Transgendered Persons and Feminist Strategy

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Le mouvement féministe a eu de la difficulté à identifier la meilleure façon d'intégrer les personnes transgenres dans le militantisme, l'analyse juridique et la politique féministes. Le problème s'est cristallisé récemment dans le cas de Kimberly Nixon, une personne transgenre d'homme en femme, à qui l'on a refusé un poste de conseillère au Vancouver Rape Relief and Women's Shelter. *Le présent article explore les multiples dimensions du conflit, situant l'affaire* Nixon *dans le contexte d'une discussion, du point de vue des personnes transgenres, des revendications des droits de la personne et d'une analyse fondée sur l'égalité en vertu de la* Charte canadienne des droits et libertés. *L'article conteste les choix stratégiques et juridiques des deux parties dans cette affaire. Il fait le lien entre les questions difficiles qui se posent dans l'affaire* Nixon *et les limites du discours des droits comme outil féministe de droits à l'égalité. L'article conclut que la meilleure façon de résoudre ce conflit en particulier serait de poursuivre le dialogue plutôt que les recours judiciaires.*

The feminist movement has struggled over how to integrate transgendered persons into feminist activism, legal analysis, and politics. The issue has recently crystallized in the case of Kimberly Nixon, a male-to-female transgendered person who was refused a counseling position at the Vancouver Rape Relief and Women's Shelter. This article explores the various dimensions of the conflict, locating the Nixon *case within a discussion of transgendered human rights claims and* Canadian Charter of Rights and Freedoms *equality analysis. The article challenges the strategic and legal choices made by each party. It links the difficult questions in* Nixon *to the limitations of rights discourse as a (feminist) (equality rights) tool. The article concludes that the best way to deal with this particular conflict is through sustained dialogue rather than further litigation.*

Rights are used to gain access, recognition, respect, and affirmation. Yet rights can also exclude and divide. People accustomed to working in concert to improve the lot of disadvantaged groups sometimes find themselves battling each other. In 1995, Kimberly Nixon, a transsexual[1] woman, sought a volunteer position at the

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Vancouver Rape Relief Society (Rape Relief), one of Canada's first women-run organizations for female victims of physical and sexual assault. A Rape Relief trainer suspected, on the basis of her physical appearance, that Nixon had not always been a woman. After confirming this with Nixon, the trainer explained that she could not train as a peer counselor and asked her to leave. Nixon, who reportedly found the incident so humiliating that she contemplated suicide,[2] hired a lawyer and filed a complaint with the British Columbia Human Rights Commission.

Nixon's complaint[3] has sparked painful disagreement within the feminist movement in Canada.[4] Women, who have worked through[5] issues such as the incorporation of lesbian[6] or race-conscious perspectives[7] into feminist theory, find themselves on opposite sides of a deep chasm.[8] Advocates disagree about the appropriate use of formal equality analysis, about the extent to which self-identification is sufficient for inclusion in a particular group, and about whether *Kimberly Nixon v. Vancouver Rape Relief and Women's Shelter* (*Nixon*) threatens the very existence of "women-only" spaces.

Institute for Feminist Legal Studies (Osgoode Hall Law School), where I presented an early version of this article.

1. A transsexual is "one who in some deeper sense believes they are another gender." The term "gender" is used to denote "a person's pyschosexual individuality, or the subjective awareness of maleness or femaleness." Nixon is "transsexual" because she identifies as a "woman"—that is, as someone who has a specific gender. For many persons, the word "transgendered" rejects the concept of an "either/or" approach to gender. This article uses the term "transgendered" because it encompasses a larger group of potential claimants (that is, claimants who do not adopt a particular gender). It also is the term currently employed in Canadian law. Throughout this article, "gender" is distinguished from "sex," which refers to anatomical or biological sex. See Leslie Pearlman, "Transsexualism as Metaphor: The Collision of Sex and Gender" (1995) 43 Buffalo Law Review 835 at 841-2. I recognize that this distinction rests on a belief not shared by all feminists. See, for example, Catharine A. MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983) 8 Signs: Journal of Women in Culture and Society 635 n. 1.
2. *Nixon* (BCHRT), *infra* note 3 at para. 241.
3. Nixon won her complaint and was awarded $7,500. *Kimberly Nixon v. Vancouver Rape Relief and Women's Shelter,* 2002 BCHRT 1 [*Nixon* (BCHRT)]. On appeal to the British Columbia Supreme Court, the commission's decision was quashed. See *Vancouver Rape Relief Society v. Nixon,* 2003 BCSC 1936 [*Nixon* (BCSC)].
4. I use the term "feminist movement in Canada" loosely and with full appreciation for the diverse and varied perceptions people may hold about its parameters.
5. Of course, I do not suggest that women have *resolved* these issues. See, for example, Joanne St. Lewis, "Beyond the Confinement of Gender: Locating the Space of Legal Existence for Racialized Women," in Radha Jhappan, ed. *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002).
6. Diana Majury, "Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context" (1994) 7 Canadian Journal of Women and the Law 286.
7. Angela Harris, "Race and Essentialism in Feminist Legal Theory" 42 Stanford Law Review 581; Sherene Razack, "Speaking for Ourselves: Feminist Jurisprudence and Minority Women" (1991) 3 Canadian Journal of Women and the Law 440.
8. The tribunal noted that "[the] views of the parties to this dispute became increasingly polarized." *Nixon* (BCHRT), *supra* note 3 at para. 232.

This article first discusses the legal context in which transgender claims have arisen in Canada. It then examines the *Nixon* complaint, its challenges for feminism, and its possible role in the ongoing debate over feminist legal action. Although certain views about the merits of the case are expressed,[9] neither "side" is vindicated. This article has different aims. Specifically, it seeks to illuminate some of the philosophical underpinnings of the debate; to discuss the risks of rights-based discourse; and to point to some larger lessons that all those interested in equality-seeking strategies—but particularly feminists—can take from this experience.

Legal Framework for Transgender Claims in Canada

In Canada, transgender claims to date have arisen in the human rights context. In the Northwest Territories, "gender identity" has been added as a specific prohibited ground of discrimination.[10] In other jurisdictions, including British Columbia, Québec, and the federal system, cases have established that discrimination based on "sex" includes discrimination against transgendered individuals.[11] In Ontario, the Human Rights Commission released a policy paper[12] agreeing with this interpretation. Several cases have vindicated transgendered persons' complaints.[13]

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9. I began this project feeling more sympathetic towards Nixon. My subsequent research and analysis deepened my appreciation for the extent of Rape Relief's dilemma.
10. *Human Rights Act,* S.N.W.T. 2002, c. 18, s. 5(1):

    > For the purposes of this Act, the prohibited grounds of discrimination are race, colour, ancestry, nationality, ethnic origin, place of origin, creed, religion, age, disability, sex, sexual orientation, gender identity, marital status, family status, family affiliation, political belief, political association, social condition and a conviction for which a pardon has been granted.

11. *Ferris v. O.T.E.U., Local 15* (1999), 36 C.H.R.R. D/329, (sub nom. *Ferris v. Office & Technical Employees Union*, Local 15) 99 C.L.L.C. 230-034 (B.C. Human Rights Trib.); *Waters v. British Columbia (Minister of Health),* 2003 BCHRT 13; *Kavanagh v. Canada (Attorney General)* (2001), 41 C.H.R.R. D/119 (Can. Human Rights Trib.); *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Maison des jeunes À-Ma-Baie Inc. (No. 2)* (1998), 33 C.H.R.R. D/263 (T.D.P.Q.); *Montreuil v. National Bank of Canada, 2003 CHRT 27; Montreuil v. National Bank of Canada,* 2004 CHRT 7.
12. Ontario Human Rights Commission, *Policy on Discrimination and Harassment Because of Gender Identity* (Toronto: Queen's Printer, 2000).
13. In *Tawney Sheridan v. Sanctuary Investments Ltd.* (1999), 33 C.H.R.R. D/467, a BC Human Rights Tribunal held that a pre-operative male-to-female (MTF) transsexual was wrongly prevented from using a women's washroom. The tribunal found that pre-operative transsexuals must be accommodated in such requests to the point of "undue hardship." In *Marmela v. Vancouver Lesbian Connection,* (1999), 36 C.H.R.R. D/318 [*Marmela*], an all-women's organization was held to have discriminated against a pre-operative transsexual when it suspended her participation on the basis of so-called "male" behaviour. In 2003, the Federal Court of Canada upheld a ruling by the Canadian Human Rights Tribunal that a federal ban on all

In a case involving discriminatory state action, a transgendered person could seek a remedy through section 15 of the *Canadian Charter of Rights and Freedoms.*[14] In some foreign jurisdictions, such as the United States, it is necessary to decide whether a pre- or post-operative transgendered person is male or female[15] and then work backward from that fact to determine whether any alleged unequal treatment is on the basis of "sex." In Canada, section 15 includes more grounds of discrimination. Therefore, a sex determination is not strictly necessary in every case. For example, a transgendered person who can demonstrate that she is subject to a burden or withheld a benefit on the basis of transsexual status likely need not establish whether she is "male" or "female." Although some transgender claims could fall under the enumerated grounds of "sex" or "disability," Canadian courts are more likely to recognize that such discrimination relates to a new, analogous ground[16] of "gender identity."[17] However, depending on the justification offered by the respondent, a person's actual (or former) sex could be relevant, as noted by the BC Supreme Court in *Nixon:*

> [Nixon's] previous male characteristics could be relevant in some cases. Two examples come to mind. One is participation as a female subject of medical research which sought to distinguish between males and females

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sex-change operations was discriminatory. A medically recommended sex-change is an essential medical service and, as such, would be required under the *Corrections and Conditional Release Act,* S.C. 1992, c. 20, s. 86(1)(a). *Canada (Attorney General) v. Canada (Canadian Human Rights Commission),* 2003 FCT 89.

14. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982 [*Charter*]. Section 15 states:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

15. Pearlman, *supra* note 1 at n. 9.
16. For a summary of the approach to determining analogous grounds see *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 S.C.R. 203.
17. This article does not enter the debate over which ground should apply. There is a burgeoning commentary detailing the advantages and disadvantages of each option: Paisley Currah and Shannon Minter, "Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People" (2000) 7 William and Mary Journal of Women and the Law 7 at 48; Katherine Franke "Current Issues in Lesbian, Gay, Bisexual and Transgendered Law" (1999) 27 Fordham Urban Law Journal 279 at 381.

as defined by chromosomal makeup, such as a study of baldness. A second is competition as a female in certain sports.[18]

Thus *Nixon* emerged at a time when Canadian law had begun to recognize the legal status and rights of transgendered persons. In most contexts, such claims would enjoy the support of feminists and equality advocates alike. There has, though, been little recognition of the possible limits to the notion of "equal treatment" between such persons and (particularly) women born as women. Nor has there been sustained thought within the feminist movement over the possible conflicts that can arise. *Nixon* thrusts that conflict into a harsh spotlight.

The Nixon *Complaint*

Kimberly Nixon is a woman who was born a man. Through a combination of surgery and other treatment, she completed sex reassignment.[19] Pursuant to section 27(1) of the *Vital Statistics Act,*[20] she changed her birth certificate. In August 1995, Nixon responded to an advertisement by Rape Relief for volunteer peer counselors and attended an initial training session. Nixon's stated motivation for doing this related to male violence that she experienced both before and shortly after her sex reassignment surgery.[21] At a pre-screening interview, and as a condition to joining the collective, Nixon indicated her acceptance of Rape Relief's four core beliefs: (1) violence is never a woman's fault; (2) women have the right to choose an abortion; (3) women have the right to choose their sexual partners; (4) volunteers agree to work, on an ongoing basis, on their existing prejudices including racism.[22]

Nixon "passed" the pre-screening and was invited to the next regularly scheduled training session. It was during that session that a Rape Relief facilitator

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18. *Nixon* (BCSC), *supra* note 3 at para. 38. The case of Michelle Dumaresq is instructive. Dumaresq, a MTF cyclist, won a spot on the Canadian women's downhill mountain biking team and competed for Canada at the 1992 world championships. The Canadian Cycling Association accepted her changed birth certificate as sufficient proof of sex for her to compete as a woman. In May 2004, the International Olympic Committee announced that athletes who have undergone sex-change surgery will be eligible for the Olympics if their new gender has been legally recognized and they have gone through a minimum two-year period of postoperative hormone therapy. The decision covers both MTF and female-to-male (FTM) cases. Associated Press, "Committee Clears Transsexuals for Olympics," 17 May 2004.
19. *Nixon* (BCHRT), *supra* note 3 at para. 10.
20. *Vital Statistics Act,* R.S.B.C. 1996, c.469. Section 27(1) reads:

    > If a person in respect of whom trans-sexual surgery has been performed is unmarried on the date the person applies under this section, the director must, on application made to the director ... change the sex designation on the registration ... in such a matter that the sex designation is consistent with the intended results of the trans-sexual surgery.

21. *Nixon* (BCHRT), *supra* note 3 at para. 21.
22. *Ibid.* at para. 23.

asked her to leave. The facilitator's notes indicate that she identified Nixon as a man solely on the basis of her appearance. The facilitator advised Nixon that "women had to be oppressed since birth to be a volunteer at Rape Relief, and that because she [Nixon] had lived as a man she could not participate."[23] The next day, Nixon filed a human rights complaint.[24]

Rape Relief, arguing that the tribunal lacked jurisdiction, first sought judicial review of the decision to hear the complaint. The BC Supreme Court held that the *Human Rights Code*'s[25] prohibited ground of "sex" discrimination includes discrimination on the basis of "transsexualism."[26] Rape Relief did not challenge this finding, and the case proceeded on the basis that Nixon was excluded from Rape Relief because of sex. Neither of the named applicants disputed Rape Relief's contention that it is a "women-only" space permitted by statute to exclude men. They disagreed only with Rape Relief's claim that, for its purposes, Kimberly Nixon is not a "woman." The dispute raises a number of legal issues[27] of which only a few are discussed in this article: the required elements, in the human rights context, of a *prima facie* case; whether Rape Relief's decision is based on a bona fide occupational qualification; and whether Rape Relief can rely on the exemption found in section 41[28] of the *Code*.

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23. *Ibid.* at para. 31.
24. *Nixon* (BCSC), *supra* note 3 at para. 12.
25. *Human Rights Code,* R.S.B.C. 1996, c. 210.
26. *Vancouver Rape Relief Society v. British Columbia (Human Rights Commission) et al.* [2000] B.C.J. No. 1143.
27. The issues were organized as follows:

    (i) Is a denial of the opportunity to volunteer, based on sex, a violation of the discrimination in employment provisions contained in s. 13(1)(a) or (b) of the Code?

    (ii) Is the training program offered by Rape Relief a service to the public such that discrimination based on sex with respect to it is a violation of s. 8(1)(a) or (b) of the Code?

    (iii) Has Ms. Nixon established a *prima facie* case of discrimination?

    (iv) If Ms. Nixon has established a *prima facie* case of discrimination, is being born a woman and having experienced life in the world as a woman a bona fide occupational requirement or a bona fide justification of discrimination against her?

    (v) Is Rape Relief entitled to rely on the exemptions contained in s. 41 of the Code?

    This article discusses only issues (iii)-(v).
28. This exemption reads in part:

Rape Relief argued that Nixon, as part of her *prima facie* case, needed to demonstrate that Rape Relief did more than treat her differently because of her sex—she needed to demonstrate that the organization violated her human dignity. Rape Relief relied on the Supreme Court of Canada's synthesis of the test by which discrimination is now analyzed under section 15 of the *Charter*. Although *Nixon* is a human rights complaint, Rape Relief argued that discrimination claims require the same approach.

Rape Relief used a legal development that has caused great concern to some feminists and equality rights advocates.[29] The so-called "human dignity" approach to equality derives from the Supreme Court of Canada's decision in *Law v. Canada.*[30] In *Law,* the Court attempted to draw together several divergent approaches that have plagued its previous section 15 decisions.[31] The Court held that the appropriate focus for a court deciding a *prima facie* claim of discrimination is the "essential purpose of section 15," which it described as

> prevent[ing] the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and [promoting] a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[32]

The Court stressed that the analysis must be undertaken from the perspective of "a person in circumstances similar to those of the claimant, who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity."[33] While the stress on human

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> If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by ... a common ... sex ... [or] political belief, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

29. See, for example, Gillian Calder and Sarah Lugtig, "Advancing Women's Equality through Law: Section 15 Analysis at the Turn of the Century" (paper presented at West Coast LEAF's National Forum on Equality Rights, Vancouver, BC, 6 November 1999); Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Canadian Bar Review 299.
30. *Law v. Canada,* [1999] 1 S.C.R. 497 [*Law*].
31. See, particularly, the 1995 "trilogy"of *Miron v. Trudel,* [1995] 2 S.C.R. 418; *Egan v. Canada,* [1995] 2 S.C.R. 513; and *Thibaudeau v. Canada,* [1995] 2 S.C.R. 627.
32. *Law, supra* note 30 at para. 51. In order to establish a *prima facie* section 15 violation, a claimant must prove: (1) a distinction or differential treatment imposed by law, (2) based on an enumerated or analogous ground, (3) that results in discrimination by bringing into play the "central focus" of section 15(1) "in remedying such ills as prejudice, stereotyping, and historical disadvantage." The "human dignity" element is considered throughout the analysis, but with particular focus at stage (3).
33. *Law, supra* note 30 at para. 61.

dignity may appear benign or even helpful to equality claimants, the decisions issued since *Law* have shown it to be a vague and malleable tool[34] that can impose a significant burden on a *Charter* plaintiff. In several cases, the Supreme Court of Canada has determined that laws, which unquestionably had an adverse impact on disadvantaged persons, nevertheless did not violate their human dignity.[35]

Thus, Rape Relief appropriated a controversial element of equality jurisprudence to cut off Nixon's discrimination claim "at the pass." Rape Relief's argument exposes the tension that equality advocates face when responding to a discrimination claim. It was, understandably, important to Rape Relief that it not be found to have "discriminated" against Nixon. Nonetheless, Rape Relief essentially suggested that Nixon's claim engaged no dignitary interest. Specifically, Rape Relief argued that "no reasonable person would feel that their dignity was impacted by being excluded, like most other British Columbians, from the training program at a small, not-for-profit, women's shelter."[36] If accepted, Rape Relief's argument could set a damaging precedent for the treatment of other novel claims. The conclusion that a particular law harms "human dignity" inevitably is influenced by social location, historical experience, and privilege. Those who are truly "marginal" tend to be constructed as less reasonable.[37] An approach to discrimination filtered through the viewpoint of the "reasonable disadvantaged person" makes it more difficult for those who occupy society's margins to gain recognition and respect. Indeed, the Human Rights Tribunal rejected Rape Relief's position. The tribunal found that "human dignity"

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34. Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2002) at section 52.7(b):

> The element of human dignity that has now been injected into the s. 15 jurisprudence is, in my view, vague, confusing and burdensome to equality claimants ... The element of human dignity is a reversion to the idea that was rejected in *Andrews,* namely, that s. 15 should be restricted to unreasonable or unfair distinctions.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at para. 102-8; *Granovsky v. Canada (Minister of Employment and Immigration),* [2000] 1 S.C.R. 703 at paras. 61, 67, 70 [*Granovsky*]; and *Lovelace v. Ontario,* [2000] 1 S.C.R. 950 at paras. 84-87, 89-90.

35. For example, in *Granovsky, supra* note 34, the Court found no violation of section 15 because the claimant misidentified the proper comparator group. Granovsky, who suffered from a chronic but temporary disability, sought to establish that pension entitlement criteria designed for able-bodied persons failed to consider his disability. The Court held that the correct comparator group was the permanently disabled who, under the scheme, could apply for Canadian Pension Plan benefits under substantially modified criteria. Once this "error" was corrected, the Court held, a "reasonable person" in Granovsky's circumstances would appreciate that a statutory provision meant to address the needs and circumstances of the permanently disabled, did not discriminate against persons not "disabled enough" to fall within the provision. See *Lovelace v. Ontario.* [2000] 1 S.C.R. 950, for a similar analysis in a claim where one disadavantaged group sought a benefit granted to another disadvantaged group. For further discussion of problems with the *Law* test, see Jane Bailey and Carissima Mathen, "Constitutional Advancement of Women's E-Quality: Responding to Challenges and Seizing Opportunities" Queen's Law Journal [forthcoming].

36. *Nixon* (BCHRT), *supra* note 3 at para. 90.

37. I have borrowed this idea from the comments of an anonymous reviewer, with thanks.

has not achieved the status of a "stand-alone" criterion under the *Law* test.[38] In the alternative, it held, the particular context of human rights complaints makes it inappropriate to require that complainants demonstrate a specific injury to "human dignity."[39]

Rape Relief's second argument was that its volunteer counselors, to perform their roles, need the experience of female socialization since birth.[40] Rape Relief stated:

> There is a significant danger that a male counselor, someone who may still have some male characteristics though dressed as a female or a man disguised as a woman will be disturbing to someone already extremely disturbed or afraid.[41]

The tribunal was unconvinced by the evidentiary basis offered to support the "female-socialization" criterion. Rape Relief's principal expert, Dr. Ingrid Pacey, testified that women entering therapy for a male-perpetrated sexual assault generally have a profound fear of men. Tribunal member, Heather MacNaughton, appeared to accept this observation as well as Pacey's statement that a good therapist must be able to demonstrate "accurate empathy."[42] However, when Pacey said that a therapist or counselor who had lived part of her life as a male should not offer therapy to a female victim of sexual assault, MacNaughton characterized the opinion as "hypothetical" because Pacey lacked experience in actual counseling sessions involving transgendered women. Similarly, the tribunal was unimpressed by the testimony of Rape Relief members. MacNaughton noted that one member, Lee Lakeman, did not seem to accept that Nixon was a woman at all.[43] Another member, Edith Swain, mistaking a woman in the hearing room for a man, indicated that she would feel uncomfortable with the woman as a counselor.[44]

In contrast, the tribunal found that Nixon was an exemplary counselor, based in part on her successful participation in a group peer counseling session at Battered Women's Support Services (BWSS). Another women's shelter, Women against Violence against Women (WAVAW), welcomed transgendered clients and volunteers. It is noteworthy that at least some women's centres, facing a dilemma similar to Rape Relief's, have decided to include transgendered persons. However, other evidence in the record throws the significance of this fact into some doubt. First, Kimberly Nixon actually left BWSS because she felt it was insufficiently welcoming of transgendered persons. It is unclear from the record how many BWSS members ever realized that Nixon was not born and socialized

38. *Nixon* (BCHRT), *supra* note 3 at para. 109.
39. *Ibid.* at para. 114.
40. *Ibid.* at paras. 121-4.
41. *Nixon* (BCSC), *supra* note 3 at para. 29.
42. *Nixon* (BCHRT), *supra* note 3 at para.156.
43. *Ibid.* at para. 151.
44. *Ibid.* at para. 171.

as a woman.[45] Second, while WAVAW indicated it had adopted a "transgender-friendly" policy, it had not yet employed any transgendered women as volunteers.

In addition, when evaluating Nixon's fitness as a counselor, the tribunal may have conflated the significance of a person's *actual* gender experience and identity, with the *perception* of that person's gender by female victims of male violence. As mentioned earlier, a crucial moment during the hearing occurred when Rape Relief member Edith Swain misidentified a biological woman (Sheila Gilooly) as a man and stated her discomfort were she, Swain, to encounter the woman in a women-only space. The tribunal used this moment to illustrate the truism that appearances can be deceptive and, more importantly, to refute Rape Relief's initial rejection of Nixon. Yet is this the entire story? After all, when confronted, Nixon readily admitted that she *had* lived part of her life as a man. Had Gilooly explained to Swain that she was indeed a woman, Swain's discomfort might have ceased, and, in any event, she might not have been entitled to demand a different counselor. This admittedly dramatic moment did not resolve the underlying issues.

Ultimately, the tribunal found that Rape Relief did not offer sufficient evidence that including transgendered women would make it "impossible" for Rape Relief to fulfill its objects. Rape Relief made no efforts to accommodate Nixon other than offering the standard response given to male applicants: that she join a fundraising group. Since an employer must accommodate to the point of "undue hardship," the tribunal reasoned, Rape Relief's failure to consider any intermediate steps did not satisfy the legal test under which a bona fide occupational qualification is upheld.[46]

While the tribunal's reasoning makes sense in a conventional employment discrimination claim, the reasoning is inadequate given *Nixon*'s particular context. Rape Relief is making a statement about women's place and treatment in society. Rape Relief believes that being socialized as a woman, which includes experiencing the various physical, emotional, and sexual markers of female development, is integrally connected to a woman's sense of herself as a gendered person. This experience informs her understanding of how all women are vulnerable to male sexual violence, and this understanding, Rape Relief ardently believes, is the core precept that links members of Rape Relief as a collective. The tribunal did not consider whether Rape Relief is entitled to rely on this belief on its own merits. Instead, the tribunal held that Rape Relief should have considered any alternatives to the most drastic response that flows from that belief—namely, excluding people such as Nixon. Yet, since the belief concerns precisely who can be a member of the Rape Relief collective, it is difficult to see what "reasonable" alternatives exist.

Rape Relief's third argument relied on the exemption available in section 41 of the *Human Rights Code,* which states:

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45. *Ibid.* at paras. 32-42.
46. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.,* [1999] 3 S.C.R. 3 at para. 54.

> If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by ... a common ... sex ... [or] political belief, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.[47]

Rape Relief submitted that one of its primary objects is to promote the interests of women who share a distinct political belief—that being female from birth is required to participate in the political work of combating the inferior social status of women.

Of course, Kimberly Nixon argues that she also shares the life-long experience of being "female" or, at least, has shared it from the age of five, which is when she claims to have first realized that her physical sex did not match her gender identity. However, Rape Relief defines "life-long experience" to include a person's physical sex markers and the socialization process that results from being treated as a particular gender: "[C]hildhood socialization, life-long relationships to reproduction and the experience of a particular type of subordination."[48]

The tribunal's disposition on this point was somewhat confused. MacNaughton relied on various factors to reject the argument. First, Rape Relief's stated objects did not specifically include the "political belief" that it identified—the so-called "belief" was actually a common "life experience" and therefore did not qualify under section 41 of the *Code.* Second, Rape Relief did not demonstrate that non-transsexual women have a shared, common life experience, and it did not screen potential volunteers to ensure that they do.[49] Third, Rape Relief's exclusionary policy was underinclusive because any screening occurred only when a volunteer's appearance "triggered" an inquiry into whether she had lived part of her life as a man.[50]

On further application for judicial review by the British Columbia Supreme Court, Rape Relief was successful, but in several respects its victory is problematic. Justice E.R.A. Edwards ruled that Nixon had not made out a *prima facie* claim of discrimination. He based this conclusion on several factors: the need to respect legally sex-segregated organizations; the application of section 41 of the *Code;* and the appropriate use, in the human rights regime, of the *Law* "human dignity" standard.

Edwards J. first noted that neither Nixon nor the deputy chief commissioner disputed Rape Relief's ability to exclude men. He noted as well that all parties accepted that the line between "male" and "female" is arbitrary because the concept of "sex" is now recognized as occupying a "continuum." Therefore,

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47. *Human Rights Code, supra* note 25.
48. *Nixon* (BCHRT), *supra* note 3 at para. 215.
49. The basis for this argument is unclear, since Rape Relief clearly believes that women born and socialized as women *do* share a common life experience.
50. *Nixon* (BCHRT), *supra* note 3 at paras. 218-24.

> [if] Rape Relief's exclusion of males is not *prima facie* discriminatory and sex is not a binary concept but a continuum, then exclusion of male to female transsexuals can be no more discriminatory than exclusion of males, since both males and male to female transsexuals represent points on the continuum distinct from persons who have experienced their whole lives as females.[51]

Edwards J.'s analysis implies that all sex distinctions drawn by law now are equally likely to offend non-discrimination or equality principles. Perhaps it is an inevitable by-product of the growing acknowledgment that "sex" represents a continuum. Still, abandoning the presumption that legal distinctions that burden women but not men are different from the converse[52] could negatively impact women in a world that has a long way to go to achieve full sex equality.

Second, Edwards J. held that the tribunal gave the section 41 exemption an overly restrictive interpretation. In particular, he held that Rape Relief's "political belief" about who is a woman amounted to an "article of faith" that could not be scrutinized by the tribunal, just as an article of religious dogma could not be properly scrutinized by non-believers. In other words, the belief that transgendered women who have been socialized as males are not part of a desired "identifiable group" is an "article of faith" according to which Rape Relief may exclude such persons. Edwards J.'s casual equation of a socio-political belief with an "article of faith" could create a wide swath of immunity for outright discriminatory beliefs that justify the exclusion of individuals from programs or services. For example, an organization providing a community service might, in accordance with the tenets of a particular faith, seek to serve only male clients, or an organization could seek to exclude clients who do not share certain discriminatory political beliefs. In these cases, who is entitled to scrutinize the rule? The Court's analysis suggests that "outsiders" are incompetent to engage in such scrutiny, even if persons who see themselves as members of the group disagree with the organization's interpretation (surely, a not uncommon situation). The more marginalized the group is in society, the more devastating the exclusion is to the affected individual. To simply accept Edwards J.'s notion, therefore, is to

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51. *Ibid.*

52. Generally, distinctions that impose legal burdens or withhold legal benefits on the basis of being female (or other grounds that reflect positions of historical disadvantage) almost always are found *prima facie* discriminatory under section 15. *Andrews v. Law Society (British Columbia),* [1989] 1 S.C.R. 143 at para. 37; *Nova Scotia (Attorney General) v. Walsh,* [2002] 4 S.C.R. 325, 2002 SCC 83 at para. 92; *Lavoie v. Canada,* [2002] 1 S.C.R. 769, 2002 SCC 23 at para. 83. However, where a legal rule recognizes women's historical disadvantage by imposing a burden on, or withholding a benefit from, men, the analysis of discrimination has considered the different social consequences that attach to gender. See, for example, *Weatherall v. Canada (Attorney General),* [1993] 2 S.C.R. 872 (not discriminatory for female prison guards to perform searches of male inmate cells even though male guards working in women's prison were prohibited from performing similar tasks). Yet see, in contrast, *Trociuk v. British Columbia (Attorney General),* [2003] 1 S.C.R. 835 (vital statistics act giving mothers the sole discretion to exclude father's name from birth certificate discriminates against men; social context of female vulnerability to male control over children does not mitigate injury to fathers' human dignity).

risk abandoning many such "minorities within minorities." The point is not that organizations can never design exclusionary programs. The point is that the human rights regime has a duty to perform a public-minded analysis of the exclusion from a perspective of inclusion and respect.

Third, Edwards J. found that the *Law* framework does apply to the human rights context.[53] Although the tribunal considered Nixon's complaint under the *Law* principles (as an alternative argument), Edwards J. held that it failed to adequately consider the "objective" dimension of a human dignity violation.[54] Edwards J. then substituted an analysis of "human dignity" that reveals the broader risks of Rape Relief's argument. He asserted: "The majority of persons in British Columbia (all men and those women who do not share Rape Relief's political beliefs) would be excluded from participation in the training program."[55] He continued:

> A reasonable person excluded for having experienced part of her life as a male, according to this argument, would recognize that what I characterize as Rape Relief's "article of faith" as to the political and therapeutic significance of the experience of living exclusively as a female, the basis for exclusion, did not compromise the excluded person's dignity.[56]

This argument is worrying on several levels. First, Edwards J. appears to have said that a personal experience of discrimination shared by more people is less harmful to human dignity. Edwards J. cited no case law in support of this novel and disturbing proposition that would seem to shield from scrutiny the oppression of majority groups. Second, Edwards J. failed to consider that the reasonable "British Columbian" in his scenario most likely would not perceive harm to his dignity because he simply does not care about, nor wish to participate in, Rape Relief's work. Third, Edwards J. did not consider the possibility that a complainant may share in all of the beliefs held by the excluding organization, *except* for the

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53. Edwards J. ruled that the BC Court of Appeal confirmed such an approach in *British Columbia Government and Service Employees' Union v. British Columbia (Public Service Employee Relations Commission)*, 2002 BCCA 476. This article does not discuss the merits of applying the *Law* framework to human rights complaints.

54. Nixon *(BCSC)*, *supra* note 3 at para. 124:

> The Tribunal found Ms. Nixon was "unable to understand the challenge to her participation in the training in any but a personal way and as a challenge to her status as a woman." This, Rape Relief asserts, suggests Ms. Nixon was unable to view her exclusion from Rape Relief's peer counselling objectively, a factor not taken into account by the Tribunal with respect to the impact on dignity.

55. *Nixon* (BSCS), *supra* note 3 at para. 125.

56. *Ibid.*

particular belief that justifies his or her exclusion.[57] Kimberly Nixon experienced male violence, suffered intensely for her gender dysphoria, and went to extraordinary lengths to make her physical self correspond to her emotional and mental self. She claims to support Rape Relief's work and endorses its political principles. She also endorses Rape Relief's desire to have a "woman-only" space—but she does not see herself as anyone other than a "woman" who should be able to join Rape Relief.

Edwards J. acknowledged the difficulties in applying an analysis developed in the context of analyzing state action—the *Law* test—to the human rights context. Yet, he found that it was precisely the "private"[58] nature of the exclusion that rendered Nixon's complaint a nullity:

> Although in this case Rape Relief's exclusion of Ms. Nixon is not a "law," application of the *Law* analytical framework to non-governmental conduct alleged to be discriminatory under the Code requires that it be treated as such for analytical purposes.
>
> However, exclusion by a small relatively obscure self-defining private organization *cannot have the same impact on human dignity as legislated exclusion from a statutory benefit program.* This is because any stereotyping or prejudice arising from legislated exclusion bears the imprimatur of state approval and therefore some wide public acceptance ...
>
> Legislated exclusion is there for all to see. Rape Relief's exclusion of Ms. Nixon was private. That does not mean it was subjectively less hurtful to her, but it was not a public indignity.[59]

Edwards J.'s "human dignity" analysis suggests a pyrrhic victory for Rape Relief. He seems to have had little patience with either party:

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57. I recognize that this argument could apply to the other beliefs identified as a pre-requisite for joining Rape Relief, such as the belief that women have the right to choose an abortion. However, it is much easier to argue that excluding such persons is not "discriminatory" in the same way as excluding Nixon. It is possible for a person to deliberate the former issue (abortion) so as to reach a conclusion about the moral conviction one wishes to adopt. Such a process is not applicable to the basic question of whether Nixon's lack of early female socialization makes her a "peer" in the battle against male violence against women. According to Rape Relief, a woman who is opposed to abortion is still a "woman," but her political beliefs are unsuited to Rape Relief's objects. The same cannot be said, by Rape Relief, of Nixon. Nixon can do nothing to overcome the exclusionary criterion.
58. *Nixon* (BSCS), *supra* note 3 at para. 147.
59. *Ibid.* at paras. 144-5, 147 [emphasis added].

> No objective male to female transsexual, standing in Ms. Nixon's shoes, could plausibly say: "Rape Relief has excluded me. I can no longer participate fully in the economic, social and cultural life of the province." ... Rape Relief provides access to only a tiny part of the economic, social and cultural life of the province. By reason of Rape Relief's self-definition, perhaps reflected in its small number of members, *exclusion from its programs is quite evidently exclusion from a backwater, not from the mainstream of the economic, social and cultural life of the province.*[60]

It remains to be seen which legal approach will prevail. While Nixon's claim likely will be recognized as engaging equality and non-discrimination concerns, it is less certain that her particular demand to be accommodated as a "woman" within the Rape Relief collective will be vindicated.

How Transgender Claims Challenge Feminism

> Sexual stereotypes are not slurs which only deal with a biological or functional meaning of sex, rather, they are created when the biological meaning of sex is measured against its social construction—gender.[61]

For feminists, the claim for equal treatment on the basis of gender identity raises both principled and pragmatic concerns. Feminists must confront their beliefs about who counts as a "woman"; particularize this belief to a specific subset of feminist activism; and decide whether such a debate belongs within a rights adjudication context. To the extent that transgender equality claims engage the fundamental determinants of feminist theory, those grappling with *Nixon* can draw lessons from the debate among so-called "first-," "second-," and "third-wave" feminists. First-wave feminists are closely associated with a liberal ideology that seeks to minimize sexual differences and remove barriers to individual women's achievement. According to this ideology, women have been systematically hindered in their ability to access the resources needed to deal with the world and assert their place within it. For first-wave feminists, "gender" is not a particular concern because they primarily seek to remove pre-existing sex-based disadvantage. Remove such external hindrances (lack of child care, economic dependence, and so on), first wavers insist, and women will attain a more stable and empowered social position.[62]

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60. *Ibid.* at para. 151, 154 [emphasis added].
61. Pearlman, *supra* note 1 at 871.
62. Angela Miles, "Feminism, Equality and Liberation" (1985) 1 Canadian Journal of Women and the Law 42 at 42-3; Mary Wollstonecraft, "A Vindication of the Rights of Women," in Miriam Schneir, ed. *Feminism: The Essential Historical Writings* (New York: Vintage, 1994) at 5-16.

Unlike first wavers, second wavers do not believe that merely neutralizing the implications of biological difference can ameliorate women's disadvantage. Second-wave feminists are more concerned with the distinction between sex and gender. These feminists accept sex as a biological given. However, they view the social construction attached to the sexes, and the distinct gender roles imposed on women, as both arbitrary (in that the "feminine" gender is not integrally related to the "female" sex) and deliberate (in that gender roles serve to perpetuate male power and domination). Some second-wave feminists, hoping to encourage a more general transition to a "female" ethos, extol so-called "feminine" qualities such as care and sensitivity.[63] Others see the category of "feminine" as having been created in response to male needs and desires and, therefore, seek to break down the social structures that maintain and promote the latter.[64]

In contrast to both first- and second-wave feminists, third-wave feminists believe that neither sex nor gender is fixed and unchanging. The third-wave critique of earlier "waves" has been described as follows:

> "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).[65]

Third-wave feminists are particularly critical of second wavers for accepting that sex and biology make up "a fixed and unchanging given,"[66] as this "comes close to biological determinist views that biology determines destiny."[67] In this perspective, third wavers closely resemble, and often include, critical gender theorists. Critical gender theorists wish to debunk the notion that "every human being naturally belongs to one of two gender categories."[68] They argue that "gender" is a social construct, which is not inevitable but rather arises from powerful, and powerfully entrenched, social forces. For critical gender theorists, it

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63. Carol Gilligan, *In a Different Voice* (Cambridge: Harvard University Press, 1982).
64. Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (New York: Quill, 1970); and Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987) at 39:

    > I am getting hard on this and am about to get harder on it. I do not think that the way women reason morally is morality "in a different voice." I think it is morality in a higher register, in the feminine voice.

65. Laura Grenfell, "Making Sex: Law's Narratives of Sex, Gender and Identity" 76 Legal Studies 66 at 93.
66. *Ibid.*
67. *Ibid.*
68. Terry S. Kogan, "Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled 'Other'" (1997) 48 Hastings Law Journal 1223 at 1229.

makes little sense for a person to claim that his or her birth-assigned gender does not correspond to his or her self-perception. One may be born a sexed being, but one is not born "gendered." Gender is a learned phenomenon.[69]

A feminist response to a substantive equality claim by transsexuals might advocate breaking down gender divides so that transgendered persons no longer would need to "become" women. Another response, which is adopted by Rape Relief, is that gender is a complex social phenomenon that cannot be assumed through psycho-medical means. Rape Relief's response is akin to second-wave analysis—the effects of the gender divide are so powerful and damaging that, so long as the divide persists, women's response to sexualized violence must include the power to exclude those who have not fully lived it or been subordinated by its threat.

Transgendered persons experience gender identity issues in diverse ways. Some, such as Kimberly Nixon, determine that their gender identity does not correspond to their sex markers (chromosomes, gonads, and genitals), and they seek to alter those sex markers to the greatest possible extent. Others may perceive a gender-sex disconnect but for various reasons[70] they reject a full sex change. Others may shun the label of "man" or "woman" altogether, preferring to assume no gender identity. No matter what category covers them, most transgendered persons eventually confront a situation involving a social response based on a gender to which they do not ascribe. In many ways, Kimberly Nixon's situation is the easiest for the law because her "sex" changed in a radical and permanent way. The transgendered person who chooses not to undergo physical procedures poses more of a challenge. The greatest challenge exists with respect to persons who refuse to assume any sex or gender at all. To date, the law has required that a person's sex be definite and that it correspond to the person's gender. In other words, Nixon's is the most secure case from which to launch an equality rights or anti-discrimination claim. The pre-operative transsexual is most likely to obtain relief if her claim arises during the period immediately before a definite sex change.[71] However, a resistant[72] pre-operative transsexual, or a gender non-conformist, is far less likely to prevail.

Nixon herself relied heavily on her amended birth certificate and surgical procedures as "proof" that she was a woman. The case leaves for another day the issue of how to deal with transgendered persons who do not undertake such drastic changes. It may be that post-operative transsexuality is the correct place to

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69. Anne Fausto-Sterling, *Myths of Gender: Biological Theories about Women and Men*, 2nd ed. (New York: Basic Books, 1992); Martine Rothblatt, *The Apartheid of Sex: A Manifesto on the Freedom of Gender* (New York: Crown, 1995).

70. For example, it may be too costly, pose too great a risk to one's health, or be too disruptive of existing personal relationships. This person is often referred to as a "pre-operative" transsexual, regardless of whether they wish to undergo such an operation.

71. Pre-operative transsexuals are required as part of their therapy to live as their chosen gender. If, in the course of so doing, they encounter resistance—for example, if they are barred from using a sex-specific washroom—they may be entitled to relief. See *Marmela*, *supra* note 13.

72. By "resistant," I mean one who refuses to submit to medical procedures to make his or her outward self correspond to gender identity.

draw the line for a "women-only" space, but such a line will have other consequences. As Paisley Currah and Shannon Minter note, "[a] narrowly drafted law may be construed to exclude gender variant people who may not identify or even necessarily be perceived as a specific 'type' of 'transgender person.'"[73] To the extent that it requires a diagnosis of gender identity disorder, a "clinical" definition excludes many persons. Some transgendered persons resist such a diagnosis because they do not wish to be characterized as suffering from a mental disorder. Others are unwilling to subject themselves to highly invasive, painful procedures. Still others remain "on the fence" but wish to be treated on the basis of their chosen gender.[74]

Rape Relief's resistance to recognizing even Kimberly Nixon as a "woman," then, is partly attributable to the fear of opening a Pandora's box that will complicate attempts to exclude other, more challenging categories of persons, up to and including men. Recall that Rape Relief accepts that the line between "male" and "female" is a continuum. Nonetheless, Rape Relief firmly believes that it should be able to maintain its space as "women-only"—that is, that men should continue to be excluded. In other words, the mere recognition of the biological reality that sex is a continuum does not correct the social reality that sex difference still provides the basis and justification for inequality between men and women.[75] Strikingly, Nixon and her allies defend this belief too. For example, Equality for Gays and Lesbians Everywhere (EGALE) issued a press release that, while supportive of Nixon, carefully affirmed "the right of women's organizations (including Rape Relief) to maintain a women's-only space and to politically organize with peers."[76] Essentially, Rape Relief has called on Nixon and her supporters to show how their stopping point along the continuum is any less subject to challenge, for example, by men.

Some might argue that Rape Relief is fear mongering—that its concerns are not realistic. And, indeed, it is likely that few men would seek to join the Rape Relief collective outright. Yet the prospect remains. In 1988, a man tried to take self-defence classes at the Wendo Women's Self Defence Organization and, when refused entry, brought a human rights complaint. Michael Celik argued that he had experienced violent attacks and wished to learn to defend himself. Eventually the complaint was thrown out for being vexatious,[77] but not before Wendo expended significant resources—financial and otherwise—fighting it. It is naive to assume that no men would use the opportunity to enter and destabilize a noted and outspoken women's rights advocate such as Rape Relief.

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73. Currah and Minter, *supra* note 17 at 52.
74. *Ibid.* at 53-4.
75. MacKinnon, *Feminism Unmodified*, *supra* note 64 at 44.
76. "EGALE Supports Kimberly Nixon," press release issued 25 August 2003. See also "Still a Woman, Despite the Court's Decision," press release issued by the Canadian Unitarian Council, 20 December 2003: "The CUC strongly affirms Nixon's legal rights as a woman while still recognizing the need for women-only space. 'It is our belief that transsexual rights and women's rights are not mutually exclusive,' said CUC President Elizabeth Bowen."
77. *Celik and Wen-Do Women's Self Defence Commission*, OHRC 60-991A (1991).

Aside from the risk of "saboteurs," there is the sheer difficulty of a small, under-resourced organization such as Rape Relief having to deal with persons who identify as women but do not seek to transform their physicality or with persons who do not identify as women *or* men but nonetheless wish to become members. What principle requires Rape Relief to accept Kimberly Nixon but permits it to exclude these others? Consider also the appropriate treatment of female-to-male transsexuals. Such persons have been socialized as women but have turned away from this identity. Have *they* any role to play in a "woman-identified" political movement? One case illustrates a situation that may eventually confront Rape Relief or similar organizations. In 1999, the Portland Lesbian Community Project's (LCP) only paid staff member announced that he was a female-to-male transsexual and would henceforth be known as a man. The staff member wished to remain in the collective. The community project responded by deleting the words "woman" and "women" from its bylaws, essentially eliminating its women-only focus.[78] The project thus became open to "any person who supports the purpose of LCP," while the category of voting membership was restricted to "any self-identified individual woman who supports the purpose of LCP."[79] Is Rape Relief wrong to fear similar incursions? The answer will require difficult and delicate negotiations of multiple sensibilities and profoundly held beliefs. It is not unreasonable, however, for Rape Relief to fear the *possibility* of such an event.

Finally, an important aspect of the *Nixon* claim is its location at the intersection of male and female engagement with the problem of male violence against women. Part of some feminists' visceral response to *Nixon* is the spectre of a male intrusion into female space characterized by a particular kind of political organizing that they believe requires sex-exclusivity. The situation is rendered more complex because of Nixon's own experience of male violence—an experience shared by many persons like her. Nixon has a deep personal interest in mobilizing against male violence, yet, in a sense, she once occupied the very social space from which such violence emanates. As well, Nixon did not seek counseling from Rape Relief. She did not approach Rape Relief as a victim. She approached Rape Relief with something to offer. It is appropriate to consider her relatively empowered stance when determining the response that most corresponds with fairness, equality, and dignity.

Challenges and Choices for Feminist Rights Projects

Not only does *Nixon* bring to the surface some of the assumptions underlying feminist theory but it also challenges feminists to assess the impact of an undifferentiated focus on litigation as a feminist strategy. A vigorous debate has

78. Margaret Deirdre O'Hartigan, "Post-Modernism Harms Women," *Off Our Backs*, January 1999.
79. Membership information is available on the website of Portland Lesbian Community Project, <http://www.xprt.net/~lcp/members.htm> (date accessed: 27 April 2004).

detailed the perils and potential of feminist rights discourse and litigation. Some objections to such strategies are that rights discourse is invariably totalizing and incapable of adjudicating any but the simplest, most unsophisticated claims;[80] that rights litigation serves only to validate a system of legal relations that are predicated upon the systematic subordination of most people;[81] that rights discourse seeks to claim a foothold for (white) women in a (white) man's world;[82] that rights litigation drains energy from more direct political strategies and engagement;[83] and that rights discourse affirmatively promotes "an image of the rights-bearer as a radically autonomous individual" at the expense of the "social dimensions of human personhood."[84]

Much feminist engagement with the law has been reactive—that is, in direct response to aggressive legal action by men.[85] This fact acts as both a defence against the above charges[86] and, to some scholars, further proof of the perverse nature of rights. Many persons conclude that the entrenchment of rights in the Canadian legal system and the fact that legal rights have become the principal means through which much social policy is now debated has not led to appreciably better lives for the most disadvantaged but rather has only strengthened the position of the advantaged.

Discussing rights-based strategies, Mark Tushnet observes:

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80. In particular, rights discourse is simply not equipped to deal with claims by non-white, non-heterosexual, non-able-bodied women. See Linda J. Nicholson, ed., *Feminism/Postmodernism* (New York: Routledge, 1990).
81. Radha Jhappan, "The Equality Pit or the Rehabilitation of Justice" (1998) 10 Canadian Journal of Women and the Law 60 at 80.
82. Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 Canadian Journal of Women and the Law 174 at 184.
83. Judy Fudge, "The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada" (1987) 17 International Journal of the Sociology of Law 445.
84. Mary Ann Glendon, *Rights Talk—The Impoverishment of Political Discourse* (New York: Free Press, 1991) at 109.
85. Sheila McIntyre, "Feminist Movement in Law: Beyond Privileged and Privileging Theory," in Radha Jhappan, ed., *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002) 42; Elizabeth J. Shilton and Anne S. Derrick, "Sex Equality and Sexual Assault: In the Aftermath of *Seaboyer*" (1991) 11 Windsor Yearbook of Access to Justice 107-24. Consider, for example, the various *Charter* challenges to *Criminal Code*, R.S.C. 1985, c. C-46 as am., provisions and common law rules that place barriers in the way of accused persons attempting, quite often, to introduce stereotypes into sexual offence proceedings: *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Darrach*, [2000] 2 S.C.R. 443, 2000 SCC 46. In these cases, women's groups intervened simply to ensure that existing positive laws were not dismantled through the aggressive application of individualistic, accused-friendly *Charter* analysis to sexual violence issues.
86. Carissima Mathen, "Introduction," in Women's Legal Education and Action Fund, ed., *Equality and the Charter* (Toronto: Emond Montgomery, 1996) xxiii-xxv; Elizabeth J. Shilton, "Charter Litigation and the Policy Processes of Government: A Public Interest Perspective" (1992) 30 Osgoode Hall Law Journal 653 at 655: "The women's movement cannot abjure the *Charter*. The *Charter* will not abjure us."

> [R]ights-talk often conceals a claim that things ought to be different within an argument that things are as the claimant contends. That masquerade is sometimes successful, at least until the claim is rejected by the courts or by the wider audience for the claim. It is successful because the language of rights is so open and indeterminate that opposing parties can use the same kind of language to express their positions. Because rights-talk is indeterminate, it can only provide momentary advantages in ongoing political struggles.[87]

Nixon illustrates Tushnet's point. In an important sense, both parties are making the same argument—that women require, and are entitled to, a sex-segregated space in which to heal from and organize against male violence. They disagree on who gets to be a part of that space. Both parties are familiar and comfortable with "rights talk," and one of the reasons the case poses such difficulties for feminists is that there are compelling arguments on both sides. It is difficult for a feminist to know, exactly, what to *do* about *Nixon*.

Arguments in favour of proceeding with claims such as Nixon's have been made forcefully:

> What's at stake for trans should this case be lost? It is very likely that other groups and services will begin to limit their services to trans and that it will not only be women. As things presently stand there are alot holding pattern [*sic*]. If trans can be discredited for self-identifying their gender/sex, that will severely undermine the feminist principles of choice and autonomy. If trans can be discriminated against despite being medically-identified in their new gender/sex, the issue will undermine the current level of acceptance and the dams that are holding back the words of HATE and acts of prejudice will surely burst.[88]

While the sincerity of the plea is unmistakable, one may be excused for wondering if *Nixon* could so undermine the "trans" movement. Clearly, rights discourse is significant and meaningful for many persons. Rights have been called "a most useful sort of moral furniture ... It is claiming rights that gives them their moral significance."[89] As Patricia Williams writes, "for the historically disempowered the conferring of rights is symbolic of all the denied aspects of their humanity."[90] The very process of making a rights claim involves entry into a particular aspect of human affairs—engagement with the world as a moral agent to whom attention

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87. Mark Tushnet, "An Essay on Rights" (1984) 62 Texas Law Review 1363 at 1371.
88. TAS *Embracing Diversity* Newsletter, December 2000, accessed online at <http://www.transalliancesociety.org/newsletters/2000/0012.pdf> (date accessed: 30 August 2004) [emphasis in original].
89. Joel Feinberg, *Rights, Justice and the Bounds of Liberty* (Princeton: Princeton University Press, 1980) at 151.
90. Patricia Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991) at 153.

must be paid. Nonetheless, for some, the *Nixon* complaint exemplifies the "Frankenstein"-like quality of the (feminist) (equality) rights project.

The particular framework of the claim—counseling services to female survivors of (mostly) male violence in which the complainant has offered, not requested, assistance—also may impact the response to Nixon's claim. Consider the following statement from a "trans activist":

> I'm a feminist transwoman, and have been for a very long time now. I recognize the need for good support services for women leaving domestic abuse situations, for women to have effective intervention in rape crises, and access to abortion services. I'd say that men need many similar such services. But I also recognize that my presence in those environments may not be the most effective way for me to support those services precisely because *the service is not about me or my rights.* Most people aren't suited for this kind of work, including most transwomen.[91]

This quote raises a controversial point, namely the degree to which Nixon herself should exercise discretion and responsibility over the terrain where she chooses to fight her battle for recognition.

Who owes what duty to whom? The BC *Human Rights Code* sets out, *inter alia,* the following purposes: "to promote a climate of understanding and mutual respect where all are equal in dignity and rights ... [and] to provide a means of redress for those persons who are discriminated against contrary to this *Code.*"[92] The *Code* thus seeks to validate *all* persons' right to equal dignity and respect and to remedy specific acts of discrimination. The latter goal is easily traced through the prohibited grounds of discrimination in particular services or employment offered to the public. The former, however, is more elusive, as its referent is an underlying ethos, a social arrangement in which each person treats everyone else with basic respect and dignity. Can the commitment to respect and dignity embodied by the *Code* be expressed and encouraged through the *Nixon* case?

A former chief commissioner of the BC Human Rights Commission analyzed the trans/feminist conflict this way:

> I believe that women's organizations must listen and be open to trans and inter-sexed women—society reached an understanding of gender discrimination by listening to women—and so women's organizations can learn about the lives and gender oppression suffered by trans people by listening to them. Trans people suffer discrimination from the same standardized gender-based system in many of the same ways that women do—and social justice for all women means that discrimination in all its forms is not to be tolerated, including transphobia. I believe that

91. "Transfeminism," available online at <http://www.xantippe.com/tfem/archives/2004_02.html> (date accessed: 30 August 2004) [emphasis in original].

92. *Human Rights Code, supra* note 25.

> women's organizations have the same responsibility not to discriminate as any other service or workplace, and they're just as vulnerable to human rights complaints. The rulings have shown that trans women are entitled to be treated as women, that they're entitled to volunteer with and provide services at women's organizations and that excluding particular groups of women without individual assessment or accommodation may be problematic and discriminatory.[93]

Of course, women's organizations must adhere to principles of equality and respect in their dealings with others. Still, the above quote is troubling for its rather nonchalant equation of women's organizations with any other (powerful, male-dominated) entity that is subject to human rights law. The speaker adopts a simple "treat likes alike" analysis that pays little attention to the context in which some such organizations find themselves. Under a general understanding of a human rights "ethos," Rape Relief should treat Nixon with respect. Rape Relief also must ensure its clients appropriate and effective services and abide by its explicit goal to provide the best framework from which to mount a political battle to end male violence against women.

Nixon also has "duties" although they are not always visible in a human rights framework. One does not generally describe human rights complainants as "owing" anyone anything. However, the usual approach is deficient in the *Nixon* case. As a self-described feminist and anti-violence advocate, Nixon has a duty to consider the import of her actions as they contribute to, or denigrate from, that larger goal. More significantly, as a "feminist" apparently committed to the overall betterment of women, Nixon needs to consider what her claim may do to the cohesion and vitality of the women's movement.

Does all of this mean that Nixon should not have launched her complaint? Perhaps. The *Nixon* case raises the possibility that an individual's *choice* to press for legal recognition of a right is at least as important an issue as whether she enjoys the right in the first place. Even if Nixon has a valid claim she can still be criticized for asserting that claim against Rape Relief. Not every situation is suited to state intervention, nor is every alleged violation best resolved through a public dispute resolution process. However, Rape Relief has responsibilities and duties as well. These include a duty to respect the purpose of the *Human Rights Code* and a more particular duty to provide appropriate services to clients. Yet, as an important and noted player in the women's equality movement, Rape Relief has the additional responsibility to consider the impact of its arguments on women generally and on the legal development of human rights and equality law. As discussed earlier,[94] Rape Relief adopted a provocative stand when it sought to incorporate into human rights law a controversial aspect of section 15 jurisprudence. The full impact of Rape Relief's arguments remains to be

93. "An Interview with Mary Woo Sims, Former Chief Commissioner of the B.C. Human Rights Commission," *Herizons,* Fall 2001 (Why Trans-Gendered People Need Human Rights).

94. See the "Nixon Complaint," discussed earlier in notes 29-40 and surrounding text.

evaluated. If Rape Relief is asked to account for its choices, a simple though understandable desire to win the case may not suffice.

Nixon suggests that rights advocates, including feminists, should resist the temptation to transform every dispute into a legal journey. Discussions with feminists reveal this conclusion as a common attitude to the *Nixon* complaint and its continued presence in the judicial system. While not wishing to trivialize Nixon's experience, it is unsurprising that many feminists might react to her claim in this way. *Nixon* seems to be the ultimate "lose-lose" case. What, exactly, does Nixon gain from victory: state-coerced entry into a space dedicated to assisting victims of violence and advocating for women's rights or, alternatively, a cash settlement from a financially strapped non-profit organization? Nixon has a legal right not to be discriminated against on the basis of the fact that she is a transgendered person but should she push for that right in every circumstance and against every alleged transgressor?[95]

This article does not endorse the anti-*Charter* perspective that framing disputes as rights issues is fundamentally misleading and counter-productive. The author recognizes the continued need for such initiatives.[96] Nonetheless, *Nixon* represents a perilous path for feminists and like-minded allies. The chief problem is the extraordinary difficulty posed by trying to trace out a "feminist" response in a context that, ultimately, can vindicate only one party. This article concludes that no such response is likely to be forthcoming. *Nixon* eludes a feminist result compatible with the modern human rights regime. Under generally accepted principles and precedents, Nixon's claim is stronger than Rape Relief's defence. As described earlier, Edwards J.'s judgment for Rape Relief opens too many loopholes in the current scheme of human rights protection. However, to simply force Rape Relief, or organizations similar to it, to accept women such as Nixon,[97] is to adopt a completely formal, decontextualized remedy that is blind to the realities of working and advocating in a feminist space in which sex segregation is deemed to be essential and is permitted by law. It is to ignore the social and political reality of male-on-female violence in order to accommodate the self-perception of a former man who is now, legally, a woman. This is not the kind of case that the feminist movement needs.

The charge could be made that this analysis is negative and unhelpful to the resolution of the case. The point I wish to make is that there *is* no legal resolution that avoids doing deep harm to the feminist rights project, either by trivializing the

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95. I acknowledge that part of the issue lies in the tribunal's acceptance that volunteer opportunities constitute "employment" or, alternatively, a "service" under the *Human Rights Code*. In other words, it is possible to critique *Nixon* on a jurisdictional basis. The scope of human rights regimes *vis-a-vis* volunteer organizations obviously is an important issue, but I leave that argument to others. My argument in this section goes beyond jurisdiction to consider the extra-legal aspects of the case.

96. Carissima Mathen, "The Expanding Role of Interveners: Giving Voice to Third Parties," in Honourable Justice Douglas D. Yard and Douglas E. Finkbeiner, Q.C., eds., *Competence and Capacity: New Directions*, 2000 Isaac Pitblado Lectures (Winnipeg: Law Society of Manitoba, 2000) at 85-119.

97. Alternatively, as occurred in this case, the complainant could seek financial compensation.

unique context of women's organizations seeking to do political and legal work to combat male (sexual) violence, or by demeaning the deep feelings of alienation and exclusion of transgendered persons who seek to be a full part of that movement. The debate cannot be reduced to a human rights complaint—the struggle is a political one that belongs to the movement alone.

Conclusion

Might *Nixon* have proceeded differently? The initial complaint does not appear to have extended beyond the parties. Nixon started the process very soon after her experience. Once the commission accepted the complaint, Rape Relief responded on, first, jurisdictional and, then, substantive grounds. Significantly, neither party appears to have engaged in broader consultation with the women's movement nor does the record reveal attempts at negotiation or mediation. The absence of such initiatives is surprising given that consultation and coalition work has been an important part of feminist litigation.[98] Nor was there broader discussion between the parties or between them and the other parts of the women's movement over the appropriate response to the initial tribunal decision. There does not seem to have been much consideration of allowing the case to end, which would have required sacrifice on the part of the "loser" (Rape Relief at the tribunal level; Nixon at the British Columbia Supreme Court), but would have significantly lowered the stakes. Instead, the case went on, and its unwinnable parameters—with the unpalatable results sure to flow therefrom—risk being incorporated into human rights and equality precedent.

What can feminists learn from *Nixon?* Though the case continues to proceed,[99] it has highlighted a variety of issues. First, many advocates, including feminists, have a tendency to evade some of the most difficult questions regarding the limits of rights, including what they can actually accomplish and how to deal with inter-rights conflict. The principal means of this evasion is the reliance upon legal discourse. Advocates can push for a particular remedy—say, extension of equal pay for work of equal value—without having to face uncomfortable choices related to the state's finite resources and who owes what duty to whom. The *Nixon* case cannot be so easily shunted aside because it is addressed to women in a particular way and it touches the very meaning of one's existence *as* a "woman."

Second, feminists have yet to resolve the debate between gender as essentialism and gender as social construction. Concepts of gender and sex are used—sometimes interchangeably—in a strategic, rather than principled, fashion, so as to yield a particular outcome. Arguments that rest on biological determinism

98. The emergence of coalitions as an integral part of feminist legal strategy is described in Jhappan, *supra* note 81 at 78; and Mathen, "Introduction," *supra* note 86 at xxii.

99. As of the writing of this article, the case is before the BC Court of Appeal. Equality for Gays and Lesbians Everywhere (EGALE) recently announced that will intervene in the appeal in support of Nixon. EGALE, "Background on *Nixon v. Vancouver Rape Relief*," 4 April 2005, online at <http://www.egale.ca/index.asp?lang=E> (date accessed: 13 April 2005).

grounds are used or discarded at will. The choice to straddle the fence is not necessarily wrong. The point is that *Nixon* forces feminists to make a choice about how to use sex and gender, and the movement is ill-equipped to do so.

Finally, *Nixon* reveals the risks of the feminist rights project. It is unsettling to assert that the *Nixon* case would have been better resolved in the socio-political realm. This is *not* the same thing as concluding that Rape Relief's exclusion of Kimberley Nixon was legitimate. However, it is simply not apparent what major benefit is realized from taking *Nixon* forward in the legal realm when feminists are so divided over the very definition of what it means to be a "woman." Surely it is better for those in the movement to, first, strive for honest discussion and common understanding than to submit adversarial arguments for resolution from a removed adjudicator. *Nixon* is best left to the political realm because the stakes of the precise conflict are not of the magnitude to demand an imposed reconciliation, and no court or tribunal can truly settle the broader debate. The difficult issues underlying *Nixon*—the conflict between some feminists and some transgendered persons—can be addressed only within the movement itself.