital* 284. According to the *Oxford English Dictionary*, the first usage of "gender" in this sense is recorded in 1963.

151 See below for discussion.

152 It is apparent that the sex/gender distinction debate may be limited to English speaking feminisms as the word "gender" does not figure in the same way in the Romance languages for example. It appears that non-English. Western European feminisms are more likely to debate the notion of sexual difference: see Judith Butler, "Feminism by Any Other Name – Interview with Rosi Braidotti, in Elizabeth Weed and Naomi Schor eds. *Feminism Meets Queer Theory* (Bloomington: Indiana University Press, 1997) at 41-42.

capacity for equality.<sup>153</sup> Women's ability is not the product of sex and biological differences but a product of differences in education and socialisation. Liberal feminists see the sources of difference between men and women as being rooted in gender, which is understood as cultural, rather than in sex, which is understood as biological. Women's inequality is attributed to culture and the existence of gender roles which regulate male and female behaviour. Sex is not understood as importing any fundamental differences between men and women. The fact for example that women bear children is seen as an obstacle that can be overcome by public child care and other such measures of reform.<sup>154</sup> Thus liberal feminism seeks to avoid the dangers of biological determinism by minimising sexual differences and the role of biology in sexual difference.

### 1.6.2 'Second Wave' Feminism

The distinction between sex and gender has been more fully embraced by "second wave" feminism, in particular Radical and Cultural feminism.<sup>155</sup> These feminists see that biological determinism operates by conflating sex and gender, so that gender is seen in the biological determinist framework as solely an effect of biology. To Radical feminists, the sex-gender distinction promises to open up the possibilities of eliminating essentialist views of gender. Feminists use the sex/gender distinction to draw a line between nature and culture in order to distinguish gender as a cultural construct and to divorce women's 'natural sex' from culturally drawn negative characteristics traditionally associated with women. In this framework, gender is cast as the cultural harbour of prevailing norms of masculinity and femininity which have no relation to natural sex.

While gender is cast as socially constructed and a result of patriarchy, *sex* is embraced by Cultural feminism because it is understood as being accessible in a natural and untainted state. Cultural feminism seeks to disarticulate patriarchal gender norms from the understanding of biological sex. This disarticulation would bring to the fore the positive aspects of biological

---

153 See for example, Shulamith Firestone's, *The Dialectic of Sex* (London: The Women's Press, 1979). Firestone argued that reproductive technologies could assist women in their claim for equality in that it could free them from the oppressive conditions of procreation, a difference which blocks women's access to equality. Thus she asserted a disembodied view of women's capacity for equality. At the same time she can be construed as positing a biological determinist view in that she characterises biology as providing a natural block to women's equality.

154 Or more radical as that proposed by Firestone (ibid).

155 Radical and Cultural feminists were united in their rejection of liberal feminism's model of equality which, in their view, failed to address or recognise women's embodied differences.

sex and 'true' biological femaleness. Mary Daly, for example, celebrates a new organic female creativity and, through the work of Carol Gilligan and others, women are projected as nurturing, caring and sensitive. According to second wave Cultural feminism, women's identity is founded on 'true femaleness' based on women's biological nature – their sex and bodies.<sup>156</sup>

Likewise, in Radical feminism, sex is considered the primary division in society and the primary identity category. Contrary to the liberal feminist view that sexual difference is irrelevant, Radical feminism emphasises women's sex as fundamentally different. But this difference, in Catherine MacKinnon's view for example, is socially constructed by a patriarchal dominance/submission structure. Male-dominated society constructs women as sexual objects for the use of men. The experience of this subordination is that which constitutes women's identity. She states:

What defines woman [socially] is what turns men on ... Gender socialisation is the process through which women come to identify themselves as such sexual beings .. It is that process through which women internalise (make their own) a male image of their sexuality as their identity as woman, and thus make it real in the world.<sup>157</sup>

Here MacKinnon identifies women's reality as totally constructed by male views of sex.<sup>158</sup>

### 1.6.3 'Third Wave' Feminism

'Third wave' feminists are critical of the acceptance of the sex/gender distinction by first and second 'wave' feminisms. To accept the distinction as useful to feminism is to embrace the idea that there is a distinction between sex and gender. It is to accept a natural relation between sexed bodies (male/female) and culturally constructed genders (masculinity/femininity). Judith Butler, a post-structural feminist, points out that the acceptance of the sex/gender distinction presumes that there is a natural and necessary relation between masculinity and the male

---

156 Robin West's "Jurisprudence and Gender" (1988) 55 University of Chicago LR 1 is commonly cited as the most controversial legal example of Cultural feminism. She argued that modern legal theory did not reflect women's critical experiences of pregnancy, heterosexual intercourse, breast feeding and menstruation, and the intimacy involved in these experiences. Thus West drew sexual difference as rooted in biology, rather than in social constructions of biology.

157 MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Mass, Harvard University Press, 1989) at 110-111.

158 Note that MacKinnon's 'dominance theory' can be distinguished from other strands of second wave feminism as it does not embrace the sex/gender distinction. In MacKinnon's view, both sex and gender are socially constructed. See below for a discussion of how her approach differs from other social constructionist approaches. However, MacKinnon's theory is similar to that of other 'second wave' feminists in that it divides human beings into two internally homogenous and rigid categories, men and women.

subject, and femininity and the female subject. According to Butler, this approach proves useful only when taken to its logical limit because at this point it produces “a radical discontinuity between sexed bodies and culturally constructed genders”.<sup>159</sup> This radical discontinuity or “disharmony”, which is embodied by transgendered people, questions one of the central presumptions of the binary gender system in that it disrupts the naturalness of the “harmony” between sex and gender. The assumption of this kind of harmony is demonstrated for example in the above decisions.

‘Third wave’ feminists criticise the ‘second wave’ conception of sex and biology as a fixed and unchanging given. They point out that the Cultural feminist view that differences between men and women are rooted in sex and biology tends to promote an essentialist view, in that the idea for example that women are child rearers becomes fixed through biology as women’s essential and natural role. They argue that this ‘second wave’ view thus comes close to biological determinist views that biology determines destiny.<sup>160</sup> In much the same way as Ormrod J held that sex can be determined without taking into account social or psychological factors, this use of the sex/gender distinction by Cultural feminists (and some Radical feminists) assumes that sex can exist outside of cultural discourse, prior to, and free of, cultural politics. Basically it presupposes that sex and biology are natural rather than cultural constructs. Butler, for example, calls Cultural feminism’s recourse to the idea of an original or genuine feminism ‘before’ culture, “a nostalgic and parochial ideal that refuses the contemporary demand to reformulate an account of gender as a complex cultural construction”.<sup>161</sup> In her view this ideal “tends to serve culturally conservative aims” and constitutes an exclusionary practice within feminism.<sup>162</sup>

This view of sex being fixed and unchanging is also evident in Radical feminist theory such as MacKinnon’s social constructionist view of sex. While many ‘third wave’ feminists subscribe to a social constructionist view of the category of sex, like that of Laqueur explained earlier,<sup>163</sup> this approach is not as ahistorical and two-dimensional as that of MacKinnon. Whereas MacKinnon sees sex as simply a product of patriarchal social structures, post-structuralists understand sex as a historical and cultural concept subject to a panoply of forces

---

159 *Gender Trouble*, *supra* note 4 at 6.

160 Such a reading can be made of Daly, *Gyn/Ecology* *supra* note 3.

161 *Ibid* at 36.

162 *Ibid*.

163 See, for example, Butler and Scott discussed below.

and discourses. It is a concept articulated by language and its meaning changes over time and cultures. Thus both sex and gender are expressions of specific cultural and historical beliefs about sexual difference. As Joan Scott, another post-structural feminist, expresses it, sex and gender are “organizations of perception rather than transparent descriptions or reflections of nature”.<sup>164</sup> In relation to Cultural feminism’s tendency to find a point of origin or ‘Truth’ in women’s nature, she states: “If sex, gender and sexual difference are effects – discursively and historically produced – then we cannot take them as points of origin for our analysis.”<sup>165</sup>

Like other post-structural feminists, Butler and Scott consider the meaning of sex as never finally fixed – as an open site of contestation of meaning. Their approach differs from that of MacKinnon’s in that they do not use the mechanism of gender construction as all determining and universal. Their approach allows for the possibility of multiple shifts in meaning. Butler, for example, believes that the mechanism of gender construction only proves useful to feminism when it “implies the *contingency* of that construction”.<sup>166</sup> This contingency is glimpsed, for example, when sex and gender radically refuse and disrupt presumed continuity or harmony, as demonstrated in the phenomenon of transgenderism. This “contingency” allows the possibility of some element of agency, in that seemingly fixed categories and dichotomies are disrupted and transformed. To draw the mechanism of gender construction as all determining, like MacKinnon, is to come to the same result as “the position that grounds universal oppression in biology” – biological determinism.<sup>167</sup> In Butler’s view, neither biological determinism nor pure social constructionism allow for the possibility of agency.

Butler argues that sex is an effect of gender and that it is as culturally constructed as gender.<sup>168</sup> In this, Butler challenges the nature/culture distinction which is used by Cultural feminist theorists to support and elucidate the sex/gender distinction. The idea of a transparent “nature” that can be known outside of cultural knowledges of it is perpetuated by the nature/culture distinction. The projection of sex as the raw material of culture and the root of gender operates to naturalise the nature/culture distinction and, more critically, to naturalise “the strategies of domination that that distinction supports”.<sup>169</sup> ‘Natural’ sex postures as the

---

164 Joan Scott, “Some Reflections on Gender and Politics” in Myra Marx Ferrec, Judith Lorber and Beth B Hess, eds. *Revisioning Gender* (London: Sage Publications, 1999) at 73 (hereinafter, “Some Reflections”).

165 *Ibid.*

166 *Gender Trouble*, *supra* note 4 at 38; emphasis original.

167 *Ibid* at 36.

168 *Ibid* at 7.

169 *Ibid* at 37.

unquestioned foundation of culture. If sex is seen as political, then, Butler argues, the culture/nature distinction collapses, as does the sex/gender distinction. Butler's project can thus be characterised as one of denaturalising foundational dichotomies and categories used by law and other discourses.

Butler's next move is to argue that if sex is an effect of gender, then "the distinction between sex and gender turns out to be no distinction at all".<sup>170</sup> In her view, the distinction should be collapsed as it has no valuable meaning or use (except when pushed to its radical limits).<sup>171</sup> Butler asserts that the elimination of this distinction is strategically necessary in order to oppose and avoid the discourse of biological determinism, which restricts the meaning of gender (and sex) to received notions of masculinity and femininity.

Butler and Scott's view of sex is influenced by the work of post-structuralist thinkers such as Althusser, Saussure, Lacan and, in particular, Foucault. Foucault's work emphasises the historical specificity of meaning and discourses. Discourses are more than ways of producing meaning – discourses, such as for example legal discourses, constitute the 'nature' of the material body, of sex, of biology (and so forth) as we understand them. Biology and sex do not exist outside their discursive articulation. While law is a powerful discourse because of its institutional basis, it is not the only discourse. It is constantly challenged and influenced by other discourses – such as, in the case of transsexuality, the discourses of medicine, feminisms, culture, and also other conservative forces such as religion. For this reason there is no discursive unity or uniformity on the question of sex and thus the meaning of sex is never fixed – it is an open site of contestation.

Similarly, the (meaning of the) subject is never fixed. According to a post-structuralist view, the subject is not coherent, stable or unified but a site of fluidity and constant transformation. Some post-structuralists, such as Butler, understand transsexuality as challenging the liberal humanist notion of the subject as unified, coherent and stable. The law's reliance on this notion of the subject is evidenced by its demonstrated general inability to accommodate and accept the identity of a subject whose sex/gender identity is fluid and mutable. Transsexuality is seen to disturb this picture of subjectivity as well as making evident

---

170 *Ibid* at 7.

171 *Ibid*.

the role of biological determinist discourses in law's picture of fixed and unchanging subjectivity.

#### 1.6.4 Contestation of Butler's Critique of the Sex/Gender Distinction

Butler's strategy of collapsing the sex/gender distinction in order to avoid and oppose biological determinist views of sex, gender and sexual difference has been the subject of some criticism. Toril Moi is one such critic who argues that while Butler's critique of the sex/gender distinction succeeds in avoiding biological determinism, it critically fails to fulfil its other objective which, Moi claims, is to develop a fully historical and non-essentialist understanding of sex or the body.<sup>172</sup> In particular she criticises Butler for failing to produce a good theory of subjectivity. The problem with Butler's critique, she says, is not with its ultimate goal but its theoretical machinery which generates a panoply of new theoretical questions and in "work that reaches fantastic levels of abstraction without delivering the concrete, situated and *materialist understanding of the body* it leads us to expect."<sup>173</sup>

Moi's main criticism concerns the materiality of the body which she believes is overlooked by Butler's critique. She comments: "if sex is as 'discursive' as gender, it becomes difficult to see how this fits in with the widespread belief that sex or the body is concrete and material, whereas social gender norms (discourses) are abstract and immaterial."<sup>174</sup> In this she demonstrates her fundamental difference from Butler in that she does not adhere to a Foucauldian analysis of power wherein discourses operate to constitute the meaning of materiality such as the body. She is thus unpersuaded by Butler's theory of materiality in *Bodies That Matter*,<sup>175</sup> which is that matter is an effect of power and that in this way the body is both material and constructed. Moi believes that Butler is going too far in her recoil from essentialism and biological determinism. In Moi's view, the idea of power producing matter is too opaque and does not answer the question of why we think there are two sexes.<sup>176</sup>

Moreover, Moi challenges the natural/cultural; sex/gender dichotomy used by poststructuralists. She says: "Butler's intense labours to show that sex is as discursively constructed as gender are symptomatic of the common poststructuralist belief that if something

---

172 Moi, *supra* note 11 at 30-31

173 *Ibid* at 31; emphasis added.

174 *Ibid* at 46.

175 *Ibid* at 9-10.

176 *Ibid* at 48.

is not discursively constructed, then it must be natural.”<sup>177</sup> While this seems to misunderstand the main import of Butler’s critique, it does question, with some cause, the assumption in Butler’s work that nature is immutable, unchanging, fixed, stable, and somehow essentialist. To some extent Butler’s work appears inadvertently to reinforce the sex/gender, nature/culture, fixed/mutable dichotomies – the same dichotomies she hopes to implode. Moi criticises the assumption that, by understanding sex ‘as constructed as gender’, this will somehow make it easy to change by political action – she points out that there can also be transformation in nature. She states that: “As for the idea that sex is immutable and gender wholly changeable, we should at least note that transsexuals vehemently insist that it is their gender that is immutable, and not their sex.”<sup>178</sup>

Ultimately, Moi’s project seems to be very similar to that of Butler. Both theorists attempt to critique the usefulness of the sex/gender distinction. Moi argues that while Butler is attempting to collapse the distinction, the distinction nevertheless remains central to Butler’s work.<sup>179</sup> She suggests that Butler’s project differs little from that of ‘second wave’ feminism.<sup>180</sup> Meanwhile, Moi’s own project is somewhat nebulous. While arguing that a theory of gender and subjectivity based on the work of Simone de Beauvoir successfully avoids the sex/gender distinction, her analysis appears to be rooted in the distinction. This is apparent in her discussion of the work of Katherine Franke and Mary Ann Case.

### 1.6.5 Franke and Case

Franke’s work is highly influenced by Butler’s critique. She examines how sex discrimination law perceives and constructs sex and sexual difference, in part through an analysis of transsexual cases. Franke’s basic argument is that the central mistake of sex discrimination law is its tendency to disaggregate sex and gender. She argues that sex discrimination law is flawed because it is based on the same understanding of the sex/gender distinction as Cultural feminism. It takes biology as its starting point and fails to take account of the fact that biology is only meaningful within cultural discourses – within a gendered frame of reference. In this way the subject, for example the transsexual subject, is made to conform to gender norms and stereotypes which are associated with their biology or anatomy. The law

---

177 *Ibid* at 58.

178 *Ibid* at 51.

179 *Ibid* at 53.

180 *Ibid* at 58.

allows little room to embrace an identity which departs from these norms.<sup>181</sup> She points out that to define sex in biological or anatomical terms is to negate “the degree to which most, if not all, differences between men and women are grounded not in biology, but in normativity”.<sup>182</sup>

Franke argues that, ultimately, sex discrimination law “must abandon its reliance upon biology in favour of an underlying fundamental right to determine gender independent of biological sex.”<sup>183</sup> She advocates that sex - what it means to be a man or a woman - must be understood not in deterministic biological terms but according to a set of behavioural, performative norms.<sup>184</sup> It must be understood as inhering a degree of agency.

In contrast, Case argues that the problem with sex discrimination law in the United States is its tendency to aggregate and conflate sex and gender.<sup>185</sup> An indication of this is the fact that the word “gender” has already become synonymous with “sex”. She argues that the concept of gender has been imperfectly disaggregated in the law from sex and sexual orientation with the result that there has been a continuing devaluation of qualities deemed feminine. In her view, this is evident in cases where discrimination law fails to protect those subjects, especially men, who exhibit feminine qualities. In contrast, a woman exhibiting masculine qualities is more readily accepted.

Case embraces the sex/gender distinction and notes that she finds herself “unusually, in some agreement with both Justice Scalia and Richard Epstein”.<sup>186</sup> She quotes Scalia J’s preference for ‘sex’ discrimination’ rather than ‘gender’ discrimination because “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.”<sup>187</sup> This use of the sex/gender distinction clearly assumes that sex is biological and outside of the cultural. Case, however, voices her opposition to a biological determinist view (which she calls sociobiology) and states that she

---

181 *Ibid* at 95.

182 Katherine Franke, “The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender” (1995) 144 University of Pennsylvania LR 1 at 3 (hereinafter, “The Central Mistake”).

183 *Ibid* at 99.

184 *Ibid* at 3.

185 Mary Ann Case, “Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence” (1995) 105 Yale LJ 1 at 3 (hereinafter, “Disaggregating Sex”).

186 *Ibid* at 11.

187 *Ibid* at 11, quoting *J.E.B. v Alabama ex rel T.B* 114 S Ct 1419, 1436 n.1 (1994).

sees “a world of difference between being female and being feminine”.<sup>188</sup> In a footnote she qualifies this statement by explaining that she does not claim that the relationship between sex and gender is wholly arbitrary. So while she insists, effectively like Franke and Butler, that sex should not determine gender, she nevertheless asserts that there is some ‘not wholly arbitrary’ relationship between biological sex and gender.

Case then proceeds to list a number of adjectives such as “aggressive” and “affectionate” which psychologists regularly consider to be coded masculine and feminine in Western culture. Her aim is to unravel the reasons why the traditional feminine is devalued in both men and women and to “protect” it “without essentialising it, limiting it to women, or limiting women to it”.<sup>189</sup> Here we can see that Case’s strategy is to avoid some of the pitfalls of essentialism which befell radical feminism, while at the same time using the sex/gender distinction advocated by ‘second wave’ feminism.

### 1.6.6 Moi’s position

Moi is critical of Franke and, to a lesser degree, Case. In Moi’s view, Case’s specific strategy of asking courts to protect traditionally feminine qualities in men as well as women will have “the reactionary effect” of producing more gender stereotypes.<sup>190</sup> However, she does appear to support and advocate Case’s more general strategy in relation to the sex/gender distinction. But does Moi’s strategy of effectively retaining the sex/gender distinction<sup>191</sup> assist in addressing the question of determining sex in relation to transsexuality?

Moi focuses on the *Corbett* case and Franke’s denunciation of the case as ‘biological essentialism’. Franke’s conclusion, she says, is that law should abandon its reliance on biology in favour of the fundamental right to determine gender independent of biological sex.<sup>192</sup> To her, “Franke’s argument assumes that the claim that gender is performative secures the conclusion that transsexuals should *always* be legally recognised as being their ‘target sex’.”<sup>193</sup> In this, Moi

---

188 *Ibid* at 11.

189 *Ibid* at 105.

190 Moi, *supra* note 11 at 111.

191 This is clearly contentious. Moi believes that she is avoiding the sex/gender distinction. In my view, she advocates the use of this distinction. Moi’s strategy is based on the work of Beauvoir. She claims that Beauvoir’s account of woman as “an open-ended becoming” “rejects both biological determinism and the limiting distinction between sex and gender.”(*ibid* at 83) This claim that Beauvoir successfully avoids the sex/gender distinction is contested by Butler in *Gender Trouble supra* note 4 at 111-112.

192 Moi, *supra* note 11 at 93.

193 *Ibid* at 94.

not only questions whether transsexuals should be always legally considered their 'target sex' but also whether Butler's approach secures this result.

Moi is not convinced that transsexuals should always be legally considered their 'target sex'. Moi confesses the fact that she finds it difficult to come up with an answer as to whether April Ashley should be considered a man or a woman at the time of her marriage.<sup>194</sup> Nevertheless, she is critical of Ormrod J's judgment in *Corbett*, in particular for its contentious understanding of what matters in a marriage.<sup>195</sup> She reads Ormrod J's judgment as taking the fundamental purpose of marriage to be procreation which she sees as having the effect that "infertile or post-menopausal women ... do not qualify as women for the purposes of marriage".<sup>196</sup> But she also praises Ormrod J's decision to frame his decision narrowly to "what is April's sex for the purposes of marriage?".<sup>197</sup> She claims that this frame "helps us to see that the ideological difficulties arising from his decision have little to do with the way he thinks about sex, and rather more the way he thinks about marriage".<sup>197</sup> Moi believes that the question of April's sex should not be determined according to questions of identity and essence but according to what it means to be married in contemporary Western society.<sup>198</sup>

Moi does not appear to think that gender is something over which a person can have agency. With reference to the work of Beauvoir, she says sex is something assigned socially by 'the Other'. In her view, "It is not enough to think of oneself as a woman in order to become one."<sup>199</sup> Moi believes that the material body makes some significant difference – biological difference - and that both Franke and Butler ignore this fact. She argues: "It is neither politically reactionary nor philosophically inconsistent to believe both that a male-to-female transsexual remains a biological male *and* that this is no reason to deny 'him' the legal right to be classified as a woman."<sup>200</sup> This last statement is consistent with the positions of Franke and Butler, in that they too reject the biological as the primary determinant. But unlike Franke and Butler, Moi does not suggest an alternative determinant. Moreover, the idea that sex is socially assigned by 'the Other' does not appear to assist in addressing the legal question 'what is sex'.

---

194 *Ibid* at 97.

195 *Ibid* at 98.

196 *Ibid*.

197 *Ibid* at 97-98. But to Ormrod J, marriage is all about sex, as opposed to gender.

198 *Ibid* at 99. Note that Moi fails to elaborate further on this matter.

199 *Ibid* at 96.

200 *Ibid* at 94.

Overall, Moi is highly critical of the view she sees embedded in both the law and in Franke's work that a clear-cut decision about a person's sex must be found. She asserts: "poststructuralist and other sex/gender feminists have failed to address the question of transsexuals adequately because they have no concept of the body as a situation, or of lived experience, and because *they tend to look for one final answer to the question of what sex a transsexual is*".<sup>201</sup> She continues: "To ask courts to have a clear-cut, all purpose 'line' on sex changes is to ask them *not* to engage in new interpretations of the purpose of the different human institutions ...".<sup>202</sup>

Moi's point here is a valid one. It goes straight to the heart of one of the problems that post-structuralists encounter when proposing programmes for legal reform. In asking courts to adjudicate, to establish criteria for a test, they are asking courts to fix one legal meaning. Thus when one meaning or test is established, the possibility of multiple legal meanings is closed off. Nevertheless, it is still necessary to propose a programme or some criteria, because to do otherwise would be to condone the law's treatment of transgendered people like April Ashley. Moi's work is ultimately unhelpful in my view because of its refusal to suggest criteria by which transsexuals' sex can be determined and, moreover, its complacency about the fact that this refusal has the effect of leaving transsexuals' sex in a state of legal ambiguity. Ambiguity is, it is true, celebrated and encouraged by post-structuralists because it disrupts the operation of categories and dichotomies, and their limiting and coercive effects. But while poststructuralists suggest that law should allow ambiguity to exist, they do not advance that the law should prescribe it. For law to prescribe ambiguity for all transgendered people would be to deny agency to those who seek an unambiguous identity.<sup>203</sup> Moi fails to recognise that the stating of criteria for a legal test need not mean that these criteria cannot be reviewed and revised in the future. While she is keen to use concrete examples in her theoretical discussion, and to point out issues of materiality, she nevertheless fails to address transsexual issues as involving concrete material subjects.

---

201 *Ibid* at 97; emphasis added.

202 *Ibid*; emphasis original.

203 Furthermore, the behavioural approach I suggest in the text below would retain a degree of ambiguity in that it would not demand that masculinity be necessarily related to male subjectivity and femininity be related to female subjectivity.

### 1.7 CONCLUSION: IS BUTLER'S CRITIQUE POTENTIALLY USEFUL?

Can the sex/gender strategy articulated by Butler and Franke help develop a more complicated understanding of sex, and transsexuality and the law? The basic import of Butler and Franke's theory is that biology and anatomy should be discarded in favour of a more behavioural view of sex. Biology is dangerous as *the* determinant because it limits the possibility of agency, in that it allows little space in which to depart from social norms. Those who cannot, or refuse to, conform are considered 'gender outlaws'. This means that neither biological sex as Ormrod J understood it - chromosomes, gonads and genitals – nor anatomical sex (from birth or constructed) should be given primacy over one's psychological, social and cultural sex.

We see that the *MT v JT* approach, in its dual test of sex *for the purposes of marriage*, comes close to this understanding of sex. While this approach makes significant use of the sex/gender distinction terminology, in that it centrally discusses the 'harmonisation' of sex and gender, it critically portrays anatomy and the category of sex (for the purposes of marriage law) as potentially constructed. But its application in some instances has tended to give primacy to anatomy and thus led to the legal requirement of "irreversible" and "full" surgical intervention, irrespective of cost, unavailability or age. Interestingly, Franke mentions *MT v JT* only in a footnote.

Perhaps the approach that comes closer is that articulated by the Australian Administrative Appeals Tribunal in *SRA v Department of Social Security*<sup>204</sup> which was subsequently overruled by the Federal Court. Here the Tribunal held that psychological sex should be regarded as the most important factor in determining sex, and that social and cultural identity were also important factors. The Tribunal stated that while sex reassignment surgery could be taken as an indicator of psychological sex, it was not conclusive of its existence because in itself it has no effect upon a transsexual's psychological sex.<sup>205</sup> It further stated that the requirement that a person undergo expensive surgery was unduly onerous.<sup>206</sup> This approach avoids the sex/gender distinction by considering biological sex and anatomy as significant only

---

204 (1992) 28 ALD 361.

205 *Ibid* at para 25.

206 It must be noted that the decision was made in the area of social policy and for this reason the Tribunal was able to distinguish it from *R v Harris and McGuiness* (1988) 35 A Crim R 146 and the area of criminal law.

in their relation to psychology, ie. by positioning sex as an effect of gender. By not privileging biology and anatomy, this approach refuses the common impetus to treat them as points of origin (or 'truth') for analysis.

Butler and Franke's desire that sex be ideally understood as behavioural can be read as basically a desire that sex be understood in less rigid terms. As argued above, it is this rigidity in both of the two legal approaches which has the effect, for example, that transsexuals can not marry persons of either sex (*Corbett* approach), or that only post-operative transsexuals can marry (*MT v JT* approach). In some ways Butler and Franke's position is similar to that of self-described "gender outlaw", Kate Bornstein, who rejects the rigid categories of man and woman. For her, transsexuality is about a possibility of self-transformation which is constitutive of gender itself. Bornstein is committed to a notion of becoming and transformation, as the end in itself, rather than in attempting to fix and determine her gender. But unlike Bornstein's approach, their position can also assist those transsexuals who prefer not to live as gender outlaws – those for whom "the end" is a determined gender. Given that the law operates on the basis of a stable subject, why can behaviour and psychology not provide a sufficiently stable base? Perhaps if law perceived biology and anatomy to be as constructed and stable as psychology, then psychology would no longer be dismissed as too unstable as a determinant. The fact that a transsexual has lived and worked as a woman for twenty years and holds identity documents to the effect that she is a woman, as in the case of *SRRD*, should be sufficiently stable as a determinant of sex. The behavioural/psychological approach advocated would avoid the problems of biological determinism by providing an element of agency, and also avoid the legal sanctioning of surgical mutilation and unjustifiable discrimination among transsexuals.

In this chapter I have demonstrated that since the 1970s the law has devised two modes of determining and categorising identity for the purposes of family law. These modes illustrate the simplistic approach law employs in relation to complex social identity. I have argued that both these modes are insufficient as they fail to account for certain salient factors. A more relevant mode of determining identity can be reached, in my view, through a consideration of poststructuralist feminist thought.

## CHAPTER TWO

### NARRATIVES OF TRANSSEXUALITY: MAINTAINING AND DISRUPTING THE CATEGORIES AND BOUNDARIES OF 'MAN' / 'WOMAN'

What I find really interesting is the way in which people  
tend to apologise as if they've insulted you massively  
when they get your gender wrong... Why don't people  
apologize for portraying 'proper' gender norms?

*Interview with Judith Butler*<sup>207</sup>

Jay Prosser writes that transsexual narratives are about transition – transition from one sex to another. But in his view this transition is not an instance of play between one sex and another – it is a transition which involves finding one's 'true' sex/gender category or home. Prosser uses the metaphor of being trapped in the wrong body. He contends that transsexuals continue to deploy the image of wrong embodiment “because being trapped in the wrong body is simply what transsexuality feels like”.<sup>208</sup> Thus, in his view, transsexual narratives – autobiographical narratives at least – depict a journey from the 'wrong' gender to one's 'proper' gender – that is, to one's gender “home”.

The following is a transsexual narrative which uses distinctions related to proper/wrong: the distinctions of true/false, real/imitation. It also invests in the idea of a 'gender home'. However, it is a narrative which refuses the idea of transition.

#### 2.1.1 The Carousel of Reality and Fantasy

The narrative is that of Arthur Corbett and April Ashley. The following are the relevant facts of Arthur and April's narrative *according to the narrator*, Ormrod J. Arthur and Ashley first meet at a Paris nightclub, The Carousel, which is described by Arthur as “the Mecca of every female impersonator in the world”.<sup>209</sup> Arthur is a transvestite and a married father of four. He is described as “involved in the society of sexual deviants and interested in sexual deviations

207 Butler, Judith – Interview with Kate More: “Never Mind the Bollocks: Judith Butler on Transsexuality” in Kate More and Stephen Whittle, eds. *Reclaiming Genders: Transsexual Grammars at the Fin de Siecle* (London: Cassell, 1999) at 293 (hereinafter, “Interview with More”).

208 Jay Prosser, *Second Skins: The Body Narrative of Transsexuality* (New York: Columbia University Press, 1998) at 69.

209 [1971] P 83 at 92.

of all kinds".<sup>210</sup> He has many sexual fantasises and, allegedly, many sexual exploits. His fantasies are of being a woman but his transvestite adventures never fully satisfy him. April is the embodiment of this fantasy for him: "she looked like a woman, she dressed like a woman, and she acted like a woman".<sup>211</sup> Arthur is mesmerised: "The reality was far greater than my fantasy .. it far outstripped any fantasy for myself."<sup>212</sup> At this point the narrator interpolates: "This coincidence of fantasy with reality was to determine [Arthur's] behaviour towards [April] over the next three years."<sup>213</sup>

Arthur repeatedly says that he looked upon April as a woman and was attracted to her as a woman. But April had been born as George Jamieson. She had been in the merchant navy and from early on she had engaged in sex with men. At the age of 20 she had started taking oestrogen and had joined a famous troupe of male/female impersonators. Six months before meeting Arthur, at the age of 25, she had undergone a sex change in Casablanca. After working at The Carousel, April began working in London as a model until her "true sex" was made public. Her dream was to study at drama school one day.

Originally Arthur introduced himself to April under an assumed name but soon disclosed his "real" identity "to show that his feelings had become those of a *full* man in love with a girl, not those of a transvestite in love with a transsexual".<sup>214</sup> He started sending April emotional yet "passionless" letters transfixed on the idea of marriage and of making April the future Lady Rowallan.<sup>215</sup> After divorcing his wife, Arthur persistently proposed marriage to April. The two went to Spain together where Arthur bought a villa and a nightclub. After some time April gave in and agreed to marry Arthur. Despite Arthur's self-described Don Juan tendencies (his many adulterous heterosexual and homosexual liaisons), there was no sexual union between the two before the marriage. Fourteen days later, Arthur filed a petition for a declaration of nullity in regard to the marriage on the grounds of either incapacity or wilful refusal to consummate the marriage. April contested these grounds. In testimony she said she had never had any "real feelings" for Arthur and had seen herself as his "nurse" for three years.<sup>216</sup>

---

210 *Ibid* at 92.

211 *Ibid.*

212 *Ibid.*

213 *Ibid.*

214 *Ibid*; emphasis added.

215 *Ibid* at 93.

216 *Ibid.*

While both Arthur and Ashley saw the relationship as a heterosexual one, this was not the view of the narrator: “my principal impression was that it had little or nothing in common with any heterosexual relationship.”<sup>217</sup> He states that it would be unwise to assess April’s feminine characteristics by the impression they made on Arthur. Although he finds Arthur an “unusually good witness”,<sup>218</sup> he declares Arthur to be “an unreliable yardstick” because he is a man who is “extremely prone to all kinds of sexual fantasises and practices”.<sup>219</sup> An “indication of the unreality of his feelings” is apparently the fact that Arthur introduced April to his wife and family, and they all went on outings together.<sup>220</sup>

Although the quoted passages of Arthur’s testimony are dotted with the words “fantasy” and “reality”, these words are then applied by the narrator to April. April’s words are rarely quoted directly in the narrative. There is an insertion in the narrative of April’s letter to Arthur after the separation. Not once does she use the words “fantasy” or “reality” or any synonyms in the letter. She makes reference only to Arthur’s “lies”.<sup>221</sup> But the narrator nevertheless superimposes his theme of reality and fantasy on April’s emotions, life and testimony. As a preface to April’s letter in which she expresses her unhappiness, the narrator says: “It shows, I think, that *reality* had broken in upon her and that she, quite understandably, could not face the intolerably *false* position into which they had got themselves.”<sup>222</sup>

The narrator has given us a carousel of facts and themes, enough to make the reader feel dizzy and uncertain as to what is reality and what is fantasy. But he stabilises this carousel by reporting the medical evidence which he praises for its lucidity and its “intellectual and scientific objectivity”.<sup>223</sup> He says of the medical witnesses, in contrast to the above witnesses, that “the cause of justice is indebted to them”.<sup>224</sup> Unlike the first part of the narrative, which is framed by the author in the theme of fantasy and reality, this part of the narrative is ‘objective’. Its aim is to classify the subject, April, into a definable and ‘objective’ category. It contrasts the category of the transsexual with the homosexual and then examines the categories within the category of transsexual. The narrative here examines April’s facial and body hair, the possible

---

217 *Ibid.*

218 *Ibid* at 91.

219 *Ibid* at 93.

220 *Ibid.*

221 *Ibid* at 95.

222 *Ibid*; emphasis added.

223 *Ibid* at 89.

224 *Ibid.*

size of her penis before the operation, her urine, her chromosomes and so forth. Nine doctors present their opinions. These opinions are juxtaposed with the opinion of April herself. She is not seen as a good witness. When asked the size of her penis and whether she had been able to ejaculate before her operation, we are told that she refuses to answer and “wept a little”.<sup>225</sup> The narrator tells us, with medical authority, that transsexuals are said to be “‘selective historians’ tending to stress events which fit in with their ideas and to suppress those which do not”.<sup>226</sup> The narrator thus implies that April’s opinions as to her own condition are not objective or reliable and are possibly fantastical.

Despite their proclaimed objectivity, the medical opinions have two diametrically opposing conclusions. Critically, the Court’s medical inspectors conclude “there is no impediment on ‘her part’ to sexual intercourse”. The report of the medical inspectors discusses April’s “artificial vagina” and compare it with a “normal vagina”.<sup>227</sup>

The narrator ignores the terminology used by the Court’s medical inspectors. He emphasises early on that “artificial vagina” is not the appropriate terminology for April’s constructed genitalia. He pointedly calls it a “cavity which opened onto the perineum” or “a completely artificial cavity”.<sup>228</sup> This is presumably to ensure that the reader is never tricked into thinking that April has any ‘true’ characteristics of a woman. The narrator is determined to keep the reader to the objective facts. He says that he is “at pains to avoid the use of emotive expressions such as ... ‘artificial vagina’” because “the association of ideas connected with these words or phrases is so powerful that they tend to cloud clear thinking.”<sup>229</sup>

In this narrative, the narrator clearly privileges the testimony of Arthur over that of April. He does this by giving greater weight to the evidence of Arthur, and more critically, by applying and imposing the theme of reality and fantasy, central to Arthur’s narrative, onto the testimony of April. While it is true that April works as a female impersonator, her evidence is to the effect that she sees herself as a woman and not as an imitation or impersonation of a woman. This evidence is ignored as pre-formulated distinctions are imposed upon her testimony and life by the law. Her testimony cannot be heard outside the discourse of these distinctions.

---

225 *Ibid* at 91.

226 *Ibid* at 98.

227 *Ibid* at 96.

228 *Ibid* at 91.

229 *Ibid*.

### 2.1.2 The Map of This Narrative

In this chapter I intend to examine how transsexuals and transgendered people are understood in legal narratives, as well as some dominant feminist narratives, through such distinctions of real/imitation. In my view, the law uses these distinctions as a means of maintaining the stability of its gender categories. I examine how law, and some feminisms, rely upon these distinctions of real/imitation and ‘real woman’/‘pseudo woman’ in order to assert a ‘truth’ of ‘Woman’ and gender as being governed by biology or anatomy. The aim of this chapter is to show how dominant narratives in both law and feminism use the same dichotomies of natural/artificial, real/false etc to maintain and bolster the stability of the identity categories in which they invest

In the first part of this chapter I demonstrate that in common law jurisdictions transsexual and transgender cases are commonly framed within these distinctions of real/imitation. These cases often involve charges of gender fraud or gender deception. While these distinctions are overtly used in the *Corbett* approach, my view is that the less dominant approach, the *MT v JT* approach (discussed in Chapter One), shares the same underlying belief in the idea of one having a ‘true’ sex/gender. Persons whose anatomy is not fully reassigned to match their psychology are impliedly portrayed as imitations – ie. not quite women or men. These two approaches understand the ‘truth’ of gender as based on biology and/or anatomy.

The second part of this chapter reveals that many tenets of Radical feminism, represented here by the work of Janice Raymond, share much in common with the legal approach. They share the same desire for stable gender categories, the same fear regarding gender borders and the same essentialist views as to what constitutes these categories of woman and man.

The next part examines the work of Judith Butler who argues that it is these very distinctions of real/imitation that open up the possibility of transforming present gender norms and the possibility of agency. These distinctions operate to evidence a gap or fissure between the terms which make up these distinctions. This fissure is located at the point of what we understand as ‘real’ or ‘natural’ in relation to categories such as the category of woman. It is this point or site of instability in the category, which, in Butler’s theory, allows for a shift in present gender norms and categories.

I then look at the work of transsexual and feminist theorists and their responses to the positioning of transsexuality in Butler's theory of destabilising gender categories. Jay Prosser for example refuses this position of instability because, in his view, it denies transsexuals their 'true' gender homes. Prosser's work is marked by tension in his desire for gender authenticity or realness through the constructedness of his post-operative body. In contrast, Kate Bornstein and Sandy Stone embrace this position invoked by Butler as an anti-assimilationist position and they see it as the future of transsexual and gender politics. This position advocates a coalitional politics where primacy is not given to stable categories of identity, such as those produced in and by legal narratives, but to more fluid concepts of identity. I consider these various positions in order to assess whether the category of 'woman' is indeed *the* precondition for feminist theory and effective political action.

I conclude this chapter by charting the contestation of these same issues in the courts and by examining the implications of contesting these positions in such arenas. Specifically I look at the *Vancouver Rape Relief Case* which is currently before the British Columbia Human Rights Tribunal, where the question is whether transgendered women should be considered women for the purposes of 'women-only' organizations.

## 2.2 THE FRAME OF TRUE/ARTIFICIAL IN LEGAL NARRATIVES

### 2.2.1 "Imitation cannot be equated with transformation"

In *Corbett* the narrative searches for April's "true sex" for the purposes of marriage law.<sup>230</sup> Ormrod J's conclusion is that medical intervention cannot change this "true sex" which is determined at birth through one's chromosomes, genitals and gonads. This idea of divining the 'Truth' of sex is most apparent in the biological determinist view of sex (discussed in Chapter One). From Ormrod J's judgment it appears that in order to discover "true sex", it is necessary to identify and label what constitutes 'false' or 'artificial' sex. As pointed out above, Ormrod J undertakes this project particularly in regard to April's genitalia. He sees danger in even using the label "artificial vagina" in describing April's reconstructed genitalia. Instead, as discussed above, Ormrod J believes it is safe to call it a "completely artificial cavity". This refusal evidences Ormrod J's determination to establish and guard the borders between true/false, natural/artificial, and nature/culture. It also evidences his fear of these borders being ruptured.

---

230 *Ibid* at 104.

Similar border tension is apparent in the dissent of Carruthers J in the Australian criminal law case of *Harris and McGuinness* (discussed in Chapter One) where a *post-operative* MTF transsexual and *pre-operative* MTF transsexual were appealing their convictions for male solicitation. Carruthers J's dissent must be read as a response to the majority's rejection of the *Corbett* approach and to Mathews J's observation that the *Corbett* approach criticises "[s]uch change as is achieved [for example by post-operative transsexuals]... as being artificial and unnatural".<sup>231</sup> In Mathews J's view, the natural-artificial distinction is of little assistance in determining a person's sex for the purposes of the criminal law.<sup>232</sup> In his dissent, Carruthers J declared that the test for determining sex should be strictly biological and his judgment embraces a natural/artificial distinction in that it asserts a clear line dividing natural and artificial body parts. He quoted at length, presumably as a source of authority, a medical report which states that a marriage involving a transsexual could not be "sealed by sexual intercourse of the natural sort of coitus" and that a MTF transsexual does "not function as a woman, only seemingly, and their orgasm seems to be phantasised, acted out ..".<sup>233</sup> It also made reference to a successful MTF transsexual as being a "plastic woman".<sup>234</sup> Carruthers J rejected the idea that surgery can eliminate the discordance between a transsexual's psychology and anatomy. He said:

*An artificially created cavity in a biological male is not a vagina in the anatomical sense and does not render the transsexual as 'fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy'... Sexual intercourse (if such it could be called) using the artificial cavity cannot be considered natural coitus.*<sup>235</sup>

Carruthers J referred to Harris' constructed genitalia as "an artificially created cavity",<sup>236</sup> and described Harris' surgery as involving "the creation of a cavity which was intended to act as a substitute vagina".<sup>237</sup> Like Ormrod J, he was at pains not to call Harris' reconstructed genitalia an "artificial vagina". Evidently Carruthers J shares Ormrod J's belief in the ostensible dangers inherent in confusing and rupturing the natural/artificial distinction. In concluding this

---

231 [1988] A Crim R 146 at 180.

232 Referring to the question of a criminal offence, Mathew J said: "How can the law sensibly ignore the state of those genitalia at the time of the alleged offence, simply because they were artificially created or were not the same at birth?" (ibid at 180).

233 Ibid at 157.

234 Ibid.

235 Ibid at 159; emphasis added.

236 Ibid.

237 Ibid at 158.

part of his judgment in *Harris*, Carruthers J's quoted from the judgment of Nestadt J in the South African case of *W v W* the following statement: "Imitation cannot be equated with transformation".<sup>238</sup>

In *W v W* (discussed in Chapter One), Nestadt J labelled the post-operative MTF transsexual plaintiff a "pseudo-type of woman".<sup>239</sup> Nestadt J described the effect of the transsexual plaintiff's operation as being "to artificially supply her with certain of the attributes of a woman, namely breasts and a vagina-like cavity".<sup>240</sup> Both judges in these judgments of *Harris* and *W v W* ascribe to, and inscribe, the view that post-operative transsexuals can never be more than 'imitations'. All three judgments of Ormrod, Carruthers and Nestadt JJ view transsexuality through a frame of imitation and falsity. Underlying this idea of imitation is, of course, the idea of an original – a real woman.

This frame, however, is not limited to the biological determinist view of sex. To some degree it is also apparent in the less dominant approach which emphasises anatomy as the primary determinant. While this approach does not stigmatise the fact that this anatomy is constructed, it nevertheless treats this reconstructed anatomy as an imitation if it fails to constitute a full reconstruction. That is, it is an imitation if the journey to one's 'true' sex is not completed.

This understanding is exemplified in the Canadian case of *B v A*<sup>241</sup> where Master Cork refused to see the FTM transsexual defendant as a man. This refusal was despite the fact that he had lived as a man for twenty years and had had surgery consisting of a bilateral mastectomy, a reconstruction of a male chest contour, a nipple transplantation, a pan-hysterectomy and had had fallopian tubes and ovaries removed. In demanding that sexual reassignment surgery be

---

238 *Ibid* at 159 per Carruthers J quoting Nestadt J in *W v W* [1976] 2 SALR 308 at 314. Emphasis added. As a side note, it is interesting in relation to the question of "imitation", that Carruthers J failed to consider the case of *S v S* [1962] 3 All ER 55 which was one of the main authorities that Ormrod J referred to, and distinguished as obiter, in *Corbett*. In *S v S* the question was whether a marriage could be annulled on the grounds that the wife needed surgery to construct an artificial vagina as she had been born without a vagina or a uterus. She had never menstruated and would never be able to bear children. Ormrod J acknowledged that "passages" in *S v S* held that "an individual, born without a vagina at all, could be rendered capable of consummating a marriage by the construction of an entirely artificial one." (*ibid* at 105). This was an inconvenient case for Ormrod J because, applying his biological test, there is a possibility the wife may not be legally a woman given that all the essential determinants were not congruent in that she had been born without full female genitalia. This case effectively breaks down the natural/artificial distinction which Ormrod J sought to foster.

239 [1976] 2 SALR 308 at 314.

240 *Ibid* at 313.

241 (1990) 29 RFL (3d) 258.

“irrevocable”, Master Cork was perhaps attempting to eliminate gender ambiguity. Master Cork appears to have believed in the possibility that B could revert to ‘her’ natural state if she stopped taking hormones and underwent genital reconstruction. Nevertheless, in refusing to see B as a full man, Master Cork implied that B was an inadequate imitation. While Master Cork failed to detail what kind of surgery would be ‘irrevocable’ for a FTM transsexual, presumably B was a mere imitation because he had not sought surgery for the construction of artificial male genitalia. Master Cork commented that “many women” have similar surgical treatments as B (ie. double mastectomy and hysterectomy) and “continue completely as female”. While this is true, it is not apparent that these same women would also have reconstruction of a male chest contour like B. Thus we see that gender in relation to transsexuality is often understood in a frame of falsity and imitation.

### 2.2.2 Gender Fraud and Deception

The common association made between transsexuals and the ideas of imitation and falsity also extends to the idea of fraud and deception. This is evident in many jurisdictions which until recently had ordinances prohibiting cross dressing. For example, Chicago had an ordinance which forbade cross-dressing “in a public place ... in a dress not belonging to his or her sex, with *intent to conceal his or her sex*”.<sup>242</sup> In defending the ordinance from a challenge, the City asserted four reasons for its total ban on cross-dressing: “1) to protect its citizens from being *misled or defrauded*; 2) to aid in the description and detection of criminals; 3) to prevent crimes in washrooms; 4) *to prevent inherently antisocial conduct which is contrary to the accepted norms of our society*”.<sup>243</sup> The Chicago Ordinance was one of two ordinances whose constitutionality was challenged in the 1970s by pre-operative and post-operative transsexuals. The other Ordinance was that of the City of Houston which stated that it was unlawful for any person to appear in public “dressed with the designed intent to disguise his or her *true sex* as that of the opposite sex”.<sup>244</sup> These challenges were mounted on the ground that the Ordinances directly inhibited the medical treatment of transsexuals, as cross-dressing is part of a ‘life test’ which is a requirement for transsexuals intending to undergo surgery. Both the Chicago and Houston ordinances were found to be unconstitutional only to the extent of their application to transsexuals who had already undergone sexual reassignment surgery or were undergoing pre-

---

242      Emphasis added.

243      *City of Chicago v Wilson* 389 NE 2d 522 (1978) at 524, emphasis added.

244      *Doe v McConn* 489 F Supp 76, 79 (SD Tex 1980). Emphasis added.

surgery psychiatric therapy.<sup>245</sup> While these two challenges were successful, they are outnumbered by the numerous cases where transsexuals, and others in the queer community, have been harassed and convicted for ‘concealing their true gender’.<sup>246</sup>

Another example of the widespread association made between transsexuals and deception is seen in the case of *Richards v US Tennis Association*.<sup>247</sup> In this case a post-operative MTF transsexual was seeking entry into the Women’s US Tennis Open and was challenging the entry test, which was strictly based on chromosomes. Here one of the submissions made by the Tennis Association suggested that the test was necessary in order to prevent men from undergoing surgery specifically to be able to have an unfair advantage in women’s sporting competitions and thereby profit by winning prize money.

The association made between transsexuals and ideas of fraud and deception is more explicit in cases dealing with applications by transsexuals to alter the sex status designated on their birth certificates. In the case of *Anonymous v Weiner*<sup>248</sup> for example, the court dismissed the transsexual applicant’s petition on the grounds that it could not substitute its views for those of the New York Board of Health. The Board upheld the decision of the New York Committee on Public Health to refuse the application on the ground that: “The desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud.”<sup>249</sup> An almost identical decision was made in *Hartin v Director of the Bureau of Records and Statistics*<sup>250</sup> where a similar application was made. These judgments effectively sanction and entrench the common association made between transsexuals and the concept of fraud, whether it be gender fraud or more general manifestations of fraud. These cases are evidence of the fact that serious belief exists that people would undergo extensive sex surgery in order to profit from deceiving others as to their ‘true’ sex.

---

245 It was accepted that it was a mandatory part of transsexuals’ medical treatment to breach these ordinances as it was found that part of their preparation for surgery was to accustom themselves as to how the opposite sex dresses, acts and comports themselves.

246 See, for eg, *People of the State of NY v Archibald* 296 NYS 834 (1968) where a partygoer was convicted for appearing in female attire in a public subway station. In *McConn* the Court pointed out not only that Texas was still enforcing these ordinances but also that there were 53 arrests under the Ordinance in 1977. In *Boots of Leather, Slippers of Gold: The History of a Lesbian Community* (NY: Routledge, 1993), Madeline Davis and Elizabeth Kennedy have documented the harassment of the lesbian community in New York State by law enforcement officers under a quasi legal requirement that women at all time must wear two or three items of female clothing.

247 400 NYS 2d 267 (1977) at 269.

248 270 NYS 2d 319 (1966).

249 *Ibid* at 322.

250 347 NYS 2d 515 (1973). See at 518.

This notion that transsexuals potentially commit fraud by attempting to erase or conceal their biological sex is not without critics. It was sharply criticised by Pecora J in the case of *In the Matter of Anonymous*<sup>251</sup> which involved an application for a change of name by a post-operative MTF transsexual. He stated:

It would seem to this court that the probability of so-called fraud, if any, exists to a much greater extent when the birth certificate is permitted, without annotations of any type, to classify this individual as a 'male' when, in fact, as a foresaid, the individual comports himself as a 'female'.<sup>252</sup>

This statement was endorsed by the court in *MT v JT*. In *MT* the Court also quoted with opprobrium the following observation of the trial judge in *Weiner*: "the transsexual is not committing a fraud upon the public. In actuality she is doing her utmost to remove any false façade."<sup>253</sup> The affirmation of this statement evidences that while the *MT v JT* approach rejects the biological determinist view of gender fraud, it nevertheless invests in its own idea of falsity in relation to gender. According to this approach, what constitutes a "false façade" for a transsexual, is not one's behavioural sex but one's biological sex. Thus, in a different and subtler way, the approach invests in a version of the true/false distinction in relation to sex.<sup>254</sup>

### 2.3.FEMINISM AND NARRATIVES OF THE 'REAL WOMAN'

At this point I would like to compare the above views of transsexuality as imitation, fraud, falsity and deception evident in the law, with views expressed by some feminist theorists. I believe that this is an illuminating comparison because it demonstrates that many of the above views are shared by theorists whose work claims to focus on the operation of sex and gender norms to oppress who fail to conform to these norms.

---

251 293 NYS 834 (1968).

252 *Ibid* at 838.

253 *MT v JT* 355 A 2d 204 (1976) at 210.

254 As the quotation at the beginning of this chapter makes apparent, this norm of understanding gender through rigid distinctions and categories is fairly widespread in Western society.

### 2.3.1 Raymond and *The Transsexual Empire*

One of the most prominent figures in the feminist debate concerning transsexuality is Janice Raymond whose book, *The Transsexual Empire: The Making of the She-Male*,<sup>255</sup> is considered a leading authority amongst Radical feminists in this debate. Raymond believes that transsexualism “highlights ... definitions and boundaries of maleness and femaleness”.<sup>256</sup> It “raises many of the most complex questions feminism is asking about the origins and manifestations of sexism and sex-role stereotyping”.<sup>257</sup>

Raymond’s basic argument is that transsexualism is not a medical phenomenon but a socially caused phenomenon, which results from patriarchal sex-role stereotyping. In her view transsexualism has been captured by the patriarchal medical empire and made into a medical-technical problem in order to control sex and gender norms, as well as women’s bodies. As evidence of this attempt to control these norms and bodies, which she sees as a form of “conspiracy”, she points to the practice of gender identity clinics of encouraging patients to undergo surgery and of requiring conformity to sex and gender norms, such as heterosexuality and female passivity, before surgery takes place.

Raymond’s work has value to the extent that she highlights the dangerous degree of gender conformity required by the medical profession. However, her work reproduces this attempt to define and confine gender and sex by setting up its own boundaries of what it is to be a woman or a man. In her treatise, Raymond stands guard at the borders of gender, attempting to ward off all those who challenge the boundaries of the “territory” of woman. Only those who have female chromosomes and a “history of a woman” are welcome within these borders. Post-operative MTF transsexuals, for example, are not welcome. She refers to them as “artificial women”.<sup>258</sup> In her view, the transsexual who undergoes transsexual surgery “becomes a synthetic product” and “synthetic parts” “produce a synthetic whole”.<sup>259</sup> Raymond pointedly refers to MTF transsexuals, whom she considers to be constitutive of the transsexual

---

255 Raymond, *The Transsexual Empire: The Making of the She-Male* (New York: Teachers’ College Press, (1979) Reprinted 1994 with New Introduction) (hereinafter, *The Transsexual Empire*).

256 *Ibid* at 1.

257 *Ibid* at 99.

258 *Ibid* at 69.

259 *Ibid* at 164.

community,<sup>260</sup> as “male-to-constructed-female”. Raymond states, “if feminists cannot agree on the boundaries of what constitutes femaleness, then what can we hope to agree on?”<sup>261</sup> In her view it is necessary to “distinguish the female Self and her process from the male-made masquerade”.<sup>262</sup>

The MTF transsexual, and in particular the transsexual who identifies as a lesbian feminist, is not welcome in the women’s (and feminist) community because “he” is “a boundary violator”.<sup>263</sup> Raymond accuses transsexuals of violating women’s space(s), women’s minds and women’s sexuality.<sup>264</sup> She asserts inflammatorily: “All transsexuals rape women’s bodies by reducing the real female form to an artifact, appropriating this body for themselves. .. Rape, although it is usually done by force, can also be accomplished by deception.”<sup>265</sup> Raymond’s logic appears to be that in attempting to ‘pass’, transsexuals are involved in a form of deception which violates women’s space and symbolically rapes women.

In order to project the transsexual subject as an “artificial woman”, Raymond must define exactly what she means by a non-artificial woman – ie. a ‘real woman’. It is in this part that she has problems. Her attempt to answer this question is as follows:

... we know who *we* are. We know that we are women who are born with *female chromosomes and anatomy*, and that whether or not we were socialised to be so-called normal women, patriarchy has treated us like women. Transsexuals have not had the same history. No man can have *the history of being born and located in this culture as a woman*. He can have the history of wishing to be a woman and of *acting like a woman* .. Surgery may confer the *artifacts* of outward and inward female organs but it cannot confer *the history of being born a woman in this society*.<sup>266</sup>

Raymond latches onto female chromosomes, anatomy and “the history of being born and located in this culture as a woman” as determinative factors of what constitutes a ‘real’ woman. While in her most recent “Introduction” Raymond appears to have retracted from this earlier position that what makes a woman is the female chromosomes and anatomy she is born with,<sup>267</sup>

---

260 The FTM transsexual is apparently only “the token that saves face for the male ‘transsexual empire.’” (*ibid* at 27).

261 *Ibid* at 110.

262 *Ibid*.

263 *Ibid* at 108.

264 *Ibid* at 104.

265 *Ibid*.

266 *Ibid* at 114; emphasis added.

267 *Ibid*.

she nevertheless believes that MTF transsexuals can never become women because they have not had to live in a female body with all the history that it entails. This idea of a female “history” is a history of certain bodily cycles and life changes: “including the history of menstruation, the history of pregnancy or the capacity to become pregnant ...and the history of female subordination in a male-dominated society”.<sup>268</sup> Raymond sees this history of female subordination as partly connected to female biology. One cannot experience the social and cultural history of subordination unless one is biologically a woman.

It is worth noting that Raymond fails to consider the process by which this female “history” is given meaning in society. That is, she fails to explain the connection between ‘female history’ and the history of female subordination. Much of this “subordination” exists regardless of whether a woman menstruates or becomes pregnant. For example, a lesbian is less likely to share the same history as other women, but surely this does not make her less subordinated or less of a woman. What about the woman in *S v S*<sup>269</sup> who was born without a uterus and vagina and would therefore never experience this bodily history? What Raymond fails to analyse is that this process of subordination is projected largely according to a person’s *external appearance* and not necessarily according to their internal body cycles. Thus, many transgendered women may well share much of the same history of subordination in that they are generally read by society as women.

Raymond argues that “[t]ranssexualism urges us to collude in the falsification of reality - that men can be real women...”.<sup>270</sup> Throughout her book Raymond constantly invokes the real/artificial distinction by setting up a dichotomy between the artificial or synthetic woman and the ‘whole’ and ‘real’ woman. Raymond repeatedly uses the word “deceptive” and ‘falsity’ in regard to transsexuals’ appearance, behaviour and self-identification. She says that the “transsexually-constructed lesbian feminist” is

able to *deceptively act out the part* of lesbian feminist because he is a man .. and *not* a woman encumbered by the scars of patriarchy that are unique to a woman’s personal and social history that *he can play our parts so convincingly* and apparently better than we can ourselves. However, in the final analysis, *he can only play the part, although the part may at times seem as, or more plausible than the real woman.*<sup>271</sup>

---

268 *Ibid* at xx.

269 See *supra* note 238.

270 *The Transsexual Empire supra* note 255 at xxiii.

271 *Ibid* at 103-104; emphasis added.

In her 1994 Introduction to *The Transsexual Empire* Raymond revised her view that transsexuals “act” and asserted that in fact, transsexuals, unlike impersonators, “purport to be the real thing”.<sup>272</sup> Nevertheless, she criticises transgendered people for their “mimicry” and ‘imitation’ of women. Raymond sees transgender issues as reducing “gender resistance to wardrobes, hormones, surgery and posturing – anything but real sexual equality”.<sup>273</sup>

The ideas of falsification and deception clearly echo the sentiment in the cases discussed above. The concepts of falsification, conspiracy and deception imply the existence of a true and essential woman, a ‘real woman’. For example, Raymond’s approach shares much in common with that of Ormrod J in *Corbett*. Her approach is a biological determinist one in its insistence that sex can never be changed. As we saw in Chapter One, the problem with this approach is that it does not allow room for social change to have any effect on ‘the fundamental nature’ of men and women. It therefore operates to essentialise women’s position in prevailing oppressive gender norms and to fix these norms as natural and ahistorical. For feminism, this position creates a double bind: on the one hand, feminism wants to reject the idea that biology is destiny, while on the other hand, Raymond’s feminism wants to create a category of persons, “women”, based on biological factors, such as chromosomes, and also on socialisation by patriarchy.

Critically, Raymond’s treatise also shares the view of Ormrod J that transsexuals are only ‘acting out the part of a woman’. In *Corbett* Ormrod J implied that April was only ‘acting out the part of a woman’ by describing her as an “accomplished female impersonator”. He commented that the respondent’s “voice, manner, gestures and attitudes became increasingly reminiscent of the accomplished female impersonator”.<sup>274</sup> Furthermore, he called this impersonation a “convincing” “pastiche of femininity”.<sup>275</sup>

This notion of performance implies that transsexuals, such as Ashley, are involved in the dissimulation of sex. It also implies a distance between the ‘real self’ and ‘the act’. It presupposes that the real and authentic self is accessible. And it is accessible in the form of the ‘real body’ - the non-artificial body. In other words, the assumption made by Ormrod J and Raymond is that the ‘real self’ is somehow accessible through biology.

---

272 *Ibid* at xxii.

273 *Ibid* at xxxv.

274 [1971] P 83 at 104.

275 *Ibid*.

### 2.3.2 Butler and the Category of 'Woman'

This notion of 'the real' or 'the natural' as being readily accessible is challenged by poststructuralist feminists who question the possibility of accessing one's 'natural or real self' outside cultural discourse. Poststructuralist feminists who draw on the work of Lacan and Saussure posit that everything is understood through language (because language always precedes the speaker) and this means that it is not possible to access the natural or 'real' self outside cultural discourse. The fact that the self is only accessible through language and discourse means that the self/subject/identity is not stabilised through 'the natural' or 'the real'.

The work of Judith Butler is considered to be ground breaking amongst poststructuralist feminists and Queer theorists who examine the construction of sex and gender and the notion of the 'real'.<sup>276</sup> Butler's work embraces the phenomenons of transgender and transsexuality. Her work places them as central to feminism's attempt to challenge dominant views that presume limits and propriety of gender and that restrict received notions of masculinity and femininity. Butler's work also explores the couplings of true/false, real/artificial, natural/artificial, employed in legal and Radical feminist discourses, in order to examine the possibility of a point of slippage between these dichotomised terms – a fissure which opens up the potential for the transformation of gender norms.

Butler's aim is to oppose 'truths' and idealised expressions of gender which produce hierarchy and exclusion. She writes that her work is intended to "oppose(d) those regimes of truth that stipulate(d) that certain kinds of gendered expressions were found to be false or derivative and others, true and original".<sup>277</sup> Its "positive normative task" is to "insist upon the extension of .. legitimacy to bodies that have been regarded as false, unreal, and unintelligible".<sup>278</sup>

As discussed in Chapter One, Butler sees both sex and gender as culturally constructed – as cultural fictions that have no necessary relation to biological factors such as chromosomes. This means that the categories of man and woman and their associated norms are not natural, and hence can be transformed. In Butler's view, the category of 'woman' is not always useful

---

276 See for example, Chris Weedon, *Feminism, Theory and the Politics of Difference* (Oxford: Blackwell Publishers, 1999) 121-123.

277 *Gender Trouble* *supra* note 4 (1999 Ed) Preface at viii.

278 *Ibid* at xxiii.

because it does not signify a natural unity, as commonly presumed. 'Woman' as a category is a cultural fiction. Thus, unlike Raymond, Butler sees no value in guarding the borders of femaleness and maleness; or woman and man. Butler's theory is that oppressive gender norms can only be transformed if we open up these borders. And co-extensive with this opening up of the borders of gender is an implosion of dichotomies, such as real/artificial, which are central to narratives which assert rigid ideas of gender: for example, Radical feminism and the law.

Butler's approach questions the idea that there is some stable gender identity such as woman, or some part of gender identity, such as the body, that can provide a ground for unifying women for the purposes of feminist theory. Her approach questions the idea that there is something universal about being a woman.<sup>279</sup> Butler's theory means that the category of woman, which feminism takes as its founding category, is not always a useful category and indeed can be harmful. She argues that this invocation of the category of 'woman' as a description of a constituency "necessarily produces factionalisation" within the very constituency that is supposed to be unified by its invocation.<sup>280</sup> The "domains of exclusion" produced by the operation of such categories "reveal the coercive and regulatory consequences" of these categories, even where such categories are designed to emancipate their subjects.<sup>281</sup>

Butler is sceptical of identity politics. She comments that: "Identity categories are never merely descriptive, but always normative, and as such exclusionary."<sup>282</sup> As an example she refers to the effort in some feminisms to characterise a feminine specificity through recourse to maternity, whether biological or social. This effort, she says, has produced resistance and factionalisation and even a disavowal of feminism altogether. Similar factionalisation and exclusion has been produced by the attempt by Radical feminists, such as Raymond, to invoke the category of 'woman' as describing 'women born women'. These consequences are also apparent in the *Vancouver Rape Relief Society* case which I discuss further on.

Butler's challenge to the category of woman poses a problem for feminism in that it questions the very ground upon which most feminist politics operates. But Butler does

---

279 Note that Butler does not reject the category altogether. In the 1999 Preface to *Gender Trouble* she asserts its "important strategic use precisely as a non-substantial and open-ended category" (*ibid* at xvii).

280 Butler, "Contingent Foundations: Feminism and the Question of 'Postmodernism'" in Judith Butler and Joan W Scott, eds. *Feminists Theorise the Political* (New York: Routledge, 1992) at 15 (hereinafter, "Contingent Foundations").

281 *Gender Trouble* *supra* note 4 at 4.

282 Butler, "Contingent Foundations" *supra* note 279 at 15-16.

acknowledge that the category of ‘woman’ can be useful at times in representational politics, for example in demonstrations, legislative efforts and radical movements. She does not advocate that the term ‘woman’ ought not to be used, but that it be designated “an undesignatable field of differences .. a site of permanent openness and resignability”.<sup>283</sup> Butler suggests that that “it may be that only through releasing the category of woman from a fixed referent that something like ‘agency’ becomes possible”.<sup>284</sup> If its meaning is not fixed, then “possibilities for new configurations of the terms become possible”.<sup>285</sup> Thus Butler sees the lack of stability or fixity of this category as positive because it opens up the possibility of transforming present gender norms and expanding the possibilities of what it means to be a woman. This expansion in turn provides the possibility of a female subjectivity which includes the dimension of agency. In her view, transsexuality, and to some extent other phenomena such as drag, highlight this moment or point of instability and resignification.

### **2.3.3 Drag, Transsexuality and the Process of Denaturalising Gender Categories and Norms**

Butler’s theory of the operation of gender is briefly as follows. Gender is a regulatory fiction. It is performative effects of repeated acts. It is an imitation without an original: a repeated performance; “*a stylised repetition of acts*”.<sup>286</sup> Over time this performance has congealed to produce the appearance of substance, of something natural. That is, through this repetition an internal essence of gender is “manufactured”.<sup>287</sup> This gender performativity achieves its effects through its naturalisation in the context of a body.<sup>288</sup>

In *Gender Trouble*, Butler uses the example of drag to explain this process. She uses drag as an example because it has the potential to effectively “mock(s) both the expressive model of gender and the notion of a true gender identity”.<sup>289</sup> Butler states that:

As much as drag creates a unified picture of ‘woman’ ... it also reveals the distinctness of those aspects of gendered experience which are falsely naturalised as a unity through the regulatory fiction of heterosexual coherence. In imitating

---

283 *Ibid* at 16.

284 *Ibid*.

285 *Ibid*.

286 *Gender Trouble*, *supra* note 4 at 140.

287 *Ibid* at 136.

288 *Ibid* (1999 Preface) at xv.

289 *Ibid* at 137.

gender, drag implicitly reveals the imitative structure of gender itself – as well as its contingency.<sup>290</sup>

Through parodic repetition of ‘the original’, performances like drag reveal the original to be nothing more than a parody of the *idea* of the natural and the original.<sup>291</sup> She argues that an avenue for achieving a strategic resignification of gender norms is opened up by staging gender in ways that emphasize the manner in which ‘the unity’ of gender is the effect of regulatory practice. It is thus in the arbitrary relation between such repeated acts that there exists the possibility of gender transformation, in that there is a possibility of a failure to repeat, a deformity, or a parodic repetition which, she says, exposes “the phantasmatic effect of abiding identity as a politically tenuous construction”.<sup>292</sup>

With the example of drag Butler aims to “expose the tenuousness of gender ‘reality’ in order to counter the violence performed by gender norms”.<sup>293</sup> Butler sees drag as subversive to the extent that it reflects on the imitative structure by which hegemonic gender is produced and offers an effective model through which to deconstruct gender categories which have been naturalised to appear ‘original’.<sup>294</sup> Butler is critical of those feminists who see drag and transsexuality as a form of *appropriation* of the female gender. To her, such texts as Raymond’s are “part of a homophobic radical feminism”.<sup>295</sup>

Importantly, these repeated acts of gender are not performed on a voluntary basis. Butler has been criticized by those who have misunderstood her theory and read it as literally suggesting that gender, like drag, is a “role” that can be taken on or off at will like clothing.

---

290 *Ibid*; emphasis original.

291 *Ibid* at 31. Butler also argues for the efficacy of other gender performances which “repeat and displace through hyperbole, dissonance, internal confusion, and proliferation the very constructs by which they are mobilised.” (*ibid*).

292 *Ibid* at 141.

293 *Ibid* (1999 Preface) at xxiv.

294 *Ibid* at 125. Butler says (in the 1999 Preface) that it would be a mistake to understand drag as the paradigm of subversive action or as a model for political agency (*ibid* at xxii). To Butler drag is not an inherently subversive act (*ibid* at 125). It is a site of ambivalence as “it may well be used in the service of naturalisation and reidealisation of hyperbolic heterosexual norms” (*ibid*). But she does not adhere to the radical feminist view posited by Raymond and others that drag is inherently offensive to women and that it is an imitation always based in ridicule and degradation of women. She rejects the argument that drag is nothing but the displacement and appropriation of women.

295 Butler, Interview with More, *supra* note 207 at 294; emphasis added. Butler argues that to analyse drag as only misogyny or appropriation is to figure the transgender community as exclusively male and homosexual. In turn, it is to diagnose male homosexuality as rooted in misogyny, a position which she says follows the same homophobic logic that lesbianism is all about misandry.: Butler, *Bodies That Matter: On the Discursive Limits of ‘Sex’* (New York: Routledge, 1993) at 127 (hereinafter, *Bodies That Matter*).

This misreading has been associated with Radical feminist critics such as Sheila Jeffrys.<sup>296</sup> Responding to this critique in *Bodies That Matter*, Butler emphasises that her theory should not be interpreted as supporting a 'voluntaristic' approach to social change. She rebuts the view that her model is as simple as: "if I am performed, I can unperform myself". She states that gender performance repetition "is not performed *by* a subject; this repetition is what enables a subject and constitutes the temporal condition for the subject. This iterability implies that 'performance' is not a singular 'act' or event, but a ritualised production...".<sup>297</sup> Gender is not like clothing: it is not voluntaristic, on the contrary, she argues, it is constrained by social norms.

Butler sees transsexuality as subverting the regulatory fiction of gender because it calls into question what is natural and what is artificial about sex and gender. Transsexuality challenges the 'reality' of gender: the idea that we know what the reality is and our reflex in taking the secondary appearance of gender to be mere artifice, play, falsehood and illusion.<sup>298</sup> Once the categories of the real and the unreal, man and woman, are questioned, as we saw in the cases above, the category of *gender is put into crisis*: it is no longer clear how to distinguish between these categories. The crisis shows that these categories are not so fixed and rigid. Thus we see that 'gender reality' – "what we invoke as the naturalised knowledge of gender is, in fact, a changeable and revisable reality".<sup>299</sup> Gender is revealed as changeable and ultimately transformable.

---

296 Sheila Jeffrys, "The Queer Disappearance of Lesbians: Sexuality in the Academy" (1994) 17 *Women's Studies International Forum* 459. This literal reading of Butler perhaps more accurately reflects the theory of Bornstein, whose work I shall discuss later.

297 *Bodies That Matter: On the Discursive Limits of 'Sex'* (New York: Routledge, 1993) at 95.

298 *Gender Trouble* *supra* note 4 (1999 Preface) at xxii.

299 *Ibid* (1999 Preface) xxiii.

## 2.4. TRANSSEXUAL NARRATIVES ABOUT 'PROPER' AND 'WRONG' GENDER: IS GENDER A HOME OR A CLOSET?

### 2.4.1 Felski and Prosser's Critique of Butler's model of radical instability

While in Butler's theory transsexuality can be seen as assisting feminism in thinking through the construction and transformation of gender, Butler's theory has been criticised by transsexual and feminist theorists precisely for its deployment of transsexuality to signify a radical instability in gender. This debate ultimately involves a critique of the usefulness of gender categories (or 'homes') such as 'woman' to gender politics.

One such critic of Butler is feminist theorist, Rita Felski, who is critical of the place given to 'trans' in poststructuralist and Queer theory. She is disparaging of the strategy employed by Butler and other Queer theorists and poststructuralists to promote 'trans' as the key or universal signifier. She warns that such promotion comes "at the risk of homogenising differences that matter politically".<sup>300</sup> These differences are those between women and men and "between those who occasionally play with the trope of transsexuality and those others for whom it is a matter of life or death".<sup>301</sup> Thus, while Butler aims to challenge and shift the differences between women and men, Felski desires to preserve these differences. Felski believes that the celebration of multiple and shifting identities may "elide the particularity of women and .. deny the specificity of gendered embodiment".<sup>302</sup> Furthermore, Felski appears to accuse and scold Butler and others of merely 'playing' with the trope of transsexuality and failing to recognise the consequences that such play can have in some lives. She points out that: "Not all social subjects, after all, have equal freedom to play with and subvert the signs of gender, even as many do not perceive such play as a necessary condition of their freedom."<sup>303</sup>

Jay Prosser, a transsexuality theorist, shares this criticism. He approaches the question of gender by focussing on transgender and transsexual narratives and their subjects. Prosser rejects the place given to transsexuality by Queer/poststructuralist theory, such as that of Butler, because in his view it erases the specificity of transsexual experience and denies transsexuals a

---

300 Rita Felski, "Fin de Siecle, Fin de Sexe: Transsexuality, Postmodernism and the Death of History" (1996) 27 *New Literary History* 337 at 347 (hereinafter, "Fin de Siecle").

301 *Ibid.*

302 *Ibid.*

303 *Ibid* at 346-347.

desired sense of stability and belonging. In his view, the transsexual is “the very blind spot” of such writings.<sup>304</sup>

Like Felski, Prosser notes that the work of Butler and others, which aims to destabilise the male/female divide, brings about “a waning of teleology”.<sup>305</sup> In *Second Skins* Prosser comments that “Butler’s suggestion of a possible transgendered becoming .. conveys that gender is not a teleological narrative of ontology at all, with the sexed body (female) as recognisable beginning and gender identity (woman) as a clear-cut ending”.<sup>306</sup> In his view, Butler demotes gender from narrative to performative in that gender appears as “performative moments all along a process” rather than as the end, the telos, of narrative.<sup>307</sup> Prosser’s view is that most transsexuals seek a teleological concept of gender: they seek “to be non-performative, to be constative, quite simply to *be*.”<sup>308</sup> He argues that the transsexual narrative of gender is a journey from one location, through a transitional state, and then to another location, a place of gendered belonging. In Prosser’s view, ‘transition’ is not a place to be embraced: it is a place that provokes discomfort and anxiety; it is “necessary for the identity’s continuity; it is that which moves us on”.<sup>309</sup>

According to Prosser, moving to, and belonging to, one of the categories of man and woman is what drives transgender and transsexual narratives. He believes that these narratives embrace the categories of man and woman as having a particular value – what he terms “gender realness”. In his view, these narratives do not produce the revelation of the “fictionality of gender categories but the sobering realisation of their ongoing foundational power”.<sup>310</sup> They express the “importance of the flesh to the self” and moreover, they attest “the desire to pass as real-ly gendered in the world without trouble”.<sup>311</sup>

References to “gender reality” mark the writing of Prosser. It is apparent that he, like Raymond, does not share Butler’s view in this regard. However, like Butler, Prosser rejects Raymond’s view that reality is reflected by one’s biology, and one’s history relating to that

---

304 *Second Skins* *supra* note 208 at 14.

305 “Fin de Siecle” at 338; *ibid* at 200; Prosser, “Exceptional Locations: Transsexual Travelogues” in Kate More and Stephen Whittle eds. *Reclaiming Genders: Transsexual Grammars at the Fin de Siecle* (London: Cassell, 1999) 83 at 84 (hereinafter, “Exceptional Locations”).

306 *Second Skins*, *ibid* at 29.

307 *Ibid*.

308 *Ibid* at 32.

309 *Ibid* at 3.

310 *Ibid* at 11.

311 *Ibid* at 59.

biology. Raymond's view is that only a person with XX chromosomes can be a 'real woman'. In Prosser's view, reality is related to anatomy so that once a transsexual undergoes sex reassignment surgery, their 'gender reality' becomes that of their anatomy and not their biology. In contrast, Butler does not limit reality to a reflection of anatomy or biology. Her theory holds that when there is mimetic approximation of the real, through drag for example, this is not just an attempt to approximate the 'truly real' but is part of the constitution of what will be real. Performative theory, she asserts, "reconceives and redefines what counts as real; it alters our sense of what is real and what is liveable".<sup>312</sup> Within a view that all gender, including sex, is constructed and produced by norms and discourses, there is no dichotomy between "real" and "mimic". Thus, in Butler's view there is neither the real/essential woman nor an imitation.

#### 2.4.2 Prosser's dream of a 'real' gender home

Prosser's work advocates a "politics of home". Unlike Butler, he embraces identity politics and it is for this reason that he finds transsexuality theory to be "irreconcilable" with Queer theory.<sup>313</sup> Prosser uses the metaphors of "territory", "crossing" and "being at home in the body" in arguing for the "right to gender homes".<sup>314</sup> In this political position resembling a civil right position, he seeks "recognition of [transsexuals'] sexed realness; acceptance as men and women".<sup>315</sup> He sees the practical applications of such a politics for transsexuals as "immediate" and "transformative".<sup>316</sup> As examples, he lists total health insurance coverage for transsexuals to undergo sexual reassignment surgery and the right to change one's birth certificate after surgery. He envisages these as part of the "right of a subject to be clearly locatable in relation to sexual difference".<sup>317</sup>

In advocating a 'politics of home' Prosser fails to acknowledge that transsexuals *are* currently 'located in relation to sexual difference'. Arguably, their 'sexed realness' *is* currently recognised and they *are* accepted as men and women. Prosser fails to address the central problem facing transsexuals in relation to politics and the law, which is that the law understands the concept of 'sexed realness' quite differently to how transsexuals such as Prosser understand it. Prosser uses the term "sexed realness" as if it were unproblematic but as we saw in Chapter

---

312 "Interview with More" *supra* note 207 at 297.

313 *Second Skins* *supra* note 208 at 59.

314 *Ibid* at 177. See also "Exceptional Locations" *supra* note 305 at 83

315 *Second Skins*, *ibid* at 204.

316 *Ibid*.

317 *Ibid*.

One, this is an issue which has produced a panoply of conflicting legal narratives. The law *does* accept transsexuals as men and women but it mostly defines the reality of their sexual difference according to the same biological criteria as Raymond. Thus the law currently provides transsexuals with ‘gender homes’, but it does not always allow transsexuals to choose their ‘gender home’.

Prosser’s politics invests in the distinctions of proper/wrong: while it reverses some of the dominant meanings of these terms, it does so without challenging their power. It is perhaps this failure to truly engage with the real/false dichotomy deployed by Radical feminism and the law that makes Prosser so easily dismissive of the attempt by postmodernism and Queer theory to *denaturalise* the polarities of gender. Prosser blankly asserts that “construction” offers “nothing positive”.<sup>318</sup> In his view, “in a mainstream sense” it is a means “of devaluing and discriminating against what’s ‘not natural’ and of “invalidating the subject’s claim to speak from legitimate feelings of gendered experience”.<sup>319</sup> He asserts that such theories preclude transsexual agency in that they fail to examine how transsexuals are constructing subjects.<sup>320</sup>

#### 2.4.3 Halberstam: Is a ‘Gender Home’ an exclusionary fantasy?

Judith (Jack) Halberstam sees Prosser as calling for a new kind of essentialism.<sup>321</sup> This essentialism “allows for and recognises the investments that transsexuals do and have made in the real, the bodily and the literal”.<sup>322</sup> In my view this “new kind of essentialism” is clearly not biological but instead a form of anatomical essentialism. This form of essentialism allows for a degree of change: one’s gendered essence is fixed not at birth but according to one’s anatomy when one’s ‘true’ anatomy has been confirmed or ‘corrected’ to match one’s psychology. This form of essentialism is evident in the cases which follow the *MT v JT* approach, discussed in Chapter One, which hold anatomy and psychology as the primary determinant of sex. Like these judgments, Prosser holds “sexed materiality” as critical and very much places it within the proper/wrong distinction. Finding and ‘correcting’ one’s ‘real’ sexed materiality is essential in his account, as is stability in this (found or corrected) gender.

---

318 *Ibid* at 8.

319 *Ibid.*

320 *Ibid.*

321 Judith Halberstam, Review of *Second Skins* (2000) Signs 313 at 314.

322 *Ibid.*

Halberstam takes issue with Prosser's 'politics of home' and its use of gender categories. Prosser's model projects home as the place in which "one finally settles into the comfort of one's true and authentic gender".<sup>323</sup> She describes this space as "a fantasy space, a remembered space of stable origin and a nostalgic dream of community".<sup>324</sup> Halberstam argues that such a space can just as easily be a space of exclusion. She points out that many transsexuals, even post-operative transsexuals, are 'in between' because they cannot pass as men or women. She says: "Some bodies are never at home, some bodies cannot simply pass from A to B, some bodies recognise and live with the inherent instability of identity."<sup>325</sup> Thus she sees Prosser's dream of a gender home as an exclusionary fantasy which exists at the expense of the recognition of others who are permanently dislocated. Those who cannot assert or join this politics will remain outside and invisible. The idea of a 'politics of home' thus effectively creates borders and categories which, like Raymond's politics, operate to exclude.

#### **2.4.4 Stone and Bornstein: Claiming a Space Outside the Binary 'Gender Home'**

The "outside" is the position advocated by post-operative MTF transsexual activist Sandy Stone in her ground breaking response to Raymond, "The Empire Strikes Back: A Posttranssexual Manifesto". To Stone, the "politics of home" means "passing" – that is, aspiring to a gender reality within the binary categories of man/woman: "to be accepted as a 'natural' member of that gender [of choice]".<sup>326</sup> And 'passing', in her view, means the erasure of personal experience and the denial of mixture and ambiguity.<sup>327</sup> Stone sees 'the politics of home' model as encouraging the transsexual to erase him or herself and their history by fading into the 'normal' population. Part of this process involves the construction by the transsexual of a 'normal' history - ie. lies about one's past – which is a strategy urged by medical discourse in particular.

Stone recognises that transsexuals currently occupy a position that is politically "nowhere":<sup>328</sup> they exist outside the binary oppositions of gendered discourse in that they are not recognised as their *chosen* 'home' gender. Thus Stone calls for a "counterdiscourse" and

---

323 Judith Halberstam, *Female Masculinity* (Durham: Duke University Press, 1998) at 163.

324 *Ibid* at 163, 171.

325 *Ibid* at 164.

326 Sandy Stone, "The Empire Strikes Back: A Posttranssexual Manifesto" in Katie Conboy, Nadia Medina, and Sarah Stanbury, eds. *Writing on the Body: Female Embodiment and Feminist Theory* (New York: Columbia University Press, 1997) 337 at 352 (hereinafter, "The Empire Strikes Back").

327 *Ibid*.

328 *Ibid* at 351.

states that such a “counterdiscourse” is impossible if transsexuals continue to try ‘passing’. She argues that: “[f]or a transsexual, *as a transsexual*, to generate a true, effective and representational counterdiscourse is to speak from the outside”.<sup>329</sup>

Stone suggests that transsexuals see themselves as “a genre – a set of embodied texts whose potential for productive disruption of structured sexualities .. has yet to be explored”.<sup>330</sup> She argues that transsexuals’ erased histories disrupt the accepted discourses of gender and that transsexuals should form alliances with other gendered minorities to challenge gender norms and categories.<sup>331</sup>

To Prosser such suggestions are inadequate in that they fail to consider the “materiality of the body”. He finds the “refusal of sexual difference” in Stone’s ‘posttranssexuality’ to be unrealistic because it fails to acknowledge “an ongoing desire for sexual realness and coherent embodiment”.<sup>332</sup> He states: “While outside may be spoken from occasionally, for those whose very purpose is sexed assignment its continued occupation may be intrinsically paradoxical.”<sup>333</sup> To Prosser, such a position, which he calls “sexed dislocation”, is “uninhabitable”.<sup>334</sup>

Kate Bornstein, like Sandy Stone, lives and advocates this “uninhabitable” space on the “outside” of the binary gender categories. Her transsexual narrative, *Gender Outlaw: One Men, Women and the Rest of Us*, is described by Prosser as “our first postmodern transsexual autobiography” because its structure opposes “transsexuality’s telic structure”.<sup>335</sup> But while Stone rejects the idea of transsexuals constituting a “third gender” as “problematic”,<sup>336</sup> Bornstein embraces the idea of a “third” – be it a third gender, space or just a third. Although like Stone she has had surgery to make her an anatomical woman, unlike Stone, she does not identify as a woman. She says: “I identify as neither male nor female ... I’ve no idea what a ‘woman’ feels like. ... it was an unshakeable conviction that I was not a boy or a man. It was

---

329 *Ibid* at 350.

330 *Ibid* at 352.

331 *Ibid* at 351. Note that Stone rejects the right/wrong dichotomy in relation to embodiment and transsexuality. She states: “Under the binary phallocratic founding myth by which Western bodies and subjects are authorized, only one body per gendered subject is ‘right’. All other bodies are wrong.” (*ibid* at 353).

332 *Second Skins*, *supra* note 208 at 203.

333 *Ibid* at 204.

334 *Ibid* at 203.

335 Prosser, “Exceptional Locations” *supra* note 305 at 90.

336 “The Empire Strikes Back” *supra* note 326 at 352.

the absence of a feeling, rather than its presence, that convinced me to change my gender.”<sup>337</sup> Bornstein clearly does not claim to be a ‘real’ woman. She sees herself as living on “the borders of the gender frontier”, as living a fluid gender.<sup>338</sup> Like Butler’s theory, her life embraces gender fluidity: “Gender fluidity is the ability to freely and knowingly become one or many of the limitless number of genders .. Gender fluidity recognises no borders or rules of gender.”<sup>339</sup> Nevertheless, she is aware of the fact that for some purposes, such as avoiding transphobic violence, she must “keep one foot in the place called woman”.<sup>340</sup>

Bornstein rejects a ‘politics of home’. She understands this politics as encouraging passing, assimilation and *deception*. While she acknowledges that “the stakes are a bit higher .. if [you play with gender and] don’t have a safe base to come back to”,<sup>341</sup> she is nevertheless much less sympathetic than Stone in regard to transsexuals, such as Prosser, who advocate ‘passing’. In this respect her position is as absolutist as that of Raymond in that she sees passing as a form of deception. She calls it “lying” when transsexuals try to pass as non-transsexuals and she states that she can understand why some members of the gay and lesbian community are offended by this.<sup>342</sup> Passing is part of “a cultural imperative to be one gender or the other”.<sup>343</sup> It is a means of reinforcing rather than questioning the bipolar system of gender categories. It forces transsexuals to strive for recognition within their new gender, instead of challenging the construct of gender.<sup>344</sup> In her view, “Passing becomes silence. Passing becomes invisibility. Passing becomes lies. Passing becomes self-denial.”<sup>345</sup> Thus, like Raymond, Bornstein does not believe that MTF transsexuals can be part of the category of ‘woman’. Critically, however, unlike Raymond she believes that such gender categories hold no value or ‘truth’.

---

337 Kate Bornstein, *Gender Outlaw: On Men, Women and the Rest of Us* (NY: Routledge, 1994) at 4, 24 (hereinafter, *Gender Outlaw*).

338 *Ibid* at 12.

339 *Ibid* at 52. Bornstein’s theory of deconstructing gender is much more rudimentary and perhaps more playful than that of Butler. Bornstein, for example, has a voluntaristic view of gender. In her view, the subject has the agency to deconstruct gender individually. At her “Cross-Gender Workshops” for example, she has participants perform two phases – the “shedding of gender” and the “construction of a new gender”: see Interview with Shannon Bell, “Kate Bornstein: A Transgender Transsexual Postmodern Tiresias” in Arthur and Marilouise Kroger eds., *The Last Sex: Feminism and Outlaw Bodies* (Montreal: New World Perspectives, 1993) 104 (hereinafter, “Interview with Shannon Bell”). Arguably, her assumption that gender identities can be taken on or off like clothes effectively denies the complexity of such gender identity.

340 “Interview with Shannon Bell”, *ibid* at 110

341 *Ibid*.

342 *Ibid* at 113.

343 *Gender Outlaw* at 125.

344 *Ibid* at 127.

345 *Gender Outlaw* *supra* note 337 at 125.

Bornstein notes that the concept of passing involves “the concept of reading (seeing through someone else’s attempt at passing) and being read.”<sup>346</sup> This she sees as part of general culture’s desire and insistence upon “an unmasking”; its demand for gender’s ‘truth’.<sup>347</sup> Here she identifies that gender is culturally imbued with notions of ‘truth’ and ‘falsity’. She dismisses the metaphor commonly used in transsexual culture, and repeated by Prosser, of ‘being trapped in the wrong body’. In her view there is no right or wrong body, just as there is no true or false gender. Bornstein sees post-operative transsexuals as transitioning from one false gender to “another false gender”.<sup>348</sup> Her approach completely rejects the notion of an essential woman or man.

Bornstein believes that “hiding” one’s transsexual status in the ‘gender closet’ is “an unworthy stance” and thus she encourages transsexuals to move “in the direction of openly embracing their borderline status”.<sup>349</sup> To her, the only alternative to forced assimilation is resistance – to create another space for transsexuals outside the bipolar gender system. This is the space of the “gender outlaw”, such as Bornstein, who subscribes to a “dynamic of change”.<sup>350</sup> The function of this space and the gender outlaw is to question the extant gender categories and “to open some doorway that’s been closed off for a long time.”<sup>351</sup> She says:

its when we put gender into play, its when we question the binary,  
its when we break the rules and keep calling attention to the fact  
that the rules are breakable:that’s when we create a Third Space.<sup>352</sup>

In her life, queer theatre is her ‘Third Space’. Bornstein believes that all the categories of transgender share a common ground in that they in some way or other break one of more of the rules of gender.<sup>353</sup> Thus she calls for all such gender outlaws, and those who also break the rules of sexuality, race etc, to join with her under a banner of ‘the Third’. This is a vision of coalitional politics against gender oppression.

---

346 *Ibid* at 128.

347 *Ibid*.

348 *Ibid* at 12-13.

349 *Ibid* at 76.

350 *Ibid* at 97.

351 *Ibid* at 98.

352 *Ibid* at 140.

353 *Ibid* at 69.

### 2.4.5 Califia: Categories Remain Useful

Pat Califia criticises Bornstein's concept of 'a Third' as naïve. Califia is a self-described "sex radical and feminist". She pits herself against "feminist fundamentalism", of which Raymond's approach is seen as representative, and she supports freedom of choice in relation to an individual's gender identity. Her approach is a civil rights approach in that she is more interested in fighting for equality than deconstructing gender. To a certain extent, this approach shares much in common with that of Prosser.

In *Sex Changes*, Califia criticises Bornstein as being "the opposite of a biological determinist".<sup>354</sup> She depicts this as an extreme position with which few people would agree, and she argues that the gender system and the concept of sexual difference are based on "some physiological and genetic realities that really do divide the human race into two very different groups of people".<sup>355</sup> Bornstein, she says, is not willing to see anything positive about these differences. She argues that her work "overlooks the ways that *gender serves many fundamental needs for women as well as men*".<sup>356</sup> In her view it does not make sense to give up the degree of power that women currently have in this system without knowing what will replace it. The gender system is not the core of gender oppression (or sexuality oppression) in her view. She describes it as being "potentially innocuous".<sup>357</sup> In fact, she states that the elimination of gender identities would itself be a "form of oppression".<sup>358</sup> It therefore makes more sense, in her view, to fight for equal pay and equality between men and women rather than to fight for the deconstruction of gender.

Califia is highly dismissive of Bornstein's strategy of "a Third".<sup>359</sup> Califia contends that having a 'third' does not remedy or avoid oppression and unequal power. Such oppression can exist, she asserts, in a three-way system in that men might continue to oppress both women and

---

354 Pat Califia *Sex Changes: The Politics of Transgenderism* (San Francisco: Cleiss Press, 1997) at 247 (hereinafter, *Sex Changes*).

355 *Ibid* at 247.

356 *Ibid* at 252; emphasis added.

357 *Ibid* at 272.

358 *Ibid* at 257.

359 She notes that this concept has been borrowed from Marjorie Garber who proclaims cross dressers as "the third .. which questions binary thinking and introduces crisis": Marjorie Garber, *Vested Interests: Cross-Dressing and Cultural Anxiety* (NY: Harper Collins, 1992) at 118.

differently gendered people.<sup>360</sup> She does not believe that “a third” would place the current gender binary into a crisis which would remedy present gender inequality.<sup>361</sup>

Califia castigates Bornstein’s view of power between men and women as simplistic. Bornstein discusses gender as a class and this gender class system as having a “one-up, one-down” structure based on the gender polarity. If gender remains a binary “one side will always have more power than the other. One will always oppress the other.”<sup>362</sup> This understanding of power is admittedly crude, as is the dichotomy she effectively sets up between “gender outlaws” and “gender defenders” (ie. those who try to ‘pass’). Such oppositions negate the complexity of gender and effectively divide the transgender community by implying that some versions of transsexualism are more true than others.<sup>363</sup>

Califia sees Bornstein’s disavowal of gender identity categories as echoing Raymond’s view that transgendered people should refrain from identifying as members of their psychological/behavioural sex.<sup>364</sup> Ultimately she believes that identity categories are useful to the “movement for gender freedom” as these identity categories express “qualities that are key to their individual and communal identities”.<sup>365</sup> In her view a political alliance between members of the Queer community should not demand the erasure of these categories. Instead, she asserts, it would be a much shorter road to simply agree to work on common goals.<sup>366</sup> These views evidence that Califia is more concerned with representational politics rather than questions posed by Queer or feminist theory which consider how structural change can be brought about.<sup>367</sup> Her pragmatic type of activism closely resembles a civil rights approach.<sup>368</sup>

---

360 *Sex Changes supra* note 354 at 252.

361 In fact, she argues that “a third” currently exists in the present system and that it is children who constitute this oppressed class (*ibid* at 251).

362 *Gender Outlaw supra* note 337 at 113.

363 Patricia Elliot and Katrina Roen, “Transgenderism and the Question of Embodiment: Promising Queer Politics?” (1998) 4:2 GLQ 231 at 239.

364 *Sex Changes supra* note 354 at 260.

365 *Ibid* at 276, 256

366 *Ibid* at 256.

367 Califia’s lack of interest in these questions is evidenced by her failure to consider (or even reference) Butler’s work. In my view this explains Califia’s assertion that Bornstein’s ideas have little support in the transgender or feminist community and that there is “no solid theoretical background” to her stance of deconstructing gender. The work of Butler and other Queer theorists can be read as providing the solid theoretical background behind the idea that gender must be challenged and deconstructed. Note that Califia also appears to misread Bornstein’s idea of deconstructing gender as arguing for the elimination of all gender differences. To the contrary, Bornstein wants to question and play with gender in order to shake its rigidity.

368 Ultimately, Califia and Bornstein, as well as Butler, Stone and Prosser, share much in common. All five reject the “fundamentalist feminism” represented by Raymond. All understand the category of women as

But while she is critical of the desire to erase identity categories, her vision of politics is not based on exclusivity of identity categories, such as that of Raymond, but on a notion of a coalition of categories with common goals.

Bornstein's politics is a newer type of activism which was activated by certain events in the 1990s.<sup>369</sup> One of the events that led to this type of activism was the ejection of transgendered women from the Michigan Women's Music Festival in 1991 and the ensuing movement to challenge the festival's "womyn-born-womyn" policy. This policy was clearly a result of Radical feminist politics, such as that of Raymond, which insists that gender is a status that can be understood through biology and anatomy and through the frame of real/false.

In the above debate, ranging from Prosser to Califia, it is apparent that the question of gender categories and their ability to express 'truth' is a site of intense contestation. Ultimately all these theorists reject the notion of a 'real' woman, as well as a rigid view of gender, as espoused by Raymond. However, despite this shared rejection, they disagree as the extent to which categories of gender are useful to the pursuit of effective gender politics. In the following section I examine how such debates are played out in the courts.

## 2.5. CONTESTATIONS OF THE 'REAL' WOMAN IN COURT: THE VANCOUVER RAPE RELIEF SOCIETY CASE

The notions of a 'real' woman and a fixed category of woman are being presently contested in the courts. In Canada, transsexuals are challenging the exclusionary operation of 'womyn-born-womyn only' policies. Here we see the debate as to who is part of the category of woman, and who is 'real', dividing feminists (and transsexuals theorists) not only in the realm of theory (and the community), as seen above, but also in the courts.

A salient example is the *Vancouver Rape Relief Society case* which is currently being heard by the British Columbia Human Rights Tribunal. This case involves a post-operative

---

being inclusive of non-biological women. Califia, like Bornstein and Stone for example, is also against the cultural imperative for transgendered people to 'pass'. She advocates that these gender differences be "celebrated" (*ibid* at 257). She also recognises that: "If gender ambiguous people become more visible, and significant numbers of people become more conscientious objectors to the gender binary, everyone's notions of gender will be forced to shift." (*ibid* at 271). This statement is a faint echo of Butler's theory as to the possibility of shifting existing gender norms.

369 Raymond describes this activism as "an expressive individualism" which she claims has "depoliticised" both gender and feminism: *The Transsexual Empire supra* note 255 at xxxiv.

MTF transsexual who is challenging the Society's 'womyn-born-womyn only' hiring policy. The case has provided a site of open contestation between feminists as to what constitutes a woman and how the category of woman should be strategically used.

The facts in this case are that at the complainant's first volunteer training session to be a rape counsellor, she was asked by one of the trainers about her gender identity and as to whether she had undergone a sex reassignment operation. She was informed that the Society did not allow men, and of the Society's policy that women must have been oppressed from birth to qualify to be in the group. The complainant subsequently spoke to other trainers who espoused the same position. She was told that she could not be part of the Society's volunteer rape counselling programme because ordinary clients of the service might believe she was a man despite her post-operative status. The complainant was basically rejected as a counsellor because she had not been a woman since birth.

The complainant took her case to the British Columbia Human Rights Commission, initially alleging that she had suffered discrimination with respect to a service or facility customarily available to the public because of her "sex". She subsequently amended her complaint to allege that the Society's *policy* at the time of her ejection was discriminatory against transgendered women on the basis of sex.

The Society's position was that it had a special group exemption approval under the Code for its "women only" hiring policy. The Society interpreted this policy as limited to 'women-born-women'. Its stated rationale for its policy was that only a woman who has grown up with experience as a girl and a woman will have "the attendant insights into the relationship between male violence and women's inequality in order to assist women in crisis because of male violence".<sup>370</sup> At the time of writing, the Tribunal's judgment in this matter has not yet been delivered.

This exclusionary policy and its rationale are informed by Radical feminist views of gender identity, as delineated above with respect to Raymond. Like Raymond, it fails to take into account the fact that MTF transsexuals often share many of the same experiences as women

---

370 As quoted by the Supreme Court of British Columbia (2000) 75 CRR (2d) 173 at para 11 (of the judicial review decision). The Society filed an application in the Supreme Court seeking an injunction to prevent the BC Human Rights Tribunal from hearing Nixon's matter on the grounds that it was beyond the Tribunal's jurisdiction. For more discussion, see below text accompanying note 514ff.

from an early age, as they are often generally perceived in society as women. It also fails to recognise that transgendered people are also frequently the subject of male violence and, moreover, rape.

### **2.5.1 Before the British Columbia Human Rights Tribunal**

Before the Tribunal, counsel for the Society claimed to be taking a “substantive” equality approach to the question of discrimination, arguing that there was no discrimination in this case as a valid distinction exists between women-born-women and transgendered women and further, that not all differences constitute discrimination. The Society also submitted that volunteer training constituted neither employment nor a service to the public. In the alternative, the Society argued that it was a “bona fide occupational requirement” that a rape counsellor be born a woman as counsellors ought to share a common experience with their clients. As evidence of a non-discriminatory distinction and a lack of common experience, the Society pointed to the fact that many MTF transsexuals are treated as men until adulthood.

Counsel for the Society explicitly stated that it was not asking the Tribunal to take a position on the question as to what constitutes a woman. Instead it argued that the issue ought to be understood as one of conflicting equality rights.<sup>371</sup> In this it pitted the equality rights of transsexuals against those of women, arguing that the legislation was intended to protect the latter and not the former. It submitted that the two sets of equality claims could not be resolved satisfactorily inside the one ground of sex. The Society’s submissions further questioned whether the statutory category of sex was intended to cover complaints by transsexuals.

## **2.6. CONCLUSION: STRATEGY AND CATEGORY**

In these submissions we can see that the Society initially asked the Tribunal to accept the definition of ‘woman’ in its policy as ‘woman-born-woman’ on the ground that it applies narrowly to rape counsellors and that such an application can be justified on specific grounds. However, when the Society made its argument regarding conflicting equality rights we see that its demands are broader in that it effectively asked the Tribunal to categorise all MTF

---

371 Paras 105-106 of the Vancouver Rape Relief Society’s Brief as published at [www.rapereliefshelter.bc.ca/issues/knixonopening.html](http://www.rapereliefshelter.bc.ca/issues/knixonopening.html)

transsexuals not as members of the protected category of woman but as members of an unprotected category (transsexuals) for the purposes of human rights legislation in British Columbia. Thus the Tribunal was in fact being asked to take a position as to what constitutes the category woman for the purposes of human rights legislation.

The Society's counsel further submitted that the Complainant was attempting to bend the statutory category of sex and that, in terms of theory, the Complainant was mis-using the category of 'woman' by arguing it in contradictory ways. Firstly, counsel submitted, the Complainant's claim relies on the category being sufficiently stable and identifiable to make sense of a claim for inclusion of her and to justify exclusion (of men). At the same time it relies on a strategy of destabilisation of the distinction between male and female, on the basis that it can change through surgery and self identification.<sup>372</sup> The Society argued that this contradictory approach constitutes a formal equality approach which is incapable of addressing the complex issues in hand. Interestingly, this 'contradictory' approach articulates the complex tension evident in Prosser's 'politics of home' between his desire for stable gender categories and the need to destabilise the same categories in order to find the right category. Like the complainant, Prosser aims to use the destabilisation of categories to give transsexuals some agency in determining their gender category.

In my view the Society's position suffers from its failure to allow a degree of agency in the determination of gender. This is apparent in the Society's 'Public Response', made before the Tribunal hearing. The Society stated that it "cannot agree that sex is a matter of subjectivity alone. We do not agree that every person that honestly claims to be a woman or to wish to be a woman is one. We think that body parts, human history, growing up experiences, social shaping all matter."<sup>373</sup> As articulated earlier, and in Chapter One, it is possible for a MTF transsexual to have female "body parts" and to have felt, and been read, as female since an early age. The Society's blanket policy allows for no such possibilities. The rationale underlying the Society's policy, (that it is acting in the interests of the ordinary woman who may perceive a MTF transsexual as a man), is also flawed. This is because it fails to take into account the fact that most rape crisis groups have been able to include transgendered women in their activities, and the fact that transgendered women are disproportionately represented in the high risk group for

---

372 See for eg the Summary of Submissions by Ms Gray, para 20: [www.rapere ReliefShelter.bc.ca/issues](http://www.rapere ReliefShelter.bc.ca/issues)

373 Public Response dated April 16 2001 at [www.rapere ReliefShelter.bc.ca/issues](http://www.rapere ReliefShelter.bc.ca/issues)

sexual violence.<sup>374</sup> These facts indicate that there is little justification for the Society's rigid and exclusionary policy.<sup>375</sup>

Far from unifying women, the Society's blanket 'women-born-women' policy has produced factionalisation and exclusion within the feminist movement. In my view, it is a risky strategy for feminist narratives and defendants to search for an emancipatory solution via fixed and exclusionary categories (and their dichotomies), given the reductionist approach to complex social identity of such categories. Such a tactic of creating a universal category of woman around determinative factors such as biology involves a limited view of female subjectivity and its possibilities. It is therefore, in my view, strategically dangerous to understand the category of woman as *the* precondition of all feminist politics. Oppression on the basis of gender and sex is a sufficient basis to ground gender politics.

This chapter has argued that a Radical feminist view of transsexuality and transgenderism mirrors that of the law in that both use the distinctions of real/artificial. Both narratives invest in the stability of gender categories and gender borders. They thus depict those who threaten the stability of these categories and borders as deceptive and false. Transgendered people are defined as not being 'real' men or women. I have argued that this is a dangerous strategy for feminism in that it produces factionalisation and exclusion, and it makes the category of woman, and associated oppressive gender norms, static. A better strategy is for feminism to harness the disruption of categories produced by transgenderism. Once categories, such as real/unreal, man/woman, are disrupted, the category of gender is itself put into crisis. It is no longer stable and rigid. It is thus opened to the possibility of the transformation of current gender norms.

---

374 Paisley Currah and Shannon Minter, *Transgender Equality: A Handbook for Activists and Policy-Makers* (New York: The Policy Institute of the National Gay and Lesbian Taskforce and National Centre for Lesbian Rights, 2000) at 10.

375 Note that while I have a problem with the Society's blanket policy of excluding all transgender women, I believe that it would be more appropriate to have criteria by which the inclusion of transgendered women could be considered by the Society on an individual basis – for example, how long they have felt and been read by society as a woman.

## **CHAPTER THREE**

### **ENFORCING CONFORMITY TO THE ‘REAL WOMAN’ / THE ‘REAL MAN’?: DIFFERENT APPROACHES TO DISCRIMINATION LAW**

#### **3.1. INTRODUCTION**

How does a ‘real woman’ or a ‘real man’ look and behave? Do the law’s categories operate to enforce the gender norms and stereotypes of appearance and behaviour? Can these stereotypes 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 this chapter I examine anti-discrimination case-law involving transgendered claimants in order to trace how it negotiates and constructs these gender norms and stereotypes of the ‘real woman’ and the ‘real man’. This case-law of courts in the United States, Europe, and Canada evidences the contestation of the meaning of the categories of sex, gender and transgenderism.

The aim of this chapter is to examine how transgendered people use law’s categories in their search for equality and emancipation. I aim to demonstrate that the emancipatory attempt by transgendered people to encode law’s categories with their identity and difference is not a path entirely free of danger.

In my comparative analysis, I first examine United States’ equality jurisprudence where two competing approaches to the application of Title VII to transgendered people are apparent. The traditional Title VII jurisprudence refuses to protect transgendered persons from discrimination in the workplace. Here the courts take a narrow interpretive approach, focussing on Congress’ intent to protect only those who are discriminated against because of their maleness or femaleness. Thus, in declining to expand the category of sex to cover transitional transsexuals, the courts cast transitional transsexuals as neither sex for the purposes of

discrimination law. 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, transgendered 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 analyse 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, focussing narrowly on the words and intentions of the relevant provisions. From its use of the ‘similarly situated’ comparator test it is apparent that the Court 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 recognises 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 which 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 to the question of which approach provides the best jurisprudential approach to discrimination against transgendered claimants. This involves a consideration not only of the practical results of each approach but also their theoretical underpinnings. The United States’ 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 transgendered people, should be symbolically eliminated or whether we should seek to symbolically (and practically) accommodate and affirm such difference. In my view, the ideal of eliminating difference

imports the problem of encouraging assimilation. I therefore argue that the Canadian approach, which positively recognises difference, should ideally be embraced.

In concluding, I assert that when considering how transgendered 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. In my view this example demonstrates that caution is necessary before fully embracing the ostensibly emancipatory approach of installing transgender identity into anti-discrimination law.

### 3.1.1 Sex or Gender Discrimination?

The following case-law in the United States, Europe and Canada addresses the question of whether transgendered 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.*<sup>376</sup> Scalia J expressed his preference for the term 'sex' discrimination and that it be kept separate from the concept of 'gender' discrimination. This is because, 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."<sup>377</sup> In this preference, it is evident that Scalia J 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. 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 behavioural, 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 behaviour, conforms to expected levels of masculinity and femininity. She argues: "The wrong of sex discrimination must be understood to include all

---

376 114 S Ct 1419 (1994).

377 *Ibid* at 1436 n.1.

gender role stereotypes whether imposed upon men, women, or both men and women in a particular workplace.”<sup>378</sup>

In Chapter One, we saw that the dominant family law approach privileges a transsexual’s *sex* (which it calls biology) in determining a transsexual’s sex/gender for the purposes of marriage. And at the same time it labels a transsexual’s condition as one of ‘*gender identity*’. In United States’ jurisprudence, this classification has presented problems for transgender claimants in that their claims have been characterised as constituting ‘gender discrimination’ which is not covered under narrow formulations of ‘sex discrimination’, such as that espoused by Scalia J. It is only recently that the two terms sex and gender have become understood as inclusive or interchangeable in discrimination law. However, as I show in the following section, Scalia J’s view is consistent with the traditional equality jurisprudence regarding transsexuality in the United States.

## 3.2. JURISPRUDENCE IN THE UNITED STATES

### 3.2.1 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 two avenues were pursued in *Holloway v Arthur Andersen*<sup>379</sup> where a MTF transsexual, Ramona Holloway, claimed that Arthur Andersen and Co. 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

---

<sup>378</sup> Franke, “The Central Mistake” *supra* note 182 at 8.

<sup>379</sup> 566 F 2d 659 (1977).

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”.<sup>380</sup> 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”. It referred to her “red lipstick and nail polish, hairstyle, jewellery and clothing”, her use of the men’s room and “his behaviour at social functions” as constituting a problem for the employer.<sup>381</sup>

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 of the scope of Title VII, the Court focussed 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”.<sup>382</sup> Ignoring the fact that Title VII is a remedial statute which 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”.<sup>383</sup> 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”.<sup>384</sup>

Thus, without examining the relativity 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

---

380 *Ibid* at 661.

381 *Ibid*.

382 *Ibid* at 662. The Court failed to elaborate on this point but from the decision it is clear that the Court meant biological sex.

383 *Ibid* at 662.

384 *Ibid* at 663.

anatomical characteristics” because this definition was what Congress intended.<sup>385</sup> In concluding that Title VII does not embrace discrimination against transsexuals, the Court stated that the “manifest purpose of Title VII’s prohibition against sex discrimination in employment is to ensure that men and women are treated equally.”<sup>386</sup>

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 while she or he is attempting to make his or her body conform to his or her psychological sex. Furthermore, gender and sex are unrelated terms: biology and anatomy are somehow completely disparate from socially constructed identity.

In dissent, Goodwin J argued that there was bias in the majority decision in that the right to claim discrimination under Title VII is limited by the decision to those who were “born into the victim class”.<sup>387</sup> 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. He 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 Goodwin J’s 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.”<sup>388</sup>

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”.<sup>389</sup> In addition it rejected the argument that Title VII excludes transsexuals. In its view, a transsexual can claim discrimination because he or she is male or female, but not because he or she is a

---

385 *Ibid* at 662.

386 *Ibid* at 663.

387 *Ibid* at 664.

388 *Ibid*.

389 *Ibid* at 663.

transsexual who chose to change his or her sex.<sup>390</sup> Thus the Court attempted to set up a meaningful distinction between discrimination *because of sex* and discrimination *because of a change of sex*.

These two avenues have been unsuccessfully pursued in other cases such as *Voyles v Ralph K Davies Medical Center*,<sup>391</sup> *Kirkpatrick v Seligman v Latz Inc*,<sup>392</sup> *Sommers v Budget Marketing Inc*,<sup>393</sup> *Ulane v Eastern Airlines Inc*,<sup>394</sup> and *Dobre v National RR Passenger Corp*.<sup>395</sup>

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

---

390 *Ibid* at 664. In Holt’s view, the Court’s refusal to afford equal protection to transsexuals, or sexual minorities in general, is a proposition unsupported by other case law. As an example she cites the public crossdressing cases of *Doe v McConn* 489 F Supp 76 (SD Tex 1980) and *The City of Chicago v Wilson* 389 NE 2d 522 (1987) as well as the Supreme Court decision in *Romer v Evans* 116 SCt 1620 (1996): Kristine Holt, “Re-Evaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence” (1997) 70 Temp L Rev 283 at 292.

391 403 F Supp 456 (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.

392 636 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” (*ibid* at 1050).

393 667 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 interpretive approach in construing Title VII and also considered that Sommers’ 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.

394 742 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” (*ibid* at 1087). The Court found that Ulane was not being discriminated 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 which takes the same restrictive approach: see for eg *Sommers v Iowa Civil Rights Commission* 337 NW 2d 470 (Iowa 1983). But also see *Maffei* below for an alternative approach.

395 850 F Supp 284 (E.D. Pa 1993).

transforming her body to conform” to it. Focussing once again 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”.<sup>396</sup> The Court stated: “Accordingly, an employer may not discriminate against a female because she is *female*.”<sup>397</sup> 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 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.”<sup>398</sup>

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. Under this case-law, this sex in transition does not qualify for protection under Title VII. Transitional transsexuals are not recognised as a legally protected identity. The social effect of this is to encourage transsexuals to conform as much, and as quickly, as possible to male and female sex stereotypes. 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”.<sup>399</sup> Transsexuals are thus placed in a double bind: they are discriminated against for their gender *non-conformity*, and, as discussed in Chapter Two, criticised by Radical feminists and others precisely for their *conformity* and assimilation. This line of legal reasoning also encourages transsexuals to withdraw from the public sphere while transitioning and to erase their transsexual identity and history once they have transitioned. They are encouraged to eliminate their difference in order to be accepted as social and legal subjects.

---

396 *Ibid* at 286.

397 *Ibid* at 286.

398 *Ibid* at 287.

399 See for eg, Califia, ch 2 *supra* note 354.

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 defies conventional expectations.

### 3.2.2 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*<sup>400</sup> the Supreme Court of New York County found that the rulings in the above federal cases were "unduly restrictive" and it decided that such precedent should not be followed in interpreting a New York City statute.<sup>401</sup> In this case 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*<sup>402</sup> 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 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 the precedential value of the decision is minimal but 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 for transsexuals against discrimination.<sup>403</sup> Firstly, there is a glimmer of hope in relation to the Equal Protection Clause as a result of dicta in *Brown v Zavaras*.<sup>404</sup> 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 post-operative transsexual inmates and inmates with low hormone levels were provided with hormones. In dismissing her claim the Tenth Circuit referred to *Holloway* as authority but critically added that "recent

---

400 626 NYS 2d 391 (1995)

401 *Ibid* at 394.

402 1996 WL 737215 (SDNY).

403 See Taylor Flynn, "Transforming the Debate" *supra* note 69.

404 63 F 3d 967 (10th Cir 1995).

research concluding that sexual identity may be biological suggests reevaluating *Holloway*”.<sup>405</sup> However, the Court refused to make the evaluation itself.<sup>406</sup>

Recent cases provide greater hope of the possibility of the inclusion of transsexuals under Title VII. In particular the case of *Schwenk v Hartford*<sup>407</sup> provides this hope in its relaxing of the distinction between the terms sex and gender. Here a pre-operative MTF transsexual inmate of a male prison made a claim under the *Gender Motivated Violence Act* (the “GMVA”) in respect to an attempted rape by a prison guard which 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.<sup>408</sup>

The Court 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 preceded to consider the use and definitions of the terms sex and gender in *Holloway*, *Dobre* and *Ulane*. It found that in these cases “[m]ale-to-female transsexuals, as anatomical males whose outward behaviour 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.”<sup>409</sup> 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

---

405 *Ibid* at 971.

406 *Ibid*. This was on the vague basis that “Mr. Brown’s allegations are too conclusory to allow proper analysis of this legal question”.

407 204 F 3d 1187 (9th Cir 2000).

408 The Court also held that the defendant was entitled to qualified immunity from the plaintiff’s GVMA claim since the law regarding this question was not clearly established at the time of his alleged sexual assault.

409 *Ibid* at 1201.

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.<sup>410</sup>

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*”.<sup>411</sup>

This erasure of the distinction between the terms was influenced by the Supreme Court decision in *Price Waterhouse v Hopkins*.<sup>412</sup> 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 of. As Brennan J states, “[t]here were clear signs .. that some of the partners reacted negatively to Hopkins’ personality because she was a woman.”<sup>413</sup> 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 criticised and it was 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 jewellery”.<sup>414</sup> Hopkins was denied promotion although her work record surpassed those of other candidates, some of whom were found to have equally as 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, Brennan J found that “Congress’ intent [was] to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute.”<sup>415</sup> In his view, Title VII must be taken to mean that “gender must be irrelevant to employment decisions”.<sup>416</sup> An example he gave of an employer acting “on the basis of gender”

---

410 *Ibid* at 1201-1202.

411 *Ibid* at 1202; emphasis added.

412 490 US 228 (1989) (hereinafter *Price Waterhouse*).

413 *Ibid* at 235.

414 *Ibid*.

415 *Ibid* at 239; emphasis added. Brennan J stated: “We need not leave out common sense at the doorstep when we interpret a statute”(*ibid* 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.

416 *Ibid* at 240.

by using sex stereotypes is where “an employer .. acts on the basis of a belief that a woman cannot be aggressive, or that she must not be”.<sup>417</sup> Brennan J 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*.”<sup>418</sup>

While the approach in *Price Waterhouse* appeared to be new, it was in fact the culmination of stereotyping claims which began in the early 1970s.<sup>419</sup> However, it represented the first time that the Supreme Court recognised that sex stereotyping constitutes sex discrimination.

The Supreme Court judgment of *Oncale v Sundowner Offshore Services Inc*<sup>420</sup> was also influential on the Ninth Circuit’s decision to depart from the traditional Title VII jurisprudence in *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, Scalia J recognised 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 our legislators by which we are governed”.<sup>421</sup> 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”.

---

417 *Ibid* at 250.

418 *Ibid* at 251; emphasis added (quoting *LA Dept of Water and Power v Manhardt* quoting *Sprogis v United Air Lines Inc* 444 F 2d 1194, 1198 (CA7 1971)).

419 Varona and Monks argue that “the seed” was planted by the Supreme Court in 1971 in *Phillips v Martin Marietta Corp* 400 US 250 (1971) when it first recognized “sex-plus” discrimination as being actionable under Title VII: Anthony E Varona and Jeffrey M Monks, “Engendering Equality: Seeking Relief under Title VII against Employment Discrimination Based on Sexual Orientation” (2000) 7 William and Mary Journal of Women and the Law 67 at 76. (Hereinafter, “Engendering Equality”).

420 523 US 75 (1998)

421 *Ibid* at 76.

Following these decisions and the Supreme Court's words in *Price Waterhouse* that Title VII was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes", one question is whether this stereotyping approach protects men who exhibit "effeminate" behaviour and appearance to the same extent as it protects masculine women such as Ann Hopkins? Despite the *Price Waterhouse* ruling, Karl Klare argued in the mid 1990s that it is "generally lawful" to discriminate against male job applicants with effeminate appearance as well as "cross dressers".<sup>422</sup> He referred to the 1970s cases of *De Santis v Pacific Telephone*<sup>423</sup> and *Smith v Liberty Mutual Ins Co*<sup>424</sup> as still standing as authorities on this question. Curiously he made no reference to the *Price Waterhouse* precedent. In *De Santis* 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 in *De Santis* 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 my view it is unlikely that a Circuit court would now follow either *De Santis* or *Smith*, although this would depend very much as to how a plaintiff's claim is framed. In the case of *Higgins v New Balance Shoes*<sup>425</sup> for example, the plaintiff, who had suffered the mockery of his fellow workers in regards to his sexuality and effeminacy, failed in his claim of impermissible stereotyping 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.<sup>426</sup>

---

422 Karl E Klare, "Power/Dressing: Recognition of Employees' Appearance" (1992) 26 New England Law Review 1395.

423 608 F 2d 327 (9th Cir 1979).

424 596 F 2d 325 (5th Cir 1978).

425 195 F 3d 252 (1st Cir 1999).

426 *Ibid* at 261, fn 4.

### 3.2.3 A “Canary in the Sartorial Coal Mine”?

A recent circuit decision which provides hope in trans litigation circles in relation to the question of whether ‘effeminate’ men are protected under Title VII is *Rosa v Park West Bank & Trust Co.*<sup>427</sup> This decision was not, however, an employment discrimination decision but one dealing with the credit worthiness of an effeminate 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* (“the 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”.<sup>428</sup> 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”.<sup>429</sup>

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” which meant 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 Brennan J’s judgment in *Price Waterhouse* that “stereotyped remarks [including statements about dressing more ‘femininely’] can certainly be evidence that gender played a part”, thus impliedly accepting that Rosa had been the subject of prohibited sex stereotyping under Title VII.<sup>430</sup> 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, that there is a claim for sex discrimination where, but for an individual’s sex, the

---

427 214 F 3d 213 (1st Cir 2000).

428 *Ibid* at 214.

429 Civ. Action No. 99-30085 – FHF at 2.

430 *Ibid* at 251.

individual would not have been treated adversely; and second, that 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 Freedman J was evidently blind.

Of course this case can also be understood as a transgender case. Both Rosa's brief and that of NOW Legal Defense and Education Fund and Equal Rights Advocates in support of Rosa, submitted by Jennifer Levi and Katherine Franke respectively, omitted the fact that Rosa is a transgendered person in that she identifies herself as female.<sup>431</sup> This was presumably a strategic omission so that the Court would not view Rosa's claim in the relatively uncertain and evolving frame of transgender case-law and become distracted by the question of Congressional intent.

*Rosa* has been followed by the Superior Court of Massachusetts in *Doe v Yunits*<sup>432</sup> and very recently by the Appellate Division of the Superior Court of New Jersey in *Enriquez v West Jersey Health Systems*.<sup>433</sup> In *Yunits, Doe*, a fifteen year old biological male suffering gender dysphoria brought an injunction against school officials for excluding her from school for wearing traditionally female attire. This attire included "items such as skirts and dresses, wigs, high heeled shoes, and padded bras with tight shirts". The defendants alleged that Doe's clothing and behaviour were disruptive and distractive to the educational process. They alleged that she was "known to primp, pose, apply make-up, and flirt with other students in class".<sup>434</sup> They argued that the school's policy was gender neutral in that girls who wore items of men's clothing, "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*.

---

431 The fact of Rosa's identification is articulated in Franke, "*Rosa v Park West Bank: Do Clothes Really Make the Man?*" (2001) 7/2 Michigan Journal of Gender and Law 141 at 143. The Brief for Rosa is published in this volume of the journal. See also Jennifer Levi, "Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights" (2000) 7 William and Mary Journal of Women and the Law 5.

432 2000 WL 33162199 (Mass. Super.) (Oct 11, 2000). Note that Jennifer Levi, who is a GLAD Staff Attorney, was also counsel in this case.

The analysis in *Rosa*, *Schwenk* and *Hopkins* has also been accepted by the Connecticut Commission on Human Rights and Opportunities in the Declaratory Ruling on Behalf of John/Jane Doe (dated November 6, 2000). The Commission held that this approach was more attuned to the letter and spirit of Connecticut anti-discrimination law than the traditional jurisprudence. It thus declared that transsexuals may pursue claims of sex discrimination under Connecticut legislation.

433 Nos. A-5581-99T5, A-2017-99T5. Decided July 3, 2001 Only Westlaw citation available.

434 *Ibid* at 2.

The Court in *Yunits* rejected the defendants' argument and stated that it failed to "frame the issue properly".<sup>435</sup> It reasoned that because Doe identified 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 above traditionally female items of clothing. If not, then 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 it used the same comparator as in *Rosa*.

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".<sup>436</sup> It stated that it refused to allow "the stifling of [Doe's] selfhood merely because it causes some members of the community discomfort" and it suggested that students could benefit from being exposed to such diversity at an early age.<sup>437</sup> The Court allowed the injunction on the basis that Doe was likely to establish a case of sex discrimination.<sup>438</sup>

The *Price Waterhouse* approach was also applied in the explicitly 'transgender' employment discrimination case of *Enriquez*.<sup>439</sup> 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!" Upon her refusal, her contract was terminated and her patients were falsely informed that her whereabouts were unknown by the medical centre. 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 *Price Waterhouse*, *Schwenk* and *Rosa* was more in line with the state's historical policy of liberally construing the LAD.<sup>440</sup> It also approved the words of Handler J in *MT v JT* (discussed in Chapter One) to the effect that the term sex embraces the term 'gender' in

---

435 *Ibid* at 6.

436 *Ibid* at 7; emphasis added.

437 *Ibid*.

438 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 also the subsequent hearing: *Doe v Yunits* 2001 WL 664947 (Mass. Super.) (Feb 26, 2001) where Justice Gants held that Doe could sue those who applied the dress code but not the members of the School Committee who endorsed the code.

439 Nos. A-5581-99T5, A-2017-99T5. Decided July 3, 2001 Only Westlaw citation available.

440 *Ibid* at 7.

that it is broader than anatomical sex. Thus we see the broadening of the term 'sex' beyond family law.

### 3.2.4 The Applicability of the *Price Waterhouse* approach

As is evident, this 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 behaviour, which perform their psychological gender, do not match the social stereotypes associated with their birth sex.<sup>441</sup> However, as Varona and Monks point out, the courts have not consistently applied this approach.<sup>442</sup> It is arguable that a more direct path 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 transgendered people such as Lucas Rosa and Doe whose experiences of adverse treatment are unrelated to an intention to undergo a surgical change of sex. 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 denaturalising the gender norms which 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

---

441 This approach is 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, all the same suggests that *Rosa* is useful for gay and lesbian rights advocates because of the Court's emphasis on the actionability of discrimination based on gender-variance. Flynn points out that "some" gay men and lesbians are likely to be subject to discrimination based both on their gender nonconformity and sexual orientation and that in such circumstances they could claim sex discrimination (where the ground of sexual orientation discrimination is not available) ("Transforming the Debate" *supra* note 69 at 404). Varona and Monks go further to argue that "anti-gay discrimination often is not based on the victim's actual sexual orientation, but on the perception that his/her mannerisms and appearance are inappropriate for his/her sex (ie too 'feminine' for men or too 'masculine' for women)." ("Engendering Equality" *supra* note 419 at 104). They advise that because this is a form of gender stereotyping, gays and lesbians should have an actionable discrimination claim under Title VII as stated in *Price Waterhouse* (*ibid* at 104). In my view, this may overstate the case. Flynn's qualifier of "some" is important in that it acknowledges the limitation of this protection for gay and lesbian plaintiffs. 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 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.

442 "Engendering Equality", *supra* note 419 at 99.

jurisprudence in that it engages and protects the complexity of transgender identity. However, its path is not yet clear as thus far only lower courts have followed the Circuit decisions of *Rosa* and *Schwenk*, neither of which were Title VII cases.

In the next section I compare this approach with those taken by the courts in the European Community and Canada. This comparison raises the question of whether ‘trans’ litigants would be as well protected by a broader approach than that of sex stereotyping which addresses issues of systemic and economic discrimination. This comparison is followed by an examination of the theoretical underpinnings of discrimination law and the potential practical problems involved in encoding transgender difference into discrimination law.

### 3.3 JURISPRUDENCE IN THE EUROPEAN COMMUNITY

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

In the cases of *Rees v The UK*,<sup>443</sup> *Cossey v The UK*,<sup>444</sup> *Sheffield and Horsham v The UK*,<sup>445</sup> and *X, Y and Z v The UK*<sup>446</sup> discussed in Chapter One, we saw that the European Court of Human Rights has sanctioned the United Kingdom’s adherence to the dominant biological sex approach in the field of family 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 were effectively set up as distinct concepts. Despite this, the European Court of Justice (“the ECJ”), in one of the most applauded judgments dealing with transgenderism and equality, *P v S & Cornwall County Council*,<sup>447</sup> 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.

---

443 (1986) 8 EHRR 56, Series A No 106.

444 (1990) 3 EHRR 622, Series A No 184.

445 (1998) 27 EHRR 163.

446 (1997) 23 EHRR 143.

447 (1996) ECR I-2143.

In this section, I first examine the Court's approach in *P v S*. I then compare it with the approach taken in the subsequent case of *Grant v South West Trains* which involved a lesbian complainant. In my view, while *P v S* 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 purposive 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 Community's 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 matter was initially heard by the English Industrial Tribunal which held that such a situation was not covered by the United Kingdom's *Sex Discrimination Act* (as it then was).<sup>448</sup> 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 been treated the same if she were a woman.

Before the European Court of Human Rights the question was whether P's dismissal was contrary to Article 5(1) of Directive 76/207/EEC which provides that "Application of the principal 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

---

448 After *P v S* the UK introduced the *Sex Discrimination (Gender Reassignment) Regulations 1999* (No. 1102 of 1999) pursuant to s. 2(2) of the *European Communities Act 1972*. They are intended to extend the *Sex Discrimination Act 1975* 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.

situated' comparator should be a FTM transsexual and that the test should be whether the employer would have equally dismissed P if she had previously been a woman.

The Court responded to this argument by interpreting the Directive broadly as “simply the expression .. of the principle of equality, which is one of the fundamental principles of Community law”.<sup>449</sup> 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”.<sup>450</sup> 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.<sup>451</sup> Critically it stated: “Such discrimination is based, essentially if not exclusively, on the sex of the person concerned”.<sup>452</sup> 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,<sup>453</sup> which in P's case would have been the male sex.<sup>454</sup> 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.<sup>455</sup> Thus “sex” discrimination was interpreted as covering discrimination against transitional transsexuals.

Significantly, the term “gender” was never used or discussed by the Court.<sup>456</sup> While the Court referred to the broader principle of equality as an underlying principle of Community law,

---

449 *Ibid* at para 18.

450 *Ibid* at para 19.

451 *Ibid* at para 20.

452 *Ibid* at para 21.

453 *Ibid*.

454 The problem of finding a comparator was encountered in *Sheffield and Horsham v The UK* (1998) 27 EHRR 163. 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 UK'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 UK 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 (*ibid* at paras 71-77). 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.

455 *P v S* (1996) ECR I-2143 at para 22.

456 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

its judgment was nevertheless cautious, ‘extending’ the Directive’s “sex discrimination” prohibition only to the “dismissal of a transsexual for a reason related to a gender reassignment”.<sup>457</sup> The decision was praised universally, with some commentators suggesting that it had broader implications. Campbell and Lardy for example praised the decision as a “significant contribution to the developments of Community law on fundamental rights”.<sup>458</sup> They asserted that “the phrase ‘on the grounds of sex’ now carries a much broader meaning than that previously attributed to it”.<sup>459</sup> They reasoned that:

[b]y 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*.<sup>460</sup>

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*”.<sup>461</sup> Indeed this possibility was observed by the English Industrial Tribunal in a subsequent case which stated that *P v S* was “persuasive authority for the proposition that discrimination on the ground of sexual orientation [was] unlawful”.<sup>462</sup>

Such comments were perhaps encouraged by the Opinion of Advocate General Tesaro who took a more broad and philosophical approach than that of the Court.<sup>463</sup> 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

---

facts constituted an instance of sex discrimination, the Court did not need to answer this question directly: Angus Campbell and Heather Lardy, “Discrimination Against Transsexuals in Employment” (1996) 21 E L Rev Oct 412 at 416 (hereinafter, Campbell and Lardy).

457 *P v S* (1996) ECR I-2143 at concluding para 24. Note that the term “sex reassignment” was not used either by the Court nor in the UK’s submissions as summarized by the Court (*ibid* at paras 14-15). In my view, this would have been a strategic use of the term by the latter.

458 Campbell and Lardy, *supra* note 456 at 418.

459 *Ibid* at 415.

460 *Ibid* at 417; emphasis added.

461 *Ibid*. In a footnote they state that it: “looks likely [to] have important implications for those arguing for protection against discrimination on grounds of homosexuality” (*ibid* at 417 n25); see also Leo Flynn “Case Note: *P v S*” (1997) Common Market Law Review 367 at 367, 387 (hereinafter, “Case Note”).

462 The Tribunal made this observation when referring the case of *Grant* to the European Court of Justice. See *Grant v South West Trains* Case C-144/97, discussed below, at para 10.

463 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.

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, behaviour and roles shared by men and women”.<sup>464</sup> He compared this liberal trend with the law’s approach: its ‘dislike’ for ambiguities and its desire “to think in terms of Adam and Eve”.<sup>465</sup> 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”.<sup>466</sup> This traditional approach, he noted, is “taken too much for granted” in courts in the United Kingdom and the United States.<sup>467</sup> In his view this approach constitutes “a quibbling formalistic interpretation and a betrayal of the true essence of that fundamental and inalienable value which is equality”.<sup>468</sup> Such an approach would imply that transsexuals constituted a “third sex”.<sup>469</sup>

The Advocate General suggested that for the purposes of this case, “sex is important as a convention, a social parameter”.<sup>470</sup> 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”.<sup>471</sup> In other words, sex is a social convention or construction which requires women to play certain social roles which are not necessarily connected to their physical characteristics. In the same way, “the unfavourable treatment suffered by transsexuals is most often linked to a negative image, a moral judgment which has nothing to do with their abilities in the sphere of employment”.<sup>472</sup>

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”.<sup>473</sup> 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

---

464 *P v S* (1996) ECR I-2143 at para 17.

465 *Ibid.*

466 *Ibid.*

467 *Ibid* at para 18.

468 *Ibid* at para 20.

469 *Ibid* at para 22.

470 *Ibid* at para 20.

471 *Ibid.*

472 *Ibid.*

473 *Ibid* at para 19.

constitutions of the more advanced countries: *the irrelevance of a person's sex with regard to the rules relegating relations in society*".<sup>474</sup>

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.

In the case that followed, *Grant v South West Trains*,<sup>475</sup> 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) spouses who were of the opposite sex. She argued that this constituted discrimination prohibited by Article 119 of the Treaty or Directive 75/117.<sup>476</sup>

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 that 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 in that as a female worker she was not receiving the same benefits as a male worker. Grant's submission in this respect was that she be considered foremost as a woman rather than as a lesbian woman. By taking this strategy Grant hoped that her case 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 [which] originate in prejudices regarding the sexual and emotional behaviour or persons of a particular sex, and are in fact based on those persons' sex".<sup>477</sup> Effectively, however, she was arguing *gender* discrimination<sup>478</sup> in that her submission's logic was that it was no more than a social norm of 'appropriate feminine behaviour' for women to be sexually attracted to men. The Court completely rejected this logic and decided to consider Grant as a lesbian woman, comparing her

---

474 *Ibid* at para 24; emphasis original.

475 Case C-144/97; [1998] IRLR 165 (hereinafter, *Grant*).

476 EC Directive 75/117 is on the approximation of the laws of the Member states relating to the application of the principle of equal pay for men and women.

477 *Grant*, Case C-144/97 at para 18.

478 According to the commonly understood distinction between these terms to which I do not subscribe. See Chapter One.

treatment with that of a gay male employee, and thus making her case one of sexual orientation discrimination.

The Court emphasised that *P v S* was confined to the case of a worker's gender reassignment.<sup>479</sup> 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".<sup>480</sup> The Court thus rejected Grant's claim, finding that she had suffered the same treatment as would be suffered by a gay male worker.

In contrast, the Advocate General's Opinion in *Grant* held that "the essential point" in *P v S* was "that the discrimination was based exclusively, or essentially, on *gender*".<sup>481</sup> He construed Article 119 of the Treaty as "covering all cases where *gender* is objectively the factor causing an employee to be paid less".<sup>482</sup> Furthermore, he viewed the discrimination in the relevant Regulation as "exclusively gender-based. Gender is simply the only decisive criterion in the provision."<sup>483</sup> These views were clearly rejected by the Court.

In my view, 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 term "sex". By constantly using the term "gender discrimination" in his Opinion, Advocate General Elmer was attempting to argue that the term is interchangeable with "sex discrimination". He presumably recognised that the term is potentially broad enough to cover male/female sex discrimination, discrimination against transsexuals, as well as discrimination on the basis of sexual orientation in that all of these forms of discrimination involve societal assumptions or stereotypes as to how gender/sex should be performed. Like Advocate General Tesaro in *P v S*, he appears to be more willing to address some of the more complex issues at hand.

---

479 *Ibid* at para 42.

480 *Ibid* at para 47. 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 in force. The Treaty of Amsterdam – Article 13 EC (where all Member States' governments indicated the importance they attribute to the fight against sexual orientation) – had not yet been ratified and was not yet in force. In *Grant* the Court noted that the Treaty "will allow the Council under certain conditions to take appropriate action to eliminate various forms of discrimination, including sexual orientation" (*ibid* at para 48). For further discussion, see Iris Canor, "Equality for Lesbians and Gay Men in the European Community Legal Order – 'they shall be male and female'" (2000) 7 Maastricht Journal of European & Comparative Law 273.

481 *Ibid* at para 15.

482 *Ibid* at para 16.

483 *Ibid* at para 23.

These two decisions of the Court demonstrate the Court's 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 *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 *Grant*, it was argued by a number of optimistic commentators that *P v S* represented a shift away from the Aristotelian formal approach to equality and the requirement that a comparator of the opposite sex be used.<sup>484</sup> It was asserted that it indicated that the Court's jurisprudence was moving towards a substantive equality approach based on disadvantage and detriment, as used in Canadian jurisprudence.

In my view, an explanation for the reversal of this shift in *Grant* can be given by looking at the fact that the primary purpose of the Community is economic. The Community'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.<sup>485</sup> In my view, 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 and to take a more substantive equality approach in the case of *P v S*. 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 Community.<sup>486</sup> However, it was noted in Advocate General Elmer's Opinion in *Grant* that gays and lesbians make up a significant 35 million of the EC's population.<sup>487</sup> In my view it is possible that the Court in *Grant* considered

---

484 "Case Note", *supra* note 461 at 377-378; and Catherine Barnard, "*P v S*: Kite-Flying or a New Constitutional Approach" in A. Dashwood and S. O'Leary eds. *The Principle of Equal Treatment in EC Law* (London: Sweet and Maxwell, 1997) 59 at 61.

485 *A Critical Introduction to European Law* (London: Butterworths, 1996) 166

486 *P v S* (1996) ECR I-2143 at para 9.

487 *Grant*, Case C-144/97 at para 42.

that a possible negative economic effect would result from requiring employers to provide partner benefits to homosexuals. Thus the Court in *Grant* did not believe it was at liberty to further expand the term “sex”. In my view, 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 Community’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 The UK*.<sup>488</sup> Here the Court insisted on following the formal equality approach set out in *Cossey v The UK* and *Rees v The UK* and made no reference to *P v S* or its comparator test despite the fact that it was argued by the applicants.

In my view, neither decision of the Court gives an indication as to its understanding of the aim of sex discrimination law in the Community. 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 one *or* the other. In my view, despite its praiseworthy decision in *P v S*, the Court and its sex equality jurisprudence are clearly at an embryonic stage.

### 3.4. CANADIAN JURISPRUDENCE

The Canadian jurisprudence is similarly limited to a few 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.<sup>489</sup>

---

488 (1998) 27 EHRR 163 at paras 71-77. See also *supra* note 454.

489 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” (1999) 8 Social and Legal Studies 5. Sharpe notes that the regulation of transgendered 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 (*ibid* at 15). See also the Inquiry Report of the Australian Commonwealth Senate (Legal and Constitutional Legislation Committee) on Sexuality Discrimination (1998) at [www.apf.gov.au/senate/committee/legcon-ctte/citizens/](http://www.apf.gov.au/senate/committee/legcon-ctte/citizens/).

The first case is that of (*QHRC acting on behalf of*) *ML v Maison Des Jeunes and CT and AT*.<sup>490</sup> Here, ML, the complainant, was employed by the Maison de Jeunes, 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.

In construing the ground of “sex” in relation to transsexualism, the Commission undertook a comprehensive analysis of the recognition of transsexualism in relevant sex discrimination law and other areas of the law in Quebec,<sup>491</sup> the rest of Canada, the United States, Europe, as well as international human rights law. The scope of research and analysis in this judgment provides a stark comparison with the sparse decisions of other jurisdictions such as the ECJ in *P v S* and courts in the United States. The Commission also considered some 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’”<sup>492</sup> and arguing that the relativity of these concepts must be accepted before the condition of transsexuals can be understood.<sup>493</sup>

The Commission found that the term “sex” was not defined in the Quebec *Charter*, the Canadian *Charter*, or any Canadian human rights legislation, although several Canadian human rights laws included pregnancy in the scope of the term “sex”.<sup>494</sup> From this the Commission concluded that “the discriminatory ground of ‘sex’ is not solely limited to the biological dimension which distinguishes the sexes from each other”.<sup>495</sup> It proceeded to explain this

---

490 (No 2) (1998) 33 CHRR D363 (Trib. Qué).

491 Here the court briefly referred to the case of *Anglsberger* [1982] 3 CHRR 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 Article 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.

492 *Ibid* at para 86.

493 *Ibid* at para 99.

494 *Ibid* at para 101

495 *Ibid* at para 102.

conclusion by examining the example of pregnancy in more depth, looking at the Supreme Court decision of *Brooks v Canada Safeway Ltd*<sup>496</sup> where the Court was asked to decide whether discrimination on the basis of pregnancy constituted sex discrimination. In *Brooks* the Court held that the capacity for pregnancy is an “incident of gender” and concluded that “[d]istinctions based on pregnancy can be nothing other than distinctions based on sex..”.<sup>497</sup> The Commission also drew on the judgment of McLachlin J in *Miron v Trudel*,<sup>498</sup> where, referring to *Brooks*, 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 s. 15(1) aims to eradicate”.<sup>499</sup>

The Commission found that under section 15(1) of the Canadian *Charter* and section 10 of the Quebec *Charter of Human Rights and Freedoms*, the term ‘sex’ has “much more than a taxonomic value, and exposes the great discrepancies of the binary model in terms of a classification that managed to pass for the archetype of the model itself”.<sup>500</sup> The Commission concluded from the Supreme Court jurisprudence that an extensive notion of the concept of sex was appropriate. It stated: “we believe that sex does not include just the state of a person but also the very process of the unification and transformation that make up transsexualism”.<sup>501</sup> The Commission thus found that the scope of the term “sex” in s. 10 of the Quebec *Charter* covered the plaintiff and found that there had been an infringement of her right to equal treatment in employment (s. 16) and her right to dignity (s. 4).<sup>502</sup> It asserted: “it is not clear how discrimination based on transsexualism or on the process of transsexualism could be anything other than sex based”.<sup>503</sup>

---

496 [1989] 1 SCR 1219.

497 *Ibid* at 1244.

498 [1995] 2 SCR 408.

499 *Ibid* at para 109.

500 *Ibid* at para 104.

501 *Ibid* at para 111.

502 The Commission rejected the defendant’s claim that the termination was justified on the grounds that ML’s ongoing employment would cause potential problems with the youth as a result of her sex change. It emphatically rejected the evidence of the defence’s expert witness who attempted to draw parallels between transsexualism, homosexuality and pedophilia (*ibid* at paras 139 – 141). The Commission accepted the testimony of the complainant’s expert witness that transsexualism does not fall into a category of behaviours which could prove problematic around children (*ibid* at para 158). The Commission ordered that the defendant pay the claimant \$4000 in compensation for moral injuries as well as damages for lost wages.

503 *Ibid* at para 115.

In another Canadian case, *Tawni Sheridan v Sanctuary Investments Ltd (doing business as BJs Lounge)*,<sup>504</sup> the British Columbia Human Rights Tribunal heard a sex discrimination complaint 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”.<sup>505</sup>

In determining whether “sex” can be interpreted to include transsexualism, the Tribunal examined *P v S* as well as *ML* and a few US 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.<sup>506</sup> 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 result is the same: transsexuals experience discrimination because of the lack of congruence between the criteria which determine sex.<sup>507</sup>

The Tribunal thus found that transsexualism should be covered under the ground of “sex”.<sup>508</sup> 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

---

504 (No 3) (1999) 33 CHRRD D/467 (BCHRT).

505 Contrary to s. 3 of the *Human Rights Act, SBC 1984*, c22 (now s. 8 of the *Human Rights Code*, c210). Note that Sheridan applied to have her complaint amended so as to allege discrimination because of her “gender identity”, a ground not enumerated under the Code. Her submission 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 (AG)* [1998] 1 SCR 493 and *Cooper* [1996] 3 SCR 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 v Sanctuary Investment Ltd and the Deputy Chief Commissioner of the BC Human Rights Tribunal and the Attorney General of BC* (No 2) (1998) 33 CHRR D/464, [1998] BCHRTD No 18 (QL).

506 (No 3) (1999) 33 CHRRD D/467 (BCHRT) at para 77.

507 *Ibid* at para 93. Clearly these criteria “which determine sex” were understood as comprising more than biological factors (unlike *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 (*ibid* at paras 107-108).

508 *Ibid* at para 117.

ground of sex in relation to the washroom incident.<sup>509</sup> 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".<sup>510</sup> However, the Tribunal rejected Sheridan's submission 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 regards to this matter it was not reasonable to expect that the complainant be accommodated given that she had had ample time to obtain new identification papers.<sup>511</sup> 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 *Mamela v Vancouver Lesbian Connection*<sup>512</sup> and *Ferris v OTE Union*.<sup>513</sup> It is currently being challenged before the British Columbia Human Rights Tribunal in the case of *Nixon v Vancouver Rape Relief Society* (discussed in Chapter Two).

---

509 *Ibid* 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 defence argued "maintenance of public decency" as a justification of 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 defence and further, that Sheridan's use of the women's washrooms did not interfere with the 'maintenance of public decency'.

510 *Ibid* at para 102; emphasis added.

511 *Ibid* at paras 112-117.

512 *Susan Mamela v Vancouver Lesbian Connection* [1999] BCHRTD No 51 (QL) at paras 93-33. 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, 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 behaviour 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 it 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 (*ibid* 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 \$3000 in compensation should it resume operation.

513 *Leslie Ferris v Office and Technical Employees Union, Local 15* [1999] BCHRTD No 55 (QL) para 83. Here the pre-operative MTF transsexual complainant successfully argued that her Union had discriminated against her because of her sex and disability. The complaint arose out of the Union's actions following a complaint made regarding her use of the women's washrooms at work. This led to harassment, hospitalization for depression, and her resignation from the company after 19 years of employment. Tribunal Member Iyer held: "it is reasonable to infer that the Union treated the complainant worse than it would have treated another Union member and that her status as a transsexual was a factor in the treatment" (*ibid* at para 103). In this case the complainant also succeeded on the ground of disability (*ibid* at paras 84-85). In addition to compensation for lost wages, the complainant was also awarded \$5000 for injury to her dignity, feelings and self-respect.

In the matter of *Nixon*, judicial review was earlier sought by the Vancouver Rape Relief Society to challenge the Tribunal's jurisdiction to hear the matter. 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".<sup>514</sup> 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 which rebutted the Court's conclusion that the words "sex" and "gender" were used either randomly or interchangeably.<sup>515</sup> 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*.<sup>516</sup>

In concluding, the Court affirmed, in obiter, a liberal and extensive interpretation of the term "sex".

From these cases it is clear that Canadian jurisprudence follows a purposive approach to human rights legislation, similar to that used by the European Court of Justice. However, it is distinguished from this other approach by its focus on broader questions of *disadvantage* – ie. 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

---

514 *Vancouver Rape Relief Society v The British Columbia Human Rights Commission and the British Columbia Human Rights Tribunal* (2000) 75 CRR (2d) 173 at para 50.

515 *Ibid* at para 57.

516 *Ibid* at para 56; emphasis added. This is the approach established by the Supreme Court in the cases of *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 and *Egan v Canada* [1995] 2 SCR 513. For a lucid explanation of this "disadvantage" approach, see N Colleen Sheppard, "Recognition of the Disadvantaging of Women: The Promise of *Andrews v Law Society of British Columbia*" (1989) 35 McGill LJ 207.

social, political and economic issues. In these cases it is also apparent that Canada's human rights tribunals do not use the 'similarly situated' comparator test.<sup>517</sup>

While a similar approach to this was arguably taken in *P v S*, it appears from *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 *Grant* it used a narrow comparator test which 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'. However, this sex stereotyping approach is limited in that it looks at claimants only as individuals and not as members of a broader group which embodies difference that challenges conventional gender norms. It also stops short of addressing broader questions of systematic and economic discrimination, which would make the approach more generally useful to women for example. Despite the limitation of this approach, it is undoubtedly useful to transgender claimants and the present nature of their claims. Overall, out of the above approaches, the sex stereotyping approach appears to cater best for such claims because it goes straight to the specific causes of this type of gender discrimination.

However, before fully assessing and embracing such 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 enables a better understanding of these varying approaches to discrimination.

---

517 See below for more discussion.

### 3.5. THE AIM OF ANTI-DISCRIMINATION LAW?

In *Price Waterhouse* Brennan J stated that the words “because of sex” in Title VII should be “taken to mean that gender must be irrelevant to employment decisions”.<sup>518</sup> 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.”<sup>519</sup> Brennan J elucidated 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 for the job and 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 spelled out by the Court in *Enriquez* where it stated:

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.

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.<sup>520</sup> Both share the same approach of making certain signs of difference irrelevant.

The ideal of eliminating difference is certainly one which has been immensely important in the history of emancipatory politics. It has been crucial in the struggle of women and blacks,

---

518 490 US 228 (1989) at 240.

519 *Ibid* at 239.

520 *Tesaro AG in P v S* (1996) ECR I-2143 at para 24; emphasis original.

for example, against exclusion and status differentiation.<sup>521</sup> However, the reverse side is that in its desire to eliminate difference rather than to positively affirm difference, this approach encourages assimilation in that formerly excluded groups must prove themselves according to rules and standards that have already been set.<sup>522</sup>

The Canadian approach takes a slightly different approach. Its aim appears to be the elimination of *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*, in particular s. 15. The dominant interpretation of s. 15 by the Supreme Court of Canada rejects the ‘similarly situated’ test used by the ECJ as frequently producing serious inequality.<sup>523</sup> It holds that s. 15 does not intend to eliminate all distinctions and points out that certain sections of the *Charter* are designed to safeguard certain distinctions.<sup>524</sup> It is arguable that the purpose of the section is similar to that of Title VII. For example, the Court in *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”.<sup>525</sup> Nevertheless, the means to preventing such disadvantage is different. The Court has critically stated that “the accommodation of difference .. is the essence of true equality”.<sup>526</sup>

This approach to equality arguably allows an oppressed group to assert a positive sense of group difference as a means to emancipation. In my view 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 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 difference.

This alternative Canadian approach puts into question whether the best strategy is to protect difference – such as gender non-conformity - through its conceptual elimination. How

---

521 Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 159.

522 *Ibid* at 164.

523 See for eg *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 166-168 per McIntyre J.

524 *Ibid* at 171.

525 [1995] 2 SCR 418 at 486-487.

526 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 169.

far should United States' 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.<sup>527</sup>

In the next section I consider Post's observations and suggestions regarding the aims and potential of United States' 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?

### **3.5.1 Is anti-discrimination law able to truly transcend difference?**

To examine the implications of the US 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 clothes, hair colour 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 emphasise 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".<sup>528</sup> He finds such ordinances unsettling because "they seem to preclude any ordinary form of human

---

527 "Prejudicial Appearances: The Logic of American Anti-Discrimination Law" (2000) 88 Calif LR 1 (hereinafter, Post).

528 *Ibid* at 11.

interaction”.<sup>529</sup> 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’”.<sup>530</sup> 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 instrumentalisation of persons”.<sup>531</sup> By this he means that persons would be valued solely for their capacity: ontology would be collapsed into capacity.

Post believes that this instrumentalisation of persons is part of the dominant conception of anti-discrimination law. He is sceptical 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, in his view, this dominant conception operates to “undermine[s] the law’s coherence and usefulness as a tool of transformative social policy”.<sup>532</sup>

### 3.5.2 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, behaviour etc.) is critical to identity: it is not a superficial layer.

In arguing for a sociological view, Post advocates that anti-discrimination law should be understood not as a practice which is capable of transcending and denying the salient factors of one’s social existence, but as “a social practice which regulates other social practices”.<sup>533</sup> These “other social practices” are, for example, those of gender and race. These are the social practices which the dominant conception aims and purports to eliminate. Post recognises that

---

529 *Ibid.*

530 *Ibid* at 15.

531 *Ibid* at 16.

532 *Ibid.*

533 *Ibid* at 17.

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 reflect the purposes of the law”.<sup>534</sup> 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.<sup>535</sup> Absent a knowledge or display of genitalia, it is generally one’s appearance and behaviour which 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” where 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.”<sup>536</sup> 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”.<sup>537</sup> However, he argues, under the dominant conception of anti-discrimination law, this negotiation and acceptance of explicit gender categories is not acknowledged.<sup>538</sup>

---

534 *Ibid* at 16.

535 *Ibid* at 26.

536 *Ibid* at 34-35.

537 *Ibid*.

538 *Ibid* at 37-8.

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:

It makes far more sense to interpret the statute as seeking to alter the particular meanings of these conventions as they are displayed in specific contexts. On this account, Title VII would in the context of employment require us to sever the connection between gender and some capacities, such as strength, but not to eliminate gender as such. In contrast to the dominant conception, this way of conceptualising 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.<sup>539</sup>

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.<sup>540</sup>

In my view, Post’s “sociological” argument is very engaging and appealing. Post’s proposed sociological view recognises the complexity of identity – the fact that differences cannot be eliminated as if taking off layering of clothing. It is useful in confirming that the aims of the United States’ approach suffer from fundamental flaws and in recognising 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 scepticism 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.”<sup>541</sup>

---

539 *Ibid* at 20.

540 “Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence” (1995) 105 Yale LJ 1 at 76.

541 Judith Butler, “Appearances Aside” (2000) 88 Calif LR 55 at 62 (hereinafter, Butler (2000)).

### 3.5.3 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."<sup>542</sup> As we saw from the case-law in the US, anti-discrimination is just as able to regulate social practices that sustain group inequality as equality. Should feminists and transgendered 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, anti-discrimination law's enforcement of gender specific dress and grooming codes 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 constrains and delegitimizes *some* social practices of gender that are based on sex stereotypes.<sup>543</sup>

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".<sup>544</sup>

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 recognise that some feminists for example, may believe that it is better to aim for the elimination of socially constructed differences, such as stereotypes and generalisations, rather than their 'alteration' and 'modification' by the law.

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.

---

<sup>542</sup> Post, *supra* note 527 at 17.

<sup>543</sup> Reva Siegel, "Discrimination in the Eyes of the Law: How 'Color Blindness Discourse Disrupts and Rationalises Social Stratification'" (2000) 88 Calif LR 77 at 78.

<sup>544</sup> *Ibid* at 115.

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 US 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 transgendered people.

### 3.5.4 Butler, Post and MacKinnon: Stereotyping and the Social Practice of Gender

Butler takes issue with Post's view of the social practice of gender, which he explains thus:

'Generalisations' and 'stereotypes' of this kind [ie. 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 generalisations 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.<sup>545</sup>

Butler reads Post as asserting that to eliminate all gender generalisations 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 normalising position in the social practice of gender, through the process of denaturalising and disempowering them. However, this does not mean 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.<sup>546</sup>

Butler also takes Post to task for implying, in the above quotation, that the practice of gender is "underwritten" by generalisations and stereotypes and that it is thus exhausted by

---

545 Post, *supra* note 527 at 18.

546 He 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: Post, "Response to Commentators" (2000) 88 Calif LR 119 at 121.

them.<sup>547</sup> 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 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 sexualised 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 with submission. Feeling this as identity, acting it as role, inhabiting and presenting it as self, is the domain of gender.<sup>548</sup>

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 which 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.”<sup>549</sup> 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 (dominatrices) and inversions (homosexuality) to stimulate sexual excitement is derived precisely from their mimicry or parody or negation or reversal of the standard arrangement.”<sup>550</sup> Lesbian sex, therefore, is a mere imitation of heterosexuality: it does not transcend the dominance/submission model associated with masculinity and femininity.

---

547 Butler (2000) *supra* note 541 at 61.

548 MacKinnon, *Toward A Feminist Theory of the State* *supra* note 3 at 143.

549 *Ibid* at 247.

550 *Ibid* at 144.

As one commentator points out, MacKinnon's theory of gender 'mirrors', rather than deconstructs, the subjects of male heterosexual pornography. It thus encodes into the law the dominance/submission model used by pornography "as the truth rather than the hyperbole of gender production".<sup>551</sup> 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 own lifetimes".<sup>552</sup> 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 generalisations. 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?" In Butler's view, it is critical 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 generalisations 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".<sup>553</sup>

---

551 Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press 1995) at 87-8 (hereinafter, Brown).

552 "MacKinnon, "Points Against Postmodernism" (2000) 75 Chicago-Kent Law Review 687 at 691.

553 Butler (2000) *supra* note 541 at 62.

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 transgendered persons may no longer be required to conform their appearance, conduct and behaviour to gender stereotypes under the stereotyping approach discussed above. Under Title VII, those individuals who deviate from stereotypical expectations must be treated the same as those who fulfil 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.”<sup>554</sup> Butler is here referring to the implications of law’s regulation and recognition of difference and identity.

The question is whether in fact the “astereotypical” is protected under US sex discrimination law. In my view, Butler’s work helps to highlight some of the possible dangers in the sex stereotyping approach, which Post and others should consider. Firstly, in its articulation that certain appearance, conduct and behaviour do not conform to conventional sex stereotypes, the law is effectively reiterating these stereotypes, and possibly entrenching them at the same time as 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. In my view, 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.

---

554 *Ibid.*

Before concluding that we embrace a legal approach which 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 of when law and its categories are encoded with their difference.

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

The work of Wendy Brown assists in illuminating these dangers. Influenced by Foucauldian analyses, Brown advises caution to those such as transgendered 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?”<sup>555</sup> The problem, in her view, is that such law attempts to transform the astereotypical into the normal, into something “normativizable through law”.<sup>556</sup> 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”.<sup>557</sup> 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 neutralised and depoliticised. 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 socially neutralised. Prosser for example is not interested in subverting the dominant paradigm but in finding recognition for his “right to a gender home” within that paradigm, as discussed in Chapter Two. In the neutralisation 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 those such as Post doubt that such neutralisation or elimination of difference ever truly takes place, or is in fact possible. Brown is also sceptical 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

---

555 Brown, *supra* note 551 at 100.

556 *Ibid* at 66.

557 *Ibid*.

securing and naturalising dominant social powers – class, gender, and so forth.”<sup>558</sup> This view that rights and discrimination discourse is also about the maintenance of privilege is shared by Siegel as mentioned above. Both 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. This she believes will happen if the law is employed “to confront ... the inequalities in women’s condition in order to change them”.<sup>559</sup> MacKinnon asserts that equality law “provides a peculiar jurisprudential opportunity, a crack in the wall between law and society.”<sup>560</sup> And the “first step” in realising this opportunity “is to claim women’s concrete reality.”<sup>561</sup> 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 shared by all women. A number of feminists have argued that their experience does 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.<sup>562</sup> If MacKinnon understands the definition and ontology of ‘women’ as being determined by pornography, is it emancipatory for women to have such a definition encoded into the law?<sup>563</sup> 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.<sup>564</sup>

---

558 *Ibid* at 99. Note that the debate about rights is a considerable field which is beyond the scope of this paper.

559 *Toward A Feminist Theory* *supra* note 3 at 242.

560 *Ibid* at 244.

561 *Ibid*.

562 See for eg Angela P. Harris, “Race and Essentialism in Legal Theory” (1990) 42 Stanford LR 581.

563 Brown *supra* note 551 at 131

564 *Ibid* at 133.

Brown asserts that MacKinnon's "failed effort" stands as a general caution against installing identity in the law because the law operates to naturalise such "inevitably totalised formulations of identity" through regulating them. 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 renaturalise. .. rights must not be confused with equality nor legal recognition with emancipation."<sup>565</sup>

So what does this advice of caution mean for transgender litigation? Brown is saying that newly politicised identities, such as transgendered 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 totalising the present condition of this identity.

Newly politicised identities can learn from feminism that strategy is an important consideration at every step. For example, it is important to "incessantly" query the step of embracing either the US sex stereotyping approach or the Canadian approach in relation to transgender discrimination law. Like MacKinnon, 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 before entrusting the law with either the task of transforming stereotypes or before embracing the law's affirmation and accommodation of astereotypical identities as an emancipatory approach.

In this chapter I have endeavoured to show that discrimination law can be used by transgendered claimants to seek protection and redress for the daily harassment and discrimination they experience as a result of their non-conforming appearance and behaviour. 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 which aims to accommodate and affirm such difference, rather than to eliminate it. This ideal appears to be that of the Canadian approach. All in all, the comparative study of discrimination law is

---

565 *Ibid.*

rewarding as it graphically illuminates the way in which law shapes social identity and difference.

## CONCLUSION

This thesis has dealt with the question of how law and feminism understand identity and difference, and the more challenging question of how law and feminism *should* understand identity and difference.

Its focus has been the law's effect on notions of identity and difference. This has involved tracing the process by which the law categorises concepts of identity and difference, or establishes new categories, in order to understand and regulate them. I have shown that in this process of categorisation, law simplifies and reduces these complex concepts. To ensure the stability of these categories, law deploys certain dichotomies and distinctions such as natural/artificial. The constant repetition of these dichotomies and distinctions leads the subject to perceive these categories as indeed natural and immutable.

In this thesis I have used the concrete example of gender categories. Law has led us to believe that there are only two natural categories of gender and that anything outside of this male/female binary is deviant, deceptive or unnatural. Transgendered people have disrupted the law's deployment of categories. While their number is not significant, their embodiment of fluid gender identity, and their lives on the borders of these gender categories, pose a fundamental challenge to law's assumptions. Transgenderism disrupts law's urge to establish *stable* categories of social and sexual identity in that it refuses traditional modes of categorisation. This disruption reveals the law's attempt to project the legal subject as stable, unified and capable of categorisation. Law, however, is one among many discourses which transgenderism challenges and disrupts. Feminism is another such discourse. Feminism is useful for illuminating the theoretical and practical struggles to understand sex, difference and identity. However, like legal narratives, some feminist narratives invest in the stability of gender categories as the ground of all effective political action. They also search for a simple answer to the questions of identity. I have argued that these feminist narratives need to reflect on their strategy and recognise that at times their strategy mirrors the processes of the law.

In Chapter One I used the example of transgendered people's engagement with family law in order to highlight the process employed by the law to comprehend the complexity of sex and gender identity. This example illustrated the search by legal narratives for a simple solution to such complex questions and it delineated the resulting superficial formulations of identity and concrete implications and injuries for those legal subjects in question. I argued that these

present approaches are not sufficient and that the law needs to reconsider its formulations in a less rigid manner. I suggested that a more progressive approach to the question of sex, for the purposes of family law, can be reached through applying poststructuralist feminist thought on the question of identity. This approach proposes that the law primarily consider behavioural factors – ie. whether a person believes they are a certain sex, lives and behaves as that sex, and is generally read in society as that sex. This course is preferable to those that focus solely on biology, or anatomy and psychology because it is a better reflection of transsexuals' social reality and it gives greater agency to the subject, instead of to the state.

In Chapter Two I revealed that feminist narratives often mirror legal narratives in that they also view transsexuals and transgendered people through the frame of such distinctions as real/imitation. In the law these distinctions operate to shape our understanding of the legal subject in accordance with legal categories. They also operate to maintain the stability of gender categories. I traced the debate among transgender and feminist theorists as to the usefulness of these categories for effective gender politics. Some feminisms rely upon these distinctions of real/imitation and 'real woman'/'pseudo woman' in order to assert a 'truth' of 'Woman'. This 'truth' of the category of woman is considered to be the precondition of feminist politics. This 'truth' excludes transgendered women from the category of woman by casting them as 'imitations'. I argued that this strategy is not constructive as it posits a rigid view of identity which fails to take into account behavioural factors. I suggested that a better approach would be to give less primacy to identity categories and to instead form a coalition of those who are oppressed on the basis of gender with a view to shifting and transforming current gender norms. The disruption posed by the fluidity of transgendered gender identity can assist in the pursuit of this aim.

In Chapter Three I examined the attempt by transgendered people to seek protection from current gender norms through anti-discrimination law. This is effectively an attempt to shift current gender norms and categories. I explored the approaches used in different jurisdictions and the disadvantages and advantages presented by each approach. I showed that the best available approach is that which aims to accommodate and affirm differences rather than to eliminate them.

Ultimately, I argued, anti-discrimination law provides transgendered people with some protection from discrimination but it is a limited avenue by which to seek the transformation of

current gender norms and stereotypes. This is because law is an institutional instrument which is just as likely to entrench gender norms as it is to shift them. However, this is not to say that seeking transformation through the law is a lost cause. In my view, it is a path which can yield results for those seeking the transformation of gender norms so long as its impulses and limitations are strategically considered.

In concluding, I believe it is critical to emphasise that transgendered 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.

## BIBLIOGRAPHY

- Arriola, Elvia R "Law and the Gendered Politics of Identity: Who Owns the Label "Lesbian"? (1997) 8 Hastings Women's Law Journal 1
- Bailey-Harris, Rebecca "Family Law - Decree of Nullity of Marriage of True Hermaphrodite Who Has Undergone Sex-Change Surgery" (1979) 53 Australian Law Journal 659.
- Barnard, Catherine "*P v S*: Kite-Flying or a New Constitutional Approach" in A. Dashwood and S. O'Leary, eds. *The Principle of Equal Treatment in EC Law* (London: Sweet & Maxwell, 1997) 51
- Barnard, Catherine "The Principle of Equality in the Community Context: *P, Grant, Kalanke*, and *Marschall*: Four Uneasy Bedfellows?" (1998) Cambridge Law Journal 352
- Beger, Nico J. "Queer Readings of Europe: Gender Identity, Sexual Orientation and the (Im)Potency of Rights Politics at the European Court of Justice" (2000) 9 Social & Legal Studies 249
- Bell, Shannon "Interview with Kate Bornstein: 'A Transgender Transsexual Postmodern Tiresias'" in Arthur & Marilouise Kroker eds., *The Last Sex: Feminism and Outlaw Bodies* (Montreal: New World Perspectives, 1993) 104
- Bornstein, Kate *Gender Outlaw: On Men, Women and the Rest of Us* (New York: Routledge, 1994)
- Bradney, Anthony "Transsexuals and the Law" (1987) 17 Family Law 350
- Brown, Wendy *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995)
- Butler, Judith "Appearances Aside" (2000) 88 California Law Review 55
- Butler, Judith "Interview with Kate More: 'Never Mind the Bollocks: Judith Butler on Transsexuality'" in Kate More & Stephen Whittle, eds. *Reclaiming Genders: Transsexual Grammars at the Fin de Siecle* (London: Cassell, 1999)

- Butler, Judith "Feminism by Any Other Name – Interview with Rosi Braidotti" in Elizabeth Weed & Naomi Schor, eds. *Feminism Meets Queer Theory* (Bloomington: Indiana University Press, 1997)
- Butler, Judith "Interview - 'Gender as Performance' - Peter Osborne and Lynne Segal" (1994) 67 *Radical Philosophy* 32
- Butler, Judith *Bodies That Matter: On the Discursive Limits of 'Sex'* (New York: Routledge, 1993)
- Butler, Judith "Imitation and Gender Insubordination" in Diana Fuss, ed. *Inside/Out: Lesbian Theories/Gay Theories* (New York: Routledge, 1991)
- Butler, Judith *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990)
- Califia, Pat *Sex Changes: The Politics of Transgenderism* (San Francisco: Cleiss Press, 1997)
- Campbell, Angus & Heather Lardy "Discrimination Against Transsexuals in Employment" (1996) 21 *European Law Rev* Oct 412
- Canor, Iris "Equality for Lesbians and Gay Men in the European Community Legal Order – 'they shall be male and female'" (2000) 7 *Maastricht Journal of European & Comparative Law* 273
- Case, Mary Ann "Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence" (1995) 105 *Yale Law Journal* 1
- Clough, Abigail S. "The Illusion of Protection: Transsexual Employment Discrimination" (2000) 1 *The Georgetown Journal of Gender and the Law* 849
- Colleen Sheppard, N. "Recognition of the Disadvantaging of Women: The Promise of *Andrews v Law Society of British Columbia*" (1989) 35 *McGill Law Journal* 207
- Cream, Julia "Re-Solving Riddles: The Sexed Body" in David Bell & Gill Valentine, eds. *Mapping Desire: Geographies of Sexualities* (London: Routledge, 1995)

- Currah, Paisley & Shannon Minter *Transgender Equality: A Handbook for Activists and Policy-Makers* (New York: The Policy Institute of the National Gay & Lesbian Taskforce & National Centre for Lesbian Rights, 2000)
- Doek, Jaap "General Report" in *Transsexualism, Medicine and Law – Proceedings of the Twenty-Third Colloquy on European Law* (The Netherlands: Council of Europe Publishing, 1995) 203
- Dollimore, Jonathan *Sexual Dissidence: From Augustine to Wilde, Freud to Foucault* (New York: Oxford University Press, 1991)
- Eichner, Maxine "On Postmodern Feminist Legal Theory" (2001) 36 Harvard-Civil Rights - Civil Liberties Law Review 1
- Elliot, Patricia & Katrina Roen "Transgenderism and the Question of Embodiment: Promising Queer Politics?" (1998) 4:2 GLQ 231
- Eskridge William N & Nan D Hunter *Sexuality, Gender and The Law* (Westbury: New York, The Foundation Press, 1997)
- Felski, Rita "Fin de Siecle, Fin de Sexe: Transsexuality, Postmodernism and the Death of History" (1996) 27 New Literary History 337
- Flynn, Leo "Case Note: *P v S*" (1997) Common Market Law Review 367
- Flynn, Taylor "Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality" (2001) 101 Columbia Law Review 392
- Franke, Katherine "*Rosa v Park West Bank*: Do Clothes Really Make the Man?" (2001) 7/2 Michigan Journal of Gender & Law 141
- Franke, Katherine "The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender" (1995) 144 University of Pennsylvania Law Review 1
- Freeman, Jody "Defining Family in *Mossop v DSS*: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation" (1994) 44 University of Toronto Law Journal 41
- Garber, Marjorie *Vested Interests: Cross-Dressing and Cultural Anxiety* (New York: Harper Collins, 1992)
- Greenberg, Julie "Defining Male and Female: Intersexuality and the Collision between Law and Biology" (1999) 41 Arizona LR 265
- Greenberg, Julie A. "When is a Man a Man, and When is a Woman a Woman?" (2000) 52 Florida Law Review 745

- Grosz, Elizabeth *Space, Time, Perversion: The Politics of Bodies* (New York: Routledge, 1995)
- Grosz, Elizabeth *Volatile Bodies: Towards A Corporeal Feminism* (Bloomington: Indiana University Press, 1994)
- Halberstam, Judith Review of Prosser, *Second Skins* (2000) *Signs* 313
- Halberstam, Judith *Female Masculinity* (Durham: Duke University Press, 1998)
- Harris, Angela P. "Race and Essentialism in Legal Theory" (1990) 42 *Stanford Law Review* 581
- Harris, DJ, MO Boyle & C Warbrick *Law of the European Convention on Human Rights* (London: Butterworths, 1995)
- Holt, Kristine "Re-Evaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence" (1997) 70 *Temp Law Review* 283
- Iyer, Nitya "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1994) 19 *Queens Law Journal* 179
- Iyer, Nitya "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 *Canadian Journal of Women and the Law* 25
- Jagose, Anna Marie *Queer Theory: An Introduction* (New York: Routledge, 1996)
- Johnson, Lori "The Legal Status of Post-Operative Transsexuals" (1994) 2 *Health Law Journal* 159
- Keller, Susan Etta "Crisis of Authority: Medical Rhetoric and Transsexual Identity" (1999) 11 *Yale Journal of Law & Feminism* 51
- Keller, Susan Etta "Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity" (1999) 34 *Harvard Civil Rights – Civil Liberties Law Review* 329
- Kroker, Arthur & Marilouise *The Last Sex: Feminism and Outlaw Bodies* (Montreal: New World Perspectives, 1993)
- Lacqueur, Thomas *Making Sex: Body and Gender from the Greeks to Freud* (Cambridge, MA: Harvard University Press, 1990)
- Levi, Jennifer "Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights" (2000) 7 *William and Mary Journal of Women and the Law* 5

- Lorber, Judith                    “Believing is Seeing: Biology as Ideology” in Rose Weitz, ed. *The Politics of Women’s Bodies: Sexuality, Appearance and Behaviour* (New York: OUP, 1998)
- MacDonald, Eleanor            “Critical Identities: Rethinking Feminism through Transgender Politics” in Barbara A. Crow & Lise Gotell, eds. *Open Boundaries: A Canadian Women’s Studies Reader* (Toronto: Prentice Hall, 2000)
- MacKinnon, Catherine A.      “Points Against Postmodernism” (2000) 75 Chicago-Kent Law Review 687
- MacKinnon, Catherine A.      *Toward A Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989)
- Mancini, G F & S. O’Leary    “The New Frontiers of Sex Equality Law in the European Union” (1999) 24 European Law Rev Aug331
- Mancini, G.F. & D.T. Keeling    “Democracy and the European Court of Justice” (1994) 57 Modern Law Review 175
- Moi, Toril                        *What is a Woman? And Other Essays* (Oxford: Oxford University Press, 2000)
- Morgan, Wayne                “Queer Law, Identity, Culture, Diversity, Law” (1995) 5 Australasian Gay and Lesbian Law Jnl 1
- Mountbatten, John            “Priscilla’s Revenge: or the Strange Case of Transsexual Law Reform in Victoria” (196) 20 Melbourne University Law Review 871
- Muller, Vivienne                “‘Trapped in the Body’ – Transsexualism, The Law, Sexual Identity” (1994) 3 The Australian Feminist Law Journal 103
- Pearlman, Leslie                “Transsexualism as Metaphor: The Collision of Sex and Gender” (1995) 43 Buffalo Law Review 835
- Pearson, Sheila Lee            “In Re McIntyre: A Victory for Pre-Operative Transgender Persons” (1998) 8 Law and Sexuality 731
- Post, Robert                    “Prejudicial Appearances: The Logic of American Anti-Discrimination Law” (2000) 88 California LR 1
- Post, Robert                    “Response to Commentators” (2000) 88 California L Review 119
- Poulter, S.                      “The Definition of Marriage in English Law” (1979) 42 Modern Law Review 409

- Prosser, Jay "Exceptional Locations: Transsexual Travelogues" in Kate More and Stephen Whittle, eds. *Reclaiming Genders: Transsexual Grammars at the Fin de Siecle* (London: Cassell, 1999) 83
- Prosser, Jay *Second Skins: The Body Narratives of Transsexuality* (New York: Columbia University Press, 1998)
- Raymond, Janice *The Transsexual Empire: The Making of the She-Male* (New York: Teachers' College Press, (1979) 2<sup>nd</sup> Ed 1994 (with New Introduction))
- Rose, Katrina C. "The Transsexual and the Damage Done: The Fourth Court of Appeals Opens Pandora's Box by Closing The Door on Transsexuals' Right to Marry" (1999) 9 *Law & Sexuality* 1
- Scott, Joan "Some Reflections on Gender and Politics" in Myra Marx Ferrec, Judith Lorber & Beth B. Hess, eds. *Revisioning Gender* (London: Sage Publications, 1999)
- Shafiqullah, Hasan "Shape Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals" (1997) 8 *Hastings Law Journal* 195
- Sharpe, Andrew "Transgender Jurisprudence and the Spectre of Homosexuality" (2000) 14 *Australian Feminist Law Journal* 23
- Sharpe, Andrew "Transgender Performance and the Discriminating Gaze: A Critique of Anti-Discrimination Regulatory Regimes" (1999) 8 *Social and Legal Studies* 5
- Sharpe, Andrew, "Anglo-Australian Judicial Approaches to Transsexuality: Discontinuities, Continuities and Wider Issues at Stake" (1997) 6 *Social and Legal Studies* 23
- Siegel, Reva "Discrimination in the Eyes of the Law: How Color Blindness Discourse Disrupts and Rationalises Social Stratification" (2000) 88 *California Law Review* 77
- Spielmann, Dean, "Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities" in P. Alston, ed. *The EU and Human Rights* (Oxford: OUP, 1999)
- Stone, Sandy "The Empire Strikes Back: A Posttranssexual Manifesto" in Katie Conboy, Nadia Medina, and Sarah Stanbury, eds. *Writing on the Body: Female Embodiment and Feminist Theory* (New York: Columbia University Press, 1997) 337

- Varona, Anthony E. & Jeffrey M Monks      “Engendering Equality: Seeking Relief under Title VII against Employment Discrimination Based on Sexual Orientation” (2000) 7 William and Mary Journal of Women and the Law 67
- Weedon, Chris      *Feminism, Theory and the Politics of Difference* (Oxford: Blackwell Publishers, 1999)
- Weedon, Chris      *Feminist Practice and Poststructuralist Theory* (London: Blackwell, 2nd ed 1996)
- Whittle, Stephen      “The Becoming Man: The Law’s Ass Brays” in Kate More & Stephen Whittle, eds. *Reclaiming Genders: Transsexual Grammars at the Fin de Siecle* (London: Cassell, 1999)
- Wintemute, Robert      “Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual orientation and Dress Codes” (1997) 60 Modern Law Review 334
- Young, Iris Marion      *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990)