"Medical Diagnosis, Not Sex or Gender Identity": Transgender Equality and the Neutral Application Problem

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1. The Neutral Application Problem

Dominant conceptual framework of U.S. equality law/the differences conception: Equality = non-discrimination, where discrimination = differential treatment unjustified by real underlying differences.

a) Differential treatment, where justified by real underlying differences, is perfectly consistent with the requirements of equality ⇒ *the equal application defense*.

b) When the justification works too well, differential treatment can be itself justified out of existence ⇒ *the unique application defense*.

2. Recent Trans Discrimination Cases

(1) *The equal application defense*: Transgender discrimination can be justified by appeal to an alternative, facially neutral underlying difference that is claimed to be shared by everybody—cis and trans.

> *Adams v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022) (en banc): A trans-exclusionary school bathroom policy does not discriminate against trans students based on transgender status because it applies to trans and cis students all the same.
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> *L.W. v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023): It is not sex discrimination to prohibit gender-affirming care for trans youth because the ban applies to "all minors, regardless of sex."

(2) *The unique application defense*: Transgender discrimination can be explained away altogether by appeal to an alternative, facially neutral underlying difference that is claimed to be unique but not universal to trans persons.

> *Doe 2 v. Shanahan*, 755 F. App'x. 19 (D.C. Cir. 2019): The Trump administration's trans military ban was not discrimination against trans persons as such because "not all transgender persons seek to transition to their preferred gender [sic] or have gender dysphoria."
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> State defendants' argument in *B.P.J. v. West Virginia State Board of Education*, No. 23-1078 (4th Cir. Apr. 26, 2023): prohibiting trans girls, but not cis girls, from participating in girls' sports is neither differential treatment of trans girls relative to cis girls, nor differential treatment of trans students relative to cis students.

My worry: The two forms of the neutral application defense foreclose every conceivable way in which a claim of transgender discrimination may be raised under the dominant conceptual framework of U.S. gender equality law. Consider the ban on gender-affirming care for trans youth upheld by *Eknes-Tucker v. Governor of the State of Alabama*, 80 F.4th 1205 (11th Cir. 2023):

a) There is no discrimination based on sex: "the law . . . equally restricts the use of puberty blockers and cross-sex hormone treatment for minors of both sexes."

b) There is no discrimination based on "transgender status, separate from sex": "the regulation of a course of treatment that, by the nature of things, only transgender individuals would want to undergo" cannot treat trans youth differently from their similarly situated cis peers, as no such cis peers exist.

c) By the same token, there is no discrimination based on "gender nonconformity," considered as separate from both sex and transgender status.

My diagnosis: The neutral application defense is not so much a misapplication of the differences conception as its direct expression and implication.

In the longer version of the paper, I consider strategies recently pursued by sympathetic courts.

I want to propose a trans feminist alternative, which I defend by showing that it cleanly bypasses the neutral application defense.

3. A Trans Feminist Alternative

Lesson from MacKinnon's reading of Brown: Sex discrimination occurs not because and when some persons are treated differently from their similarly situated counterparts on the basis of sex construed as a biological difference, but because and when they are systematically (i.e., nonaccidentally) disadvantaged by the social meaning of that purported biology—that is, *gender*.

Haslanger's insight: Gender categories are a powerful tool for analyzing gender in its social meaning. My revision/reformulation of her account:

> *Gender categories*: A category is gendered (for critical feminist analytical purposes) if its members are socially positioned as subordinate or privileged along some dimension (economic, political, legal, social, etc.), and the category is "marked" as a target for this treatment by observed or imagined, or would-be-observed or would-be-imagined, bodily features presumed (taken, suspected, expected, etc.) to be evidence of a certain (present, previous, or future) body socially interpreted as sexed one way or another.

My proposal: The best interpretation of the MacKinnon-Haslanger approach should acknowledge that the gender categories useful for critical feminist analytical purposes need not be limited to the genders *that we know of*, and that these analytical categories need not constitute the kind of building blocks important to the construction of our authentic selves (genders vs. gender categories).

The interpretation of bodies as trans represents a family of ways in which bodies may be interpreted socially as sexed: as gender-disordered, as inconsistently/insufficiently/clockably/unexpectedly/confusingly/upsettingly/disgustingly male or female, etc.

Persons diagnosed with gender dysphoria and *persons seeking gender-affirming care* are subordinate gender categories for critical feminist analytical purposes, and discrimination against them is *ipso facto* based on both sex and transgender status.

The neutral application defense can't even get going here. Consider the trans military ban:

The equal application defense fails because equal application does not erase substantive disadvantages (indeed, equal application may itself enable substantive disadvantages).

The unique application defense fails because the interpretation of bodies as gender-disordered is among the many ways in which bodies are read socially as trans.