In-Between Categories of Law: a Gender Variant Analysis of Anti-Discrimination Law and Litigation

by

Ido Hadas Katri

A thesis submitted in conformity with the requirements for the degree of Masters of Law

Faculty of Law
University of Toronto

© Copyright by Ido Katri 2015
In Between Categories of Law- a Gender Variant Analysis of Anti- Discrimination Law and Litigation

Ido Hadas Katri

Masters of Law
Faculty of Law
University of Toronto
2015

Abstract

This thesis offers a gender variant perspective on Anti-Discrimination legislation and litigation. Using queer theory, feminist legal theory and critical race theory, this thesis analyzes current debates within the trans movement regarding the use of rights based litigation and the fight for inclusion. I argue that gender variant people’s exclusion from resources and opportunities is inextricably linked, legally and affectively, to gender performance. I will show how performative aspects of the law can be brought forward by applying an “intrasectional” analysis of the protected classes relating to gender variant people within anti-discrimination law and litigation (ADL), and set the stage for the claim that ADL more broadly is intertwined with performativity. Reading the notion of performativity into legal analysis, this thesis suggests the possibility of strategic use of the existing legal rights as an instrument for change.
Acknowledgments

I would like to thank my supervisor, Prof. Brenda Cossman, for her deep engagement in the thought process of this work from beginning to end. I am grateful for the encouragement, advice and for the immense interdisciplinary knowledge of the intersection of law, gender and sexuality, she has provided throughout this project. I am very privileged to be continuing working with her on my doctoral project and excitedly looking forward to it. I would like to thank Prof. Karen Knop for her close reading of this thesis, her helpful comments and insights. I would also like to thank the staff of the Graduate Program at Faculty of Law, especially to Ms. Whittney Ambeault and Ms. Tracey Gameiro, for their indefinite support. I would like to thank Prof. Aeyal Gross from Tel-Aviv University, for believing in my academic potential long before I could imagine it.

I would like to thank my family for their love and support. To my father, Avraham Katri, first of his family to attend university, for his brilliant mind and big heart and to my mother, Dina Katri, for all her care and for always encouraging me to pursue my dreams. To my Zohar, for making all this happen, for reading and rereading and always believing.

Finally, I would like to thank Lilach and all my comrades back home at the Gila Project for Trans Empowerment, for working tirelessly to make change happen, I believe in you, and I shall return.

(_Ido Katri)_
# Table of Contents

Acknowledgments........................................................................................................ iii

Table of Contents........................................................................................................ iv

List of Figures ................................................................................................................. viii

A Brief Introduction........................................................................................................ 1

Chapter 1 The Transgender Tipping Point................................................................. 8

1 Opening Comments.................................................................................................... 8

2 The First Gay Divorce- the Separation Sexuality and gender.............................. 13

3 Single Axis Analysis and the Outsourcing of the Deviance ................................. 17

4 What’s wrong with Identity Based Rights ................................................................. 19

5 From the Emergence of Transgender Movement to Current Debates ................. 25

6 Liberal Trans Politics................................................................................................. 28

7 Radical Trans Analysis .............................................................................................. 30

8 Distribution vs. Inclusion- Picking Sides................................................................. 32

9 ADL and Marginalized Communities- The Broken Promise for Equality ............ 35

10 Intersectionality/Intrasectionality........................................................................... 41

11 Sex Discrimination and Gender Variance- Lilach’s “Funny” Femininity .......... 45

12 Other Dissenters of the Holy Trinity ...................................................................... 51

12.1 Gender Identity and Gender Expression- Thank You for Admitting We Exist .... 53

12.2 Sexual Orientation- Are You a Boy, a Girl or a Faggot? ................................. 55

13 Shifting the Basis of Comparison ........................................................................... 57

Chapter 2 Winds of Change? Canadian and Israeli Case Analysis ....................... 63

1 Opening Comments.................................................................................................... 63

2 The Medical Institutions and Trans Subjects ......................................................... 65

3 Sex/Gender/Reassignment/Realignment/Procedures .......................................... 68
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>Standardized Protocols</td>
<td>72</td>
</tr>
<tr>
<td>5</td>
<td>Gender Dysphoria and the Trans Narrative</td>
<td>74</td>
</tr>
<tr>
<td>6</td>
<td>The Hallucinations of Gender Certainty</td>
<td>78</td>
</tr>
<tr>
<td>7</td>
<td>Canadian Legal Cases Review- Introduction</td>
<td>82</td>
</tr>
<tr>
<td>8</td>
<td>Synthia Kavanagh</td>
<td>83</td>
</tr>
<tr>
<td>8.1</td>
<td>Facts and Judgment</td>
<td>84</td>
</tr>
<tr>
<td>8.2</td>
<td>The Trans Narrative</td>
<td>86</td>
</tr>
<tr>
<td>8.3</td>
<td>Experts Evidence</td>
<td>87</td>
</tr>
<tr>
<td>8.4</td>
<td>Reasoning</td>
<td>90</td>
</tr>
<tr>
<td>8.5</td>
<td>Analysis and Critique</td>
<td>93</td>
</tr>
<tr>
<td>8.6</td>
<td>Anatomy or Performativity?</td>
<td>96</td>
</tr>
<tr>
<td>9</td>
<td>Kimberley Nixon</td>
<td>99</td>
</tr>
<tr>
<td>9.1</td>
<td>Facts and Proceedings</td>
<td>100</td>
</tr>
<tr>
<td>9.2</td>
<td>Parties Arguments Regarding Sex/Gender and Findings</td>
<td>102</td>
</tr>
<tr>
<td>9.3</td>
<td>Supreme Court Reasoning</td>
<td>104</td>
</tr>
<tr>
<td>9.4</td>
<td>Analysis and Critique</td>
<td>106</td>
</tr>
<tr>
<td>10</td>
<td>XY</td>
<td>109</td>
</tr>
<tr>
<td>10.1</td>
<td>Facts of the Case</td>
<td>110</td>
</tr>
<tr>
<td>10.2</td>
<td>Parties’ Arguments</td>
<td>112</td>
</tr>
<tr>
<td>10.3</td>
<td>Judgement and Reasoning</td>
<td>114</td>
</tr>
<tr>
<td>10.4</td>
<td>Analysis and Critique</td>
<td>116</td>
</tr>
<tr>
<td>11</td>
<td>Angela Dawson</td>
<td>121</td>
</tr>
<tr>
<td>11.1</td>
<td>Facts of the Complaint</td>
<td>122</td>
</tr>
<tr>
<td>11.2</td>
<td>Incidents and Findings</td>
<td>123</td>
</tr>
<tr>
<td>11.3</td>
<td>Systematic Discrimination</td>
<td>126</td>
</tr>
<tr>
<td>11.4</td>
<td>Analysis and Critique</td>
<td>127</td>
</tr>
</tbody>
</table>
12 Israeli Legal Cases Review- Introduction ................................................................. 130
13 Lilach ......................................................................................................................... 130
14 Ploni(t) ...................................................................................................................... 132
  14.1 The Appeal .......................................................................................................... 133
  14.2 Majority Opinion ................................................................................................. 134
  14.3 Dicta and Analysis ............................................................................................... 135
15 Marina Meshel .......................................................................................................... 137
  15.1 The Equal Employment Opportunities Commission Legal Opinion ................. 138
  15.2 First and Second Ruling ...................................................................................... 138
  15.3 Analysis ................................................................................................................ 140
16 (Some) Conclusion(s) ............................................................................................ 141

Chapter 3 The Binding of Yitzhak- On Racial/Ethnic Performativity in Modern Day Israel ... 144
1 Introduction ................................................................................................................ 144
2 Mizrahi Communities in Israel- Opening Comments .............................................. 147
3 The Arab-Jew and the Israeli National Identity .......................................................... 150
4 The Emergence of the Mizrahi ................................................................................. 155
5 Racial/Ethnic Performativity ..................................................................................... 158
6 In-Between of Mizrahim ............................................................................................ 164
7 Mizrahi Rights Claims .............................................................................................. 167
8 Legislative History and the Absence of the Mizrahi Category .................................. 170
9 Yitzhak Mizrahi .......................................................................................................... 174
  9.1 Summary of the Facts, Arguments and Proceedings ............................................ 175
  9.2 Reasoning and Analysis ....................................................................................... 176
10 Eran Tzadok and Ehud Kataabi .............................................................................. 179
  10.1 Facts Argument and Findings .......................................................................... 179
  10.2 Reasoning and Analysis .................................................................................... 181
11 David Liran ................................................................. 184
11.1 Facts and Findings ...................................................... 185
11.2 Reasoning and Analysis ............................................. 186
12 Lessons Learned so far from PDPS .................................. 188
Conclusion ........................................................................ 193
Bibliography ..................................................................... 197
Copyrights Acknowledgments .......................................... 204
List of Figures

Figure 1: Roller Girl (Angela Dawson) directing the traffic in downtown Vancouver (Page 128)
A Brief Introduction

Like many other gender variant people worldwide, Lilach, a young transwoman from Tel-Aviv, was fired from her job at a fast-food restaurant\(^1\) for her gender performance.\(^2\) Three months after she had been hired at the restaurant, Lilach began coming to work wearing cosmetics and nail polish, and visited the premises several times outside her working hours wearing female attire. However, when she first arrived for a shift at work wearing a dress, her employers demanded she change her clothes immediately. The managers forbade her from working in female attire and insisted on addressing her with male pronouns, showing a profound disregard for her identity. When she continued to come to work in makeup, the managers forbade her from that practice as well, despite having allowed other female employees to do the same. Her employers admitted that they were aware that Lilach is a transwoman in transition\(^3\), but claimed that her outward appearance as a woman was "funny".

After insisting on her rights and clarifying that their actions were discriminatory, she was suspended from work and her employers instructed her to notify them in writing whether she wanted to come to work "as a woman" or "as a man". They made clear that if she wanted to work "as a woman" she would be fired, but agreed to consider the continuation of her employment if she committed herself to work "as a man". Yet, what does it mean to come to work “as a man” and not “as a woman”?

---

1 Labor Dispute L.D (TLV) 10-11-57199 Plonit v. the Respondent (Settled outside of Court)(Isr.)
2 Notably, Lilach’s case is not exceptional or local, it manifests one aspect of the daily struggle for access to resources and opportunities of gender variant individuals.
3 The process of changing one sexual characteristics in the goal of gender/sex affirmation/confirmation/realignment. I am purposely noting all these linguistic options because different people describe their transitioning differently, even the term transition itself is contested because it implies you are now something you were not before. I am using this term to refer to people accessing medical technologies of hormone replacement therapy and different surgical procedures that change one secondary and primary sex characteristics.
It is actually not hard to imagine what Lilach’s employers meant when they demanded that she come to work “as a man”. They expected her to dress in masculine attire, to talk “as a man”, that is using male pronouns, and to have other masculine traits, such as the way she walks, speaks, takes up space and styles her hair, to name a few. What Lilach’s employers were demanding was that Lilach signify herself as “a man”, using external markers attributed to masculinity to perform her gender identity (or rather, the gender identity she was assigned at birth).

What does it mean to perform one’s identity? As I will further explore throughout this thesis, performance refers to the process by which certain configurations of external markers, (such as those listed above) come to signify an “inner truth” about who you are, your characteristics and abilities. The signifiers can include all sort of information that can be marked on the body, not only bodily gestures but also, for example, the sex marked in one’s government issued ID. Every piece of external information (which can be read by an outside gaze) that signifies one as having a coherent identity stemming from some stable inner core can be understood as part of their performance. What rendered Lilach’s femininity “funny” in the view of her employers was the fact that it did not correlate to what they believed to be Lilach’s inner truth, that she was assigned male at birth. Why would they not allow her to come to work “As a woman”? Because at that point, her attributes did not cohere to normative femininity, she was not yet able to pass “as a woman”.

As I will further suggest, coherent gender performance also coheres to other social norms, i.e. norms of class, race, ability, etc., only people who follow the hegemonies’ lines in everything can ever fully adopt a normalized behavior that would render them coherent. It is not that only

---

4 in Lilach’s current gender performance she is hardly ever recognized as trans, even by trans people, perhaps because she does not cohere to common trans women attributes.
white middle class non-trans heterosexual men are coherent, but that coherence demands all of us to signify our position within the social hierarchy headed by white non-trans men. For instance, when a non-trans heterosexual feminine woman tries to transgress the border of occupational segregation, she might be discriminated against because her womanhood is understood as signifying and reaffirming the hierarchy that produces her subordination. That is her attempt to demonstrate abilities that are not correlated with those socially attributed to women (such as assertiveness), renders her gender less coherent. Likewise, gender variant people might be discriminated when they are unsuccessful signifying their participation in this social system, when they fail to “pass”. Social coherence is achieved when all the external public markers align, and is broken when one or more elements do not align. It can be argued that some external markers are changeable and others are not, that some are more external than others, more byproduct of state control than social norms and furthermore, yet I what I am interested in is the social value attached to different configurations of markers, the ways which all these different types of markers merge into a coherent identity that can be read from the outside, and the social and legal sanctions for lack of coherent performance.

This thesis begins with the story of Lilach, by no means a unique experience but rather a common encounter of gender variant people with the neo-liberal market. I ask the reader to bear this in mind while reading, as it will help us be attuned to the vivid connection between legal ideas and actual gender variant people’s lives. This thesis aims to explore the way performance is intertwined with the ways the law\(^5\) thinks about equality in anti-discrimination law. As I will

---

\(^5\) It is important to note that when I refer to “the law”, I am looking at the law broadly as a site of social power, yet I do so by looking at the sphere of rights based litigation and specifically through ADL. I will analyze the structure of common law ADL statues and court proceedings. It should be noted that section 15 of the Canadian charter, as well as the American civil rights act of 1964 and the Israeli Employment (Equal Opportunity) Law of 1988, are all oriented around the notion of “legal categories” or “protected classes”, which describe characteristic of individuals that should not be taken into account in making a decision in regard to that individual.
further show, the framing of anti-discrimination law through protected classes and the law’s use of the outside gaze to conclude whether or not an act or omission was discriminatory or not, show that the law makes use of performance in deciding cases and allocating rights. The better one can cohere to an identity enclosed in a protected class, the better their chances of gaining legal recognition, if you can prove you are a legal “woman” you can be protected as one. Moreover, in order to decide whether or not you are a legal “woman” the tribunal will often evaluate your performance.

In this thesis I will question the legal impact of those “inner truths” of one’s identity, suggesting that this concept serves to police the legal subject and is used in the (mal) distribution of resources and opportunities. I will not argue that identity is something one takes on and off at will, rather that the social meaning attached to one’s performance is perpetually being generated and charged with social value in our societies, and that these mechanisms are reflected in the law if not upheld by it.

This thesis aims to put forth a gender variant point of view on rights based advocacy. In chapter one I will review the current discussions in transgender studies’ scholarship and transgender political communities regarding the use of legal rights as an instrument for change. I will also explore questions related to identity politics in general, focusing on the ways identities can be seen as limiting to one’s life narratives, at the same time as they can be seen as building empowering capabilities. I will maintain that exclusion from resources and opportunities of gender variant people is inextricably linked, legally as well as affectively, to gender performance. I will claim that we can bring the performativity aspects of the law forward by applying an “intrasectional” analysis of the protected classes relating to gender variant people within anti-discrimination law and litigation (ADL).
I will suggest an intrasectional analysis, continuing the well-known intersectional legal analysis, which will allow me to explore the role of performance in the legally protected categories of ADL. Showing how in the case of gender variants, it is not clear whether one is exposed to harm due to their “sex”, “gender” or “sexuality”, I will suggest that critical reader should not only be attentive to the intersections of different categories, such as race and sex, but to merging of experience and practice within a given category, which I refer to as intrasectionality. I will argue that the law’s recognition of one as belonging to a specific category cannot be detached from the way performance charges that category with social value. Intrasectionality will allow me to think about why one is considered or not considered a woman in relation to how sex, gender and sexuality are constituted through performance. My inquiries into the intrasectionality of the sex category with respect to equality will set the stage for the claim that ADL is intertwined with performativity.

In chapter two I will review legal cases from Canada and Israel over the past fifteen years, where trans plaintiffs used ADL frameworks to make their claims. In order to understand the legal discourse about trans subjectivity, I will critically engage the medical discourse of trans-ness upon which legal recognition rests, through its investment in the hallucination of gender certainty (hanging on the idea that gender is a stable category). I will apply this critique, as well as my formulation of intrasectionality, to the legal cases, in order to suggest that these cases would be better understood through the lens of performativity. I will seek in each case the external markers that constitute the victims as incoherent and will look for the law’s investment in framing the victims’ demand for equality in relation to socially accepted gender norms. I will try to look not at what “the law says about itself” but at what the law “actually does”. I will focus on the implications of protecting gender variant individuals from discrimination without accounting for the elaborated disciplinary social mechanisms formulating gender as stable. I will suggest that the law’s
continued investment in gender stability is upholding the system that normalizes the exclusion of gender variants, and others. At the same time, I will also account for the rapid changes in legal discourse of the trans phenomena over the past years towards inclusion of trans subjects within the legal protection of equality, suggesting that inclusionary attempts bring tribunals more than ever in proximity with the performative aspects of discrimination, albeit not being able yet to address it head on. I will propose that understanding the shifts in legal discourse in relation to the shifts in medical-social and political discourse, helps reveal the limitation of inclusionary paradigms and points to the possibilities of an intrasectional performative analysis of existing law to address the actual lived experience of gender variance and gendered (mal)distribution of life chances.

In chapter three I will turn to look at yet another group fighting for inclusion through ADL, the Mizrahi community in Israel. Suggesting that Mizrahi-ness and gender variance pose similar challenges to the law, being both situated at the excess of closed dichotomous categories, man/woman, Arab/Jew, I will use the queer perspective on ADL developed in chapter one and two to review Israeli cases dealing with Mizrahi discrimination. Applying intrasectional analysis to the protected categories in use, I will try to identify the performative elements underlying the legal reasoning. Integrating my findings about Mizrahi performativity with my findings from chapter one and two, I will look at how sex/gender performance helps understand racial/ethnic performance. Juxtaposing the gender variant and the Mizrahi, I will argue that one way by which the law functions as a tactic of stability, presenting the current state of material and cultural inequality as given, is by the use of legal categories in ADL. My conclusion will point to the

---

6 In the context of this thesis Mizrahi-m(plural) and Mizrahi (singular) refers to Israeli Jews who have originally immigrated to Israel from Arab and Muslim countries. It the widely used term by which Jews from Arab-Jewish decent identify and it is a self-proclaimed name, its emergence would be discussed further.
potential use of ADL to better serve the people it aims to protect, by using the performative analysis offered in this thesis.
Chapter 1
The Transgender Tipping Point

1 Opening Comments

Right at the beginning of the journey to locate some of the intersections of ADL and performativity by looking at gender variant exclusion, I find myself limited by the tool I am using, language. It is hard to decide how to describe the people I wish to talk about. Many writers have chosen the word “transgender” as an umbrella term referring to all individuals “whose gender identity or expression does not conform to the social expectations for their assigned sex at birth”, in that it refers to a rage of identities and behaviors that challenge the accepted social norm of genders. It is a political term that arose outside the scope of medical discourse and was adopted by activist and academic alike for this reason. The term offered the community abilities to articulate themselves without referring to the medical pathology transsexual, allowing new ways to describe oneself outside of the narrow and normalizing enforced medical narrative, discussed in details later in the chapter.

In recent years, this term has been criticized for erasing the differences in experiences and struggles of different groups, mainly the needs and desires of self-identify transsexuals. Criticism has also been made regarding the term’s connection with post-structuralism theory that implies the nonexistence of any gender and thereby delegitimizing the desire to belong to one of the two socially accepted genders or other genders. Other people who transgress gender do not identify with this term at all and use a variety of other words to describe themselves and their experiences.

9 David Valentine, “‘I went to bed with my own kind once’: the erasure of desire in the name of identity” (2003) 23:2 Lang Commun 123.
Still others have challenged the way in which the term internalize the dichotomies between gender and sexuality, due to which it fails to capture the real life experiences and identities of many and replicates the apparatus of narrowing the human experience, a criticism the term itself makes toward the medical term transsexual. Respecting the critiques, I will use the terms “trans” and “gender variant” to talk about people whose gender presentation do not conform to the social expectations attracted to the sex they were assigned at birth. I will use the term transgender to refer to the political movement. When I refer to people who identify themselves, like Lilach, I will use the term they have picked.

Transgender scholars and legal advocates are divided around the question of the use of ADL as a tool for promoting the interests of the transgender community. The main controversy is whether ADL serves underprivileged gender variant individuals or is it de facto merely redefining the borders of gender to include very specific parts of gender variant identities and practices. At the outset it is important to state that all sides of the discussion bring forward important critiques. Agreeing with the position that abandoning right based litigation altogether is a privileged position, I will argue for a possibility to incorporate the substantial aspect of the critiques against ADL into a viable legal strategy for rights based litigation. Acknowledging the law is a tactic of social power, I will try to produce an outline for a tactical use of the law. I will argue that by deconstructing the legal phenomena of discrimination we might be able to uncover the laws

significant part in creating and upholding social mechanism (mal)distributing resources and opportunities,\textsuperscript{14} that exclude, among others, gender variant identities and practices.

Yet, before I will go in depth to those critiques and suggest a nuanced perspective on the controversy, centered on the relation between the subject and society, it is important to understand how the social system of gender works in respect to trans identities and practices. The socially accepted norms of gender, sex and sexuality, i.e. heteronormativity, distinguishes between two diametrically opposed sexes, from which are derived two diametrically opposed genders: male/man and female/woman.\textsuperscript{15} Under these norms, any sexual or gendered identity or practices are set in relation to a normative ideal of heterosexuality, i.e. a sexual relations between male/man and female/women.\textsuperscript{16} There is an alleged essential and inherent difference between men/males and women/females that is reflected in their characteristics and abilities.\textsuperscript{17} Those differences are perceived to be natural and this justifies the well-known social hierarchy of gender headed by non-trans men. This is a complex system of values which we are all forced to live by from the moment we are categorized at birth as either “boys” or “girls”, based usually only on visible genitals,\textsuperscript{18} that teaches us the social role we must portray, “femininity” or “masculinity”. Society demands that all of us be heterosexual feminine female/women or heterosexual masculine men/male and punishes anybody who dares to cross these borders.\textsuperscript{19} Being inside the border is part of what constitutes our

\textsuperscript{14} Spade, supra note 12 at 29–33.
\textsuperscript{16} Ibid at 107.
\textsuperscript{18} It is interesting to note that this very early sex classification is seemingly based in actual biology and not on mere social ideology. However, it is in this very moment that one can view how a social value is attached to a non-significant biological trait, such as you visible genitals, which one learns very early that are not to be shown in public. This one biological trait, among many other that is recoded about the newborn, effects how she/he will be treated by everybody who comes in contact with them, what baby clothes they will be dressed in, what toys they will get, what kind of compliments their parents will receive in regard to them from strangers on the street. Obviously this has no real biological significance to the newborn and says nothing about their characteristics and abilities.
subjectivity, our citizenship.

Transgender identities are also created within this dichotomous set of norms. From the perspective that accepts the dichotomous binary of mutually exclusive sexes/genders, transgender people are those who lack correlation between their subjective experience of gender and biological body. Because transgender intelligibility is formed in a society which sanctifies this perspective, transgender people often feel that something is “wrong” with them. This feeling is what medical discourse refers to as gender dysphoria, which is understood as arising from an inherent discrepancy between “biological” sex, gender identity and gender expression, a feeling which is sometimes described as “being born in the wrong body”.

However, the experience of discrepancy itself exposes the traditional tie between sex, gender and sexuality, not only as non-universal, but also that the dichotomous existence of two genders is socially inflicted. The fact that our society produces individuals who do not easily fit into the existing gender/sex-order challenges the naturalization of this order, and unearths its socio-political dimension. Hence, the experience of dysphoria and distress are not the mere result of a subjective individual’s discrepancy of sex and gender, rather it is the effect of insubordination, deliberate or not, to the social prohibition on crossing the borders of sex/gender/sexuality. This is the trans paradox: on the one hand, what constitutes trans identity is the discovery of discrepancy in the correlation between gender and sex, and a realization that the system of two all-inclusive mutually exclusive categories is too narrow to reflect one experience. On the other hand, the trans person can only be a part of society if s/he aspires to adopt a normalized behavior. In other words,

in order to be legitimized in her or his gender non-conformity, the trans person must aspire to take part in the same gendered social structure which caused her non-conformity to begin with.

My analysis of ADL from a gender variant perspective will follow Judith Butler analysis of gender performativity. Briefly, what the Butlerian analysis points out, is the falseness of the social deductive process, that when you see someone’s presentation (their clothes, hair style, diction, how they take space, ext.) you assume that presentation is an indication of a specific “sex”, and that “sex” correlates to “gender,”23 which in turn indicates “sexuality”. Butler argues, following Derrida, that there is not true “origin” that is represented, but that the presentation is what constitutes “sex” as an origin from which gendered sexual acts flow out to the public body. In this sense, gender attributes and acts are “the various ways in which a body shows or produces its cultural signification.” These acts are public, meaning that what constitutes them is their ability to be read from the outside by the public, as “they are instituted in an exterior space through the stylization of the body”24 Although Butler talks directly about “bodily gestures, movements, and styles of various kinds”, from her own description of the repetitive gender act, it is clear that all actions that signify one as having a coherent identity constitute presentation. I will return to discuss Butler’s main theoretical standpoint when I will explore the case of discrimination of trans plaintiff.

Moreover, as I will elaborate further, because the normative gendered citizen is also normative in many other way, i.e. class, race, ability, ext., only people who follow the hegemonies’ lines in everything but their gender identity can ever fully adopt a normalized behavior that would render their transgression coherent, whereas others remain forever questionable. At this point it is

---

23 Understood here as gender roles.
24 Butler, supra note 19 at 179.
enough to bear in mind the role coherence plays in both ADL and trans social integration, where being read from the outside as “normative”, i.e., presenting all your different identifications as harmonized into one stable identity is key both for ADL and in trans social integration.

2 The First Gay Divorce- the Separation Sexuality and gender

As David Valentine shows, transgender as a category of identity and community organizing emerged in the 1990’s, in the background of the development of the gay rights movement and lesbian feminism in regard to social regimes of sexuality and gender. In order to understand what transgender came to be we need to first understand how the gay and lesbian movements severed the link between sexuality and gender deviation. Transgender as concept emerged as the shelter for those abandoned deviant children that were neglected by a new gender normative model of homosexuality. This process had shaped the transgender political movement in different ways, forcing it to aspire to be more inclusive while at the same time replacing the exclusionary mechanism that constitute the current homosexual heyday.

Modern instruments for population control in respect to gender and sexuality through discursive and regulatory means have developed in a process that stretched over centuries. Up until the mid-20’s century, what we would consider under present discourse to be sexuality and gender, were bundled up in the category of deviant behavior. When Foucault describes the “invention” of homosexuality as a disorder, as a kind of “androgyne”, in one of his most

famous passages from history of sexuality, he sheds the light on how homosexuality was linked, as a category of being and practice, with what queer theory would later call “gender presentation”. Homosexuality was seen as a gender behavior, the homosexual men attributed with feminine behavior and desires and homosexual women, if considered at all, were only recognized when one undertook typical masculine behaviors. The social division between deviant and normal and the public policing of the deviants were, as Foucault argues, less directed at deviants and more towards the “normative”. By focusing on the deviant and the process of deviation, the “normative” becomes transparent, gaining an ontological status as the “neutral” and “normal”. Foucault explains how this external process of framing the borders of “normative” behavior has been internalized to self-discipline. The “technologies of the self” are a process by which the individual orient its internal actions towards notions of social coherence in order to constitute her subjectivity. By framing what is improper, the “normative” defined the borders of the proper, the borders between being a subject and an object, a citizen a non-citizen. Whoever is able to self-govern their subjectivity so it remain within lines of the “normal” thus become bearers of rights.

“invoking the ways that different subjects are constituted as members of a polity, the ways they are, or are not, granted rights, responsibilities, and representations within that polity, as well as acknowledgement and inclusion through a multiplicity

29 Foucault, supra note 27 at 43.
30 Judith Butler, Gender trouble (routledge, 2002) at 3.
31 Lynne Huffer, Mad for Foucault: Rethinking the foundations of queer theory (Columbia University Press, 2010), chap 1.
32 Michel Foucault, Technologies of the self: A seminar with Michel Foucault (Univ of Massachusetts Press, 1988).
33 Cossman, supra note 26 at 14.
of legal, political, cultural and social discourse. It is about the way subject are constituted as citizens and the way citizenship itself is constituted.”

The framing of the deviant as opposed to the normal, brought forward by discursive means as well as regulatory ones that are internalize in constant the process of becoming a subject, encompasses what it means to be a “good citizen”. By looking at the process of becoming a citizen, in respect to its normalizing power, we can understand how it relies on mutually exclusive categories of belonging and otherness, foremost of sex/gender, while at the same time fixating the rights barring status of the categories.

As part of the ongoing process of constantly constituting citizenship through mutually exclusive categories of belonging and otherness, at one point the gendered/sexed deviant started to brake from within, given birth to a new gender normative homosexual subject. From the beginning to the mid-20th century in both medical discourse and in political movements for recognition, sex and gender deviance began to be understood as separate and mutually exclusive. Gay and lesbian liberation movement framed their identities and practices through the concept of sexual identity, an ontological characteristic that is both internal and invisible. In other words, they claimed that sexual identity is inherently different from gender, which is visible, i.e. public.

---

34 Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford University Press, 2007) at 5. Coming from Israel/Palestine where the political status of individuals is heavily stratified and the government effectively control the population through different legal systems that constitute rights in a very different manner, I am aware of the universalism of the term “citizenship”. However, Cossman’s articulation of the constituting of the subject through citizenship allows me to go beyond the classical understanding of citizenship as mere bundle of political rights.

35 Cossman, *supra* note 26 at 8.

36 *Ibid* at 5.

37 Parenthetically I will note that we should also consider how this understanding of citizenship as a completed (?) regulatory forces, that distribute all sorts of privileges, has affective impacts on those it excludes that shapes their demands for inclusion. It is beyond the scope of this work, but I suggest that this affective impact is significantly noticeable in the formulation of the transgender community, as will be described in the following pages.


One of the main tactics of the homophile movement\textsuperscript{40} was to adopt a gender normative model of homosexuality, shedding away the “ferries”.\textsuperscript{41} A similar course, but from very different political angle, was taken by the 70s feminist-lesbians when they rejected the butch-femme model to give preferences to the “women born women” gender normative model of lesbianism.\textsuperscript{42}

Even though the homophile movement and lesbian-feminism used different tactics, they both made use of the idea that sex and gender exist in two separate spheres to promote their goals.\textsuperscript{43} Adopting a gender normative model of homosexuality allowed the homophiles (and later the gay liberation movement) to advance claims for inclusion based on the notion that “we are just like you” but for one, invisible, hence private, aspect of our inner world that has no effect on the public sphere.\textsuperscript{44} The gender normative model helped lesbian-feminism to claim unity of all women based on biological “truth” of birth assigned sex.\textsuperscript{45} One notable example is Janice Raymond’s “The Transsexual Empire”\textsuperscript{46} in which she accuses transsexual women of being men trying to infiltrate the feminist movement in order to take it down. Both these movements rejected gender variant identities and practices, i.e., rejected “visible” deviants, no matter how those deviants called themselves.\textsuperscript{47} Valentine argues that the distinction between biological sex, social gender, and sexual desire was a move that enabled a distinction between the those who “visibly transgressed the conventional expectations of masculinity and femininity in clothing, occupation, or manner (the contemporary realm of “gender”), and those who, despite being content to be socially men

\textsuperscript{40} A North American advocacy group of gay men “advocating or supportive of the interests, civil rights, and welfare of homosexuals”. Interestingly they choose the word homophile to distinguish themselves from the pathologized term “homosexual”, a move that the trans movement later adopted with the term “transgender”.
\textsuperscript{41} Valentine, \textit{supra} note 39 at 42.
\textsuperscript{42} Emi Koyama, \textit{Whose Feminism is it Anyway?}. (Emi Koyama, 2000).
\textsuperscript{43} Valentine, \textit{supra} note 39 at 55–59.
\textsuperscript{44} David L Eng, \textit{The feeling of kinship: Queer liberalism and the racialization of intimacy} (Duke University Press, 2010), chap 1.
\textsuperscript{45} Valentine, \textit{supra} note 39 at 47.
\textsuperscript{46} Janice G Raymond & J Neville, \textit{The transsexual empire: The making of the she-male} (Teachers College Press New York, 1994).
\textsuperscript{47} It should be noted that these histories are much richer and more complex, involving different historical events that occurred, such as the AIDS epidemic and the lesbian “sex wars”, but I cannot discuss them in depth as part of this thesis.
and women in concordance with their birth ascription, were erotically drawn to people of the same
general embodiment (“sexuality”).”

3 Single Axis Analysis and the Outsourcing of the Deviance

The gender normative model was tailored with respect to the mainstream norms of gender, which were, and still are, white and middle class. Hence, they fail to make broader claims against the social systems in which sexed/gendered subjects/activities are given different social value. For such a critique would have to address the ways that the social exclusionary framework of class and race, among other factor, nourish and are nourished by the sex/gender paradigm. Black feminism has a long tradition of analyzing the binding power of universalized critique centered on a single axis of gender binary. The act of overlooking the ways by which gender domination is shaped by race, class and culture, is the act of erasure of non-white, non-middle class, non-western, subjects.

While it is true that single axis analyses erases other differences, I argue that even within the category of sex/gender, the single axis focus creates erasure. Moreover, I argue that this analysis is also relevant to the separation of sex, gender and sexuality. By focusing on a single axis of critique, one ignores the impact of the other vectors of the experience of “gendered control”. By talking about sexual identity or gender-normative hierarchies without considering and accounting for how gender variance and other attributes impact the experience of gender policing, sexism,

48 Valentine, supra note 39 at 57.
49 Ibid at 199–201.
50 Such as culture, ableism, xenophobia, and other forces of exclusion, some we have even not named yet.
51 Spade, supra note 12 at 195.
52 Among other factor, ibid.
homo/transphobia, the LGB and feminist critiques\textsuperscript{54}, effectively and affectively erases multilayered experience of gender variant identities and practices.\textsuperscript{55} Thus, these critiques overlook socially exclusionary mechanisms created by elaborate systems of gendered/sexual stratified citizenship that is pivotal in linking different social values to identities and practices based on sex, gender and sexuality. It has been argued that white women integrated into the job market by hiring black women to do their house work. Thus, white feminism did not change the gendered distribution of labor, it merely outsourced it to black women.\textsuperscript{56} Paraphrasing this claim I argue that when gays and lesbians adopted a gender-normative model of homosexuality they outsourced the deviance status to gender variant individual.

The rise of a political homosexual homophile movement and lesbian-feminism, which adopted a gender normative model of white middle class of homosexuality, had in many ways “outsourced” the image of “perverseness” to gender variant individuals. As I will discuss further in chapter two, together with the rise of gay liberation and their fight to end homosexual pathology, the medical category of “transsexual” and the later “gender identity disorder” were invented, rendering all those who did not fit the gender normative model outcasts.\textsuperscript{57} It seems that the move toward a gender normative model of homosexuality located homosexuality outside the borders of the invert but did not unmake the category of invert itself. Thus, the gender normative model of homosexuality, albeit was and is useful in promoting certain issues, such as gay rights, did not have a significant disruptive impact on the social mechanisms that normalize society, the

\textsuperscript{54} As well as transgender critique, as I will argue later
\textsuperscript{55} Valentine, supra note 39 at 201.
\textsuperscript{57} Valentine, supra note 39 at 55.
mechanisms Foucault claimed were served by the “invention” of homosexuality. The later emergence of the category of transgender is thus rooted in this (racialized and class inflicted) history of ontological separation between “sex” and “gender”.

4 What’s wrong with Identity Based Rights

Even though the universal traits of single axis analysis are useful in promoting certain inclusionary focused goals, such as gay marriage, this very notion of success has been contested, arguing that these tactics are part of a greater scheme of neoliberalism’s individualist regime that benefits only a privileged few. Before I explore the emergence of the category “transgender” as a response to the erasure of gender variant facilitated by gender normative gay liberation, we must bear in mind the great advantage a single axis analyses provides to category based claims, for it universalizes identity. The single axis analyses builds on and in fact itself builds a universal experience and practice. Thus, it allows the movements to make a collective claim in the name of a vast unified group, composed of identifiable coherent subjects. The ability to assert the existence of a unique category opens the possibility to bring forward egalitarian demands, based in the reasoning of “sameness” despite a specific inherent characteristic. Such are the feminist demands for sex equality in the job market because “women” should not be treated differently than “men” and the LGB demands for marriage equality because gays and lesbians should not be treated differently than heterosexuals.

58 Huffer (Huffer, supra note 31, chap 1.) point out that the processes stretched over centuries, and I will add that the process of “outsourcing” the invert to gender variant is a continuous part of this process and even the rise of transgender identities, as I will further elaborate, is part of this continuum.
59 Eng, supra note 44, chap 1.
It is unsurprising that gay and lesbian demands for inclusion, that is, for full citizenship, have been translated into demands to participate in the normative sexual order. As Cossman points outs, citizenship’s focus on either rights or political participation presumes citizenship to be privatized and heterosexual. Gays and lesbians have used privacy rights to constitute their sexuality as normative, arguing that one’s sexuality is not a matter for public regulation but their own inherent private characteristic. David Eng argues that the focus of gay liberation on privacy rights allows issues of sexuality to be portrayed as relating only to the “private” sphere and therefore detached from the “public” sphere where economic systems, liberal and neoliberal, attach ontological status to rights as property. Thus, privacy is used to conceal race, class, and other categories of identity and practice, that are inextricably connected to experiences of sexuality.

Citizenship is always about inclusion and exclusion. Hence, new neo-liberal gay citizenship reveals that the desire for inclusion has direct market driven exclusionary implication. Yet, LGB history shows that the single axis analysis is indeed very powerful in formulating “successful” demands that are consistent with the neo-liberal logic of present times. It is unsurprising that gender variant individuals, that have been the victims of the outsourcing of deviance, asked to form a new collective identity, transgender, which would enable them to make coherent collective claims for recognition. However, history also shows us that these claims bear significant distributive implications.

Nancy Fraser describes this process when she addresses the problem of identity based claims in her discussion on recognition vs. redistribution as a tactic for social justice. Identity

60 Cossman, supra note 26 at 15.
61 This tactic also used by feminists in some cases, mainly with respect to abortions. Even though one of the main frameworks of feminist critique is the resistance of the separation between the private and the public. The 70s feminist-lesbians saw their sexuality as a public, as embedded in their moto “the personal is the political”.
62 Eng, supra note 44 at 967/4611.
63 Cossman, supra note 26 at 5.
based claims consider the problem of marginalized groups to be a problem recognition. The lack of recognition creates a distortion to ones understanding of themselves. From the group perspectives, to be misrecognized is to belong to a social devalued group. As a result of “repeated encounters with the stigmatizing gaze of a culturally dominant other, the members of disesteemed groups internalize negative self-images and are prevented from developing a healthy cultural identity of their own.” By creating new self-made self-representation, the group could than publicly assert respect and esteem from society at large. However, as Fraser argues, this model has some significant drawbacks. It treats misrecognition as free-standing cultural harm ignoring distributive injustice and the institutionalized social-political–matrix of exclusion. Moreover, even when misrecognition of identity is seen as connected to economic factors it is regarded as following from misrecognition, “to revalue unjustly devalued identities is simultaneously to attack the deep sources of economic inequality.” Hence, no explicit politics of redistribution is needed. Fraser points out that making claims within identity politics forces individuals to elaborate and display that they authentically belong to the group by virtue of their coherent identity. Therefore, erasing the complex practice and experience of people’s life and “the multiplicity of their identifications and the cross-pulls of their various affiliations.” This does not only have a paradoxical effect of misrecognition, it also conceals intragroup power struggles and differentiations. Argo, it masks the power relations and reinforces intragroup domination.

Fraser has been criticized by Judith Butler for creating a dichotomous separation between the “cultural” and “material”. Butler argues that while Fraser recognizes that gender and sexuality

65 Ibid at 109.
66 Ibid.
67 Ibid at 111.
68 Ibid at 112.
69 Ibid at 111.
70 Ibid at 112.
are sites of social change, she considers them as merely a problem of recognition that has no redistributive impacts. Butler argues that this dichotomy itself, between the cultural and the material is preventing in depth analyses of social structures of maldistribution. Butler recalls Fraser’s earlier feminist analyses by which gender and sexuality are a part of the ‘material life’ because they serve the sexual division of labor. Political economy is not only understood through reproduction of goods but also the social reproduction of normative persons. As will follow in my analysis of gender variant discrimination, I side with Butler in viewing sexual and gendered normativity as interlocked with the material. Following Butler’s analysis of gender, I will show how gender variant individuals are discriminated against, excluded from resources and opportunities, because their gender presentation (and perhaps sexuality) defies (intentionally or not) the social hierarchies of normative gender and sexuality. I will argue that when looking at discrimination it is clear that gender and sexual insubordination have significant material implications.

However, Butler’s argument is not flawless and it does seem cast vast mystical abilities on recognition of non-heterosexual sexualities. Butler claims (in 1997) that gay and lesbian exclusion from the institution of marriage and lack of recognition in their partnership is not solely a matter of recognition but has material impacts, such as the recognition of a unit with respect to tax and property law. However, as Fraser argues in her reply to Butler, there can be recognition within the capitalist mal(distributive) order for sexual diversity, where “capitalism does not require heterosexism”. Recent developments in the US and Canadian experience in gay marriage have proven that actually recognition can go a long way without structurally addressing maldistribution.

72 Ibid.
of resources and opportunities. That is, white middle class, less racialized gay and lesbians now have easier access to material benefits of marriage, which are significant (in respect to tax and property)\textsuperscript{74} for individuals who already have financial resources of some sorts. At the same time, large parts of the community are still if not more (due to neo liberal strands of social goods distribution, i.e., via the “new normative” family), struggling to survive outside the job market, still unable to integrate into it.

Fraser accurately foresees that the markets would react positively to homosexual integration. Yet, her claim that capitalism does not need heterosexism falls short of explaining the rise of homonormativity, that is, that in order to gain recognition and its economic benefits, gays and lesbians shaped their partnerships and narrative in light of heterosexism.\textsuperscript{75} Rather than contesting the normative concepts of sex and gender, they argued that their sexuality is actually also reproductive (both in terms of goods and persons).

In light of the development of LGBT struggles since the two essays were written, I argue that even if Butler’s examples were not accurate, her argument holds in the sense that it shows that one cannot draw a clear line between class, race, sexuality, gender and so forth, because one’s access to resources and opportunities is impacted by the way one is situated at the intersections of these categories. Gays and lesbians might not fit into any “classical” division of labor, as Fraser argues, but as I have shown above, they have also not existed as a separate category of identity reflecting sexual behaviors (and not say also gendered behaviors) until very recently. The rise of gay marriage can be attributed to the successful campaign to alien sexual diversity with

\textsuperscript{74} There are other benefits that come with gay marriage that can be relevant to people who do not have financial resources, such as access to immigration via family reunification.

\textsuperscript{75} Ibid, at 265.
normativity, the “were are like you but for our desire” campaign, that is, with locating the differences outside the scope of the economy, in the private sphere.

Sexual and gendered variance was and still is part of capital divisions, and gender and sexual normativity have been and are used to create and uphold divisions of labor. To understand this argument consider the difference between Lilach and Caitlin Jenner. Jenner, a wealthy public figure prior to “coming out” as trans can be seen as a case where recognition of gender variance accrues within the capitalist market. Yet, Jenner as she herself testifies is a typical case in the trans community, where others like Lilach, who lack access to resources and opportunities are struggling not only for recognition but for integration into the job market. Moreover, the fact that major part of Jenner’s public attention is devoted to surgeries she underwent and to how well she passes, as well as her decision to only identify as trans after “completing” SGRP procedure when she is able to perform her coherent gender, points to the fact that recognition within capitalism accrues on normative terms. That is, I argue that Jenner’s widespread acceptance is related to her gender normative narrative of transition, to portraying gender as a private inherent truth. On the other hand, it was Lilach incoherent gender performance as well as the fact the she had to work a low-pay job, the exposed her to exclusion.

The normal can adjust its context to adhere to the zeitgeist, as is has done many times before gay marriage, but its oppressive forces nevertheless remain. The economical and the social are interlocked through concepts of normativity and coherence. Fraser herself seems to accept some of Butler critique in later work, where she brings forward an alternative model, she refers to as “Misrecognition as status subordination”, which I will return to later. At this time, I only wish to point out that by using essential identity claims, the feminist, LGB and civil rights struggles have come a long way, including the passage of legislation that prohibits discrimination. Whether
these demands, when answered, create the same level of profound change in the lives of all those they claimed to universally represent is a different question. Nevertheless, understanding the power of the single axis analysis would allow us to better understand the current debates inside transgender studies and advocacy.

5 From the Emergence of Transgender Movement to Current Debates

To reiterate the argument so far, as part of the claim of separation between the spheres of sexuality and gender, put forward by the gender-normative model of homosexuality, the role of “social deviance” was “outsourced” to gender variant persons. With this context in mind, we turn now to explore the emergence of trans political identities. Trans identity emerged from the erasure created by the gender normative models of gay and lesbian political identities, with their specific underlying biases of class and race and their practices of gaining access to citizenship through essentialized identity claims. This will help us understand the current debates of trans advocacy for and against the use of right based claims, as I situate these arguments in accordance with Fraser’s analysis of the spectrum between recognition and redistribution.

The emergence of “Transgender” as a political identity and community dates back to the early 90’s, when activist groups in North America, as well as prominent academics and theorists, coined the term transgender as a political opposition to the medical term “transsexual”. Shannon Price Minter argues that the emergence of the transgender movement is connected to the need for a social and political space that would allow for transsexuals to assert autonomy over the meaning of transsexuality, to enable a move from a phenomenon that is controlled by medical institutions

76 Much like the homophile attempt to stir away from the term homosexual.
to a “freedom to be transsexual as civil and human right, not just as a clinical decision made by medical authorities”. The new term aspired to create collective demands for diverse groups, such as transsexuals, cross-dresses, transvestites, androgens, gender non-conforming individuals and even butch women or sissy men, as well as drag performers.77

Transgender was not only a response to the separation of sexuality and gender but a continuum of this separation. As explained in “Transgender Rights”,78 Transgender refers to individuals whose “gender identity” or “gender expression” does not conform to the “social expectations for their assigned sex at birth assigned at birth”.79 Hence, gender is separated from sex, this is noticeable by the move from trans-sexual to trans-gender. Transgender as a separate identity category considered the gendered body to function independently from the sexed body. One can be both transgender and gay not because gender and sexuality are intertwined, but because transgender refers to their “gender” which is separate from their “sex” and “sexuality”.

The transgender claim is that all the different identities and practices that are grouped together under the “transgender umbrella” share a “common political investment in a right to gender self-determination”.80 As in many other social movements, the liberal and the radical transgender advocates disagree on the tactics that should be taken to secure a right to gender-self-determination that would ensure access to recourses and opportunities. While the liberals advocate for inclusion, for recognition of transgendered identities as any other gender identity, the radicals argue that it is the social structure of gender that creates the exclusion of gender variant persons to begin with. That is, one side asks to allow trans persons to participate in the given social order and

77 As Suzan Stryker notes in Transgender History (Stryker, supra note 28.) this category is still “under construction” where new identities such as “genderqueer” or “bigender” are added and other such as “drag” are removed.
78 Currah, Juang, & Minter, supra note 7.
79 Ibid at 5.
thereby create change, and the other side asks to change the social order and thereby create redistribution of resources and opportunities that would include also gender variant persons. I argue that this disagreement can be understood in line with Fraser’s analysis of inclusion vs. distribution by promoting an understanding of Fraser that incorporates Butler’s critique. I suggest that at the heart of the political disagreements stands the tension within the community about identities and practices that constitute being transgender and formulate the interests of the community. Moreover, it is a debate about the meaning of belonging to such community that questions who are the beneficiaries of demands made in the name of the collective.

The field of transgender studies is more than ever engaged in understanding and defining those identities and experiences. As noted before, the term transgender includes different identities and practices of individuals who might not identify as transgender at all, such as crossdressers or transsexuals or butch lesbians. The formulation of transgender as identity politics followed the model of the gay and lesbian liberation movement in creating an identity based collective. Yet, the same marginalization of others, those who cannot fit the new “normal” model of identity, is happening within transgender. Perhaps this indicates that broadening identity categories is not the best tactic to serve the interest of gender variant. In any case, these tensions over whom the transgender movement represents and how it does so, have been at the heart of the debate since the emergence of transgender. These tensions stand at the heart of the transgender debate over the use of ADL. While the liberal side strikes for inclusion in ADL in hopes that changing the law would change lives, others are skeptical about the law’s centrality or

81 The bigger question is whether such community exist at all
84 Broadus, *supra* note 11.
importance, not to mention its alleged neutrality, in social change.\(^{85}\)

6 Liberal Trans Politics

The liberal legal-academic movement is aspiring to advance social acceptance of transgendered people by developing a progressive discourse of fundamental preconditions of the phenomena in order to justify inclusion.\(^{86}\) Within this movement there are those who take different stands on the essentializing of trans identity. Some stress the ability of the law to adapt to less essentialist categories, such as gender expression and identity. Others would argue that there is no problem with using the current legal framework, insofar that it applies to trans persons who are fine with identifying as male/men or female/women or that can articulate their demand within this framework.\(^{87}\) Then, there are those who would argue that we need to expand the categories to include gender identity and gender expression precisely so that trans persons need not fit within the categories of male/female as such. The liberal attempts are trying to complicate the legal categories, but they are still working within the law. The liberal transgender tactics, follow similar tactics of the LGB movement, aspiring to secure inclusion in anti-discrimination and hate-crime legalization, for “gender identity” or “gender expression”, promoting viability of “positive” transgender images in the public sphere, working towards acceptance and tolerance by educating the general public as well as specialized professionals such as medical staff, social workers and educators.

The inclusive approach had some important success worldwide in the recent years. The need to protect transgender people from discrimination echoes globally and has reached the highest

\(^{85}\) Dean Spade, *For Those Considering Law School* (2010).
\(^{86}\) Stryker & Whittle, *supra* note 80 at 3–4; Stryker & Aizura, *supra* note 82 at 3–5.
\(^{87}\) Broadus, *supra* note 11.
international institutions. For example, In June 2011 the United Nation Human Rights Council upheld that the protection against discrimination and violence on the basis of gender identity is part of the Universal Declaration of Human Rights and called for the use of human rights law to address the problems faced by transgendered people.\footnote{HRC, UNCHR, 17th session, UN Doc A/HRC/17/L.9/Rev.1 (17 June 2011).} In September 2014 UNHRC adopted a second decision that reflected grave concerns at acts of violence and discrimination in all regions of the world and called for sharing of good practices and ways to overcome violence and discrimination.\footnote{HRC, UNCHR, 27th session, UN Doc A/HRC/27/L.27/Rev.1 (24 September 2014).} Various laws aimed at protecting transgender individuals have been enacted by national, provincial and local authorities. Under the Ontario Human Rights Code (the code) individuals are protected from discrimination and harassment on the basis of gender identity and gender expression in employment, housing, facilities and services, contracts, and membership in unions, trade or professional associations.\footnote{Human Rights Code, RSO 1990, c H.19, pt 1.}

As the above examples indicate, there is no denial that the recent years have seen tremendous developments in public intelligibility of the transgender community and its rights, leading to the transgender movement portrayed as the “next civil rights frontier”.\footnote{Katy Steinmetz, “The Transgender Tipping Point”, \textit{Time} (29 May 2014), online: <http://time.com/135480/transgender-tipping-point/>.} However, these achievements have been denounced by more radical transgender advocates for failing to promote significant change in the lives of all parts of the community they aimed to serve, especially those in the margins of the community who struggle with multiple grounds for exclusion and whose identities and practices exceed the single axis of gender identity by way of non-hegemonic sexualities, race, class, ability.\footnote{Given the disproportionate rates of poverty in the transgender community especially for people of color, these people might be at the margins but are not necessarily the minority.} Countering these critiques, radical trans advocates shift away from
identity based claims and ADL to focus on the regulatory scheme of gender by upholding the system of mutually exclusive identity categories.

7 Radical Trans Analysis

The radical transgender claim is a distributive one, trying to locate the role of gender identity in the stratification of social goods. The radical analysis stems from the tension between the excess of gender variant identities and practice and the collective term transgender. Following queer theory, feminist theory and critical race theory, it tries to reflect the ways in which gender variant exclusion is part of greater social scheme and is aware that merely “changing the law” is not enough, that the law is a vital part of the scheme itself.⁹³ Scholars such as Valentine have noted that the life and experiences of gender variant individuals and communities, especially those at the margins, do not conform to current terminology, or understand their identity and practices as a sole matter of “gender expression”. Valentine warns us about marginalization of more heterogeneous trans identities and experiences.⁹⁴ The focus on inclusion and unification of all gender variant practices into one category of identity masks racial, class, geographical and other biases.⁹⁵ The byproduct of this process of reframing the borders of (legal or other) inclusion is the creation of new borders. The use of identity categories in the context of gender variance forces one to define those identities and to narrow the variety of possible identities, in contrast to the fact that trans people identify in many different ways, at times using more than one category.

---

⁹³ Dean Spade, “Intersectional resistance and law reform” (2013) 38:4 Signs 1031 at 12.
⁹⁴ Valentine, supra note 9.
⁹⁵ Stryker & Aizura, supra note 82 at 8.
On the other hand, the law forces trans rights claimants to accept one category or the other to be recognized. There is an underlying essentializing of not only gender identity, but also of trans identity, as moving from one gender to the other. It is possible that the law could recognize certain trans individuals, to the extent that they identify with the categories of the law. In other words, by assigning transgendered people rights based on a closed system of exclusive categories, it ensures that these rights constitute an effort to take part in the social accepted order of sex/gender.

As a result, the ability and/or desire of transgendered individuals to be "like everyone else" have a significant role in determining their access to rights and to legal procedures.\(^\text{96}\) However, discrimination against transgendered people happens precisely when they are revealed to be "not like everyone else", i.e. they do not follow the socially accepted norms of sex/gender. In other words, if no one knows\(^\text{97}\) you are trans, they cannot discriminate against you on that basis. Thus protection based on the condition of being "like everyone else" leaves out those most exposed to discrimination. For this reasons the radical trans legal-academic movement would argue that these borders are the tools by which trans exclusion is created, justified and upheld.

The radical part of the transgender movement points to the gender binary itself as an oppressive power, one of other governance strategies that constitute trans exclusion from resources and opportunities.\(^\text{98}\) Furthermore, the radical stand would argue that the focus on the individual hinders the critique of external structural social systems of gender and sexuality that create the exclusion of gender to begin with. Following Foucault, radical trans advocates ask to look at gender as a

\(^{96}\) Spade, supra note 22.
\(^{97}\) Knowing can come from different sources, one might identify as trans, one might not “pass” and be recognized as trans, another can have identification documents that to do not match their current presentation, ext.
\(^{98}\) Spade, supra note 12, chap 3.
regulatory power that has attached different value to different gendered identities and practices as “a core element of participation in our capitalist economy.”\textsuperscript{99} This regulatory power explains the “disproportionate poverty and incarceration for poor, gender transgressive people.”\textsuperscript{100} Hence, from the radical point of view in order to secure the access to resources and opportunities, transgender people need to fight the social system of gender itself. For these reasons, Dean Spade and other radical advocates reject right based advocacy, claiming it empowers the regulatory scheme of gender by upholding the system of mutually exclusive identity categories.

8 Distribution vs. Inclusion- Picking Sides

Following Fraser and Butler’s debate, one can see that the liberal advocates look for recognition while the radical ones seek to dismantle the social system that distribute life chances in accordance with gender compliance. The liberals ask to entrench “transgender” and by doing so aim to create a new self-made self-representation of the group that would publicly assert respect and esteem from society at large. The radicals stress that misrecognition of trans identities is not a “free-standing” harm, but a distributive injustice, a harm caused by a social-political matrix of gender/sex. They further claim that the entrenchment of transgender narrows the scope of protection because it only recognizes those individuals who can elaborate and display their authentic belonging to the community by virtue of coherent identity, while the process of constituting coherent gender identity is a process of framing and reframing the accepted borders of sex/gender. Moreover, this process excludes the complex and heterogeneous gender variant

\textsuperscript{99} Spade, supra note 10 at 232.
\textsuperscript{100} Ibid.
identities and practice, rendering visible for inclusion those who can be read as “fitting in”, hence those who would have been “normal”, i.e. those who “neatly fit” within other characteristics of the hegemons identity, such as class, race and ability. Indeed, as Dean Spade points out, “in the face of large scale social movements demanding change, governments have often created laws that declare equality or neutrality in order to quell dissent and maintain the status quo to the greatest extent possible,”\(^\text{101}\) thereby maintain hegemony itself.

Supposedly one must choose between these two strategies, the total liberal recognition strategy and the radical redistributive strategy, presuming that the two, like heteronormative sex/gender, are mutually exclusive. However, Fraser, perhaps in light of her debate with Butler, offers us an “in-between” way of thinking about what can be achieved by rights based litigation. Fraser puts forward the concept of looking at misrecognition as status subordination. Fraser suggest that what requires recognition is not a specific identity but the stands of group members as full partners in social interaction and calls for “examining institutionalized patterns of social value for their effects on relative standing of social actors.”\(^\text{102}\)

Following Fraser and Butler, I will argue, there is a possibility to integrate a significant part of the critique put forward by the radical analysis back into rights based litigation. Following Spade’s call “to stop believing what the law says about itself is true and what the law says about us is what matters”\(^\text{103}\), I will go beyond current critique to further examine the function of the legal categories that are used to protect against discrimination on the basis of gender variance, in order

\(^{101}\) Spade, supra note 85.
\(^{103}\) Spade, supra note 12.
to pin point their “intrasessional” relation to one another. Yet, instead of abandoning rights based litigation completely, I will argue that this existing and relatively accessible legal mechanism should be tactically used to demand more accountability from the law for the role it plays in creating and upholding the gender binary. For the demand that marginalized communities let go of their desire to be seen as equal is not politically viable and even runs the risk of imperialist tendencies. Answering the critics against the use of the existing legal categories by trans plaintiffs, Paisley Currah reminds us that non-trans people enjoy enormous privileges by having their gender recognized.104 Currah continues to explain how the anti-discrimination framework is one of the only ways available for minorities to demand resources and opportunities.105 Instead of a call to let go of desires, I borrow Eng’s reference to Spivak in the context of queer liberalism in Lawrence vs. Texas, claiming that rights based litigation is something that we “cannot not want”.106 I will therefore try to identify the ways the law is already being used to promote trans interests, aspiring to move away from looking at who the rights claimants are, to what they want and need. I will suggest that this move can open a space for discussion about the accountability of the law and the institutions it regulates, for the structural insecurities faced by marginalized groups. However, the fact that I am using the very categories that I critique in order to better account for the structural aspect of the inequalities is a challenge I can only partially address.

In order to formulate an alternative strategy for anti-discrimination litigation I will first turn to the source of the radical trans analysis, feminist and critical race theory critique of anti-discrimination laws, focusing of the problem of “coherent identity”. I will then look at the concept of

105 “Marriage Equality Symposium | Perspectives in Gender and Geography in the Marriage Debate - YouTube”, online: <https://www.youtube.com/watch?v=TpKa2opkWUc>.
106 Eng, supra note 44 at 605/3202.
“intersectionality” and how it relates to gender variant experience, accounting for what it lacks in that context. Finally, I will offer the concept of intrasectionality as a way of understanding the function of anti-discrimination prohibitions from a gender variant perspective, suggesting that intrasectionality enables the formulation of a broader distributive claim within the given legal framework.

9 ADL and Marginalized Communities- The Broken Promise for Equality

Anti-Discrimination laws have long been criticized for failing to deliver their egalitarian promise and create real change in the social status of those protected by them. Anti-discrimination laws have been criticized as a tool for social change for creating an image of equality that hides realities of disparities and their individual scope.107 Moreover, it is argued that rights based litigation hinders the structural distribution of life chances108 and because it relies on coherent identity claims that exclude heterogeneous or multilayered experiences, it often fails to serve the needs of individuals and groups whose identities and experiences reflect more than one category.109

To comprehend the faults of this legal framework, one needs to consider how it functions. ADL and rights based litigation at large, function through categories. When we look at ADL these categories take the form of protected classes. A Protected classes refers to a certain characteristic

that cannot be taken into account when making a decision in regard to an individual.\textsuperscript{110} The characteristics signified by the protected classes relate to different legal assumptions, that human experience can be divided into clearly distinguishable identities and experience, that these identities and experience can be divided into dichotomies (White/POC, Men/Women), and that these categories reflect mutually exclusive experiences.\textsuperscript{111} This framework relies on the perpetrator’s point of view. Classical ADL analysis compares how individuals belonging to mutually exclusive categories were treated by alleged perpetrators. That is, how a woman was treated differently from a man. This mode of ADL focuses on the perpetrator’s point of view. It examines whether the discriminator took into account a protected class characteristic (for example racial or gendered characteristic) when making a decision in regard to an individual belonging to a protected class. When the law is constructed through protected classes, an individual has the right that his/hers affiliation with a protected class will not be taken under consideration in decisions relating to him/her. Hence, the unlawful act requires the perpetrator to have identified a specific category, assuming that the perpetrator would treat all people within the category similarly.\textsuperscript{112} For example, when a claim of discrimination on the basis of sex arises, we first establish whether the perpetrator believed the victim to be a “woman” and then compare whether the “woman” was treated differently than a “man” would. This process would supposedly reveal whether the victim’s “sex” was taken into account. This structure of the law creates multiple problems when used to promote social justice, as its alleged purposes.

\textsuperscript{110}David Walsh, Employment law for human resource practice (Cengage Learning, 2012) at 65.
\textsuperscript{111}Typically, Anti-discrimination law evolves by adding new protected classes to its protection: that was the case when “sex” was added to the US civil rights act shortly after it was enacted; so was the case when the Supreme court of Canada in Egan v. Canada recognized that “sexual orientation” is implicitly part of the Canadian Charter of Human Rights; that was also the case when “gender identity” and “gender expression” were added as protected class to the Ontario Human rights code in 2012. This model of legal framework creates significant problems in respect to its purpose of ensuring equality for disadvantage groups and individuals.
\textsuperscript{112}Crenshaw, supra note 56 at 150.
Foremost, ADL creates the pretense of equality. It promises that once the law declared that a specific class is protected, all the people that are included in that class have equal access to resources and opportunities and when this order is broken, and only then, the law interferes and corrects the situation so it goes back to “equality”. Hence, ADL suggests that in the usual state of society everyone is equal, when in fact the disparities are still very much alive, this is crystal clear when considering the partial accesses to resources and opportunities of racialized, gender, disabled and other marginalized individuals.\textsuperscript{113}

Framing ADL using closed protected classes that reflect mutually exclusive categories reaffirms the pre-social, pre-legal, status of those categories, and hence reaffirms the social belief that there are essential general differences in abilities reflected in those dichotomies. For example, the category of “sex” prohibits to treat “women” differently than “men”, meaning it assumes that there exist pre-legal and pre-social differences in relevant characteristics between “men” and “women”, and only prohibits taking into account these alleged pre-legal and pre-social differences. These assumptions leave no space for a discussion of the social and legal process by which neutral characteristic, such as one’s chromosomes or bodily hair distribution, are given differential meaning and value.

The individual scope of ADL hinders the structural disparities and institutionalized exclusion from resources and opportunities. In the ADL framework, discrimination only results from an act or ominous of an individual and not a systematical harm.\textsuperscript{114} As though racism or sex inequalities are only about “bad people” who must be punished for their actions and not a part of

\textsuperscript{113} Spade, supra note 12 at 85.
\textsuperscript{114} Ibid at 84.
the elaborate layered system of distributing social goods. In fact, the perpetrator is not the problem but a symptom, whose behavior cannot be read fully without its affective relation to the accepted social norms of race or gender.\footnote{Freeman, supra note 107 at 1054.} Therefore category based claims struggle with bringing into the legal discourse the social system that attaches different values to socially neutral characteristic (such as chromosomes or skin pigments). Moreover, because ADL looks at isolated instances of harm, in that it applies to a specific perpetrator causing a specific harm to a specific victim, claims have much greater chance of being understood by tribunals when they are framed through such narrative. The claim has much greater chances of being recognized if it can be described as a single case of individual misbehavior. For this reason, successful ADL claims are commonly read separately from the systematical or structural exclusion that enabled them in the first place.\footnote{Eng, supra note 44 at 706/4611.}

The individualist framework of ADL also absorbs particularities and differences of identities and practices into a universalized normative model of good citizenship\footnote{Crenshaw, supra note 54 at 148–9.}. The use of protected classes requires that one would articulate their identity within that class, i.e., it demands coherence as the pre-condition for the claim. The more coherent your identity is, the more it fits neatly into one category that can be pointed out as the sole reason for discrimination, the greater your chances for a remedy. The legal demand for a “coherent identity” is inextricably linked to ADL claims as it comes from the need to belong to specific protected category concerning both gender and race. In cases of both gender and race claims, the tribunal first needs to decide whether the claimant does indeed belong to the protected category.\footnote{It is not uncommon for the court to make remarks the social situation of the protected class, but when it does so it is in order to justify the prosecution of that specific perpetrator. i.e., by applying the rule of ADL to the perpetrator, the court “fixes” the injustice that came to play in the specific case. The court is contributing to social equality by siding with the victim and not by addressing the sources or the mechanisms of that injustice.} Viewing those categories as
reflecting pre-legal objective truths, the tribunal reviews the claimants’ identity and experience as they correspond to the closed, all-encompassing set of identities and experiences that the legal category supposedly reflects. Any deviation from the imaginary concept of the law in regard to a certain category diminishes the tribunal’s capacity to recognize the harm.119 Hence, claimants are forced to reduce their lived experiences to those the tribunal can read, those who reflect only a superficial individual dimension of their exclusion, hindering major aspects of the experience and its causes.

Furthermore, as I will go on to elaborate in the analysis of the trans rights claimant, this coherence of identity is only achievable by the process of repetition of behaviors attributed to a certain identity. As such it is not an indication of some “inner truth” about ones belonging to a certain protected class but rather a presentation of an “inner truth” that constitutes belonging. The legal discourse in this framing is narrowed to developing compatibility with a specific category, much like the way trans health protocols forces trans people to articulate a specific story in order to get access to health care to begin with. This process contravenes the stated purposes of the legal and medical procedure because it forces patients/right claimants to tell the system what it wants to hear and not what is actually is going on, thus making it impossible for that system to be able to offer a “remedy,” as it is never addressing the problems themselves. Moreover, the perquisite of coherence reveals how ADL interlocks with self-discipline, further elaborating the connections between these allegedly independent form of governance and the law.120

119 Crenshaw, supra note 56 at 151–2.
120 Cossman, supra note 26 at 16.
The problem of coherence connects to my next argument, that ADL is most effective for otherwise privileged rights claimants, those who if not for one specific trait would likely not face other exclusion. That is, a decision not to hire an uneducated former sex-worker transsexual woman of color for a low wage job would probably be more difficult to frame as nothing more than transphobic decision, than the decision to dismiss a white transman software engineer that has undergone SGRP. It would undoubtedly be easier to make a claim for the software engineer without referring to the broader social system of exclusion, than to articulate within ADL the strategies a poor gender variant woman of color had to take in order to survive. This is because that system of legal categories included in ADL is focused on the individual, the one who was harmed and must belong to a protected category and the perpetrator who must identify that category. Accordingly, the tribunal’s task is to decide whether such relational identification occurred. Intrinsically, this is easier to conclude when all other factors that are not sex/gender, such as race, class and ability, do not come into play. Argo, ADL mainly serves those who otherwise would be considered to be good citizens, reflecting the characteristics the nation-state imagines its hegemonic self-disciplined citizen to portray.

ADL problems seem to be particularly acute with respect to gender variant rights claimants because of their multi-layered identities and practices leading them to face multiple intertwined

121 Also known as Sex reassignment surgery, gender reassignment surgery, sex affirmation surgery, gender confirmation surgery, sex realignment surgery, a sex change and other terms. Anyhow it refers to medical technologies sought by trans persons in respect to their gender identity and performance such as hormonal replacement therapy, genital reconstruction surgery, chest/breast surgeries and so on. Many of these surgeries are also performed on non-trans individuals for different reasons but they are only called GSRP when they are performed on trans persons. Thus, classifying these surgeries in this way is another manifestation of the ideological undertone of trans medical discourse.

122 This is the case in many other right claims, where lawyers are looking for a “good case”, which are actually cases that can be told in court without discussing the complex web of social policing that creates the different challenges people encounter when trying to access resources and opportunities.

123 Freeman, supra note 107.

124 Brenda Cossman, Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging (Stanford University Press, 2007) at 124, 175.

125 Valentine, supra note 25.
grounds for exclusion. As noted, if your identity and experience relate to more than one protected class they are less coherent and less likely to be red by tribunal. When one is understood as signifying more than one subordination, being both racialized and gendered, category based claims are less adequate. The gender variant perspective implies a need to re-conceptualize ADL in ways that go beyond protected classes. In the following section, in order to reflect the gender variant perspective, I will offer the hypothesis that gender variance is a form of “intrasectionality”, following Kimberlé Crenshaw’s work on intersectionality.

10 Intersectionality/Intrasectionality

The intersectional analysis put forward by Crenshaw is by now a cornerstone of both feminist and queer critique. Crenshaw has illuminated the law’s inability to reflect multilayered identities and experiences, due to the exclusive nature of the protected classes. In “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” Crenshaw coined the term “intersectionality”, describing the reality faced by people whose identities and experiences reflect more than one category. She points out that analyzing harm only as racist or gendered or economic creates inadequate understating of causes and solutions. Crenshaw looks at discrimination on the job market from the perspective of a non-trans black women. When that woman is discriminated against the harm occurs at the intersection of her perceived identities, as both a woman and a black person. Crenshaw uses the

126 Spade, supra note 12.
127 Crenshaw, supra note 56. Crenshaw, supra note 109.
128 Crenshaw, supra note 56.
129 Currah, Juang, & Minter, supra note 7 at 245.
130 As I will further elaborate in due course, analyzing instances of discrimination demands to look from the eyes of the perpetrator which have no “objective” knowledge of the victim’s racial or gendered “biology”, information which is also irrelevant because the reasoning of the harm is
analogy of a car crash. In an intersection traffic flows in all directions. A car accident can be a result of traffic going from east to west, from north to south or both. Likewise, discrimination against the black woman can flow from racist motives, sexist motives, or a combination of the both.\textsuperscript{131} The black woman’s experiences simultaneously arose from her being a black person and a woman.

Crenshaw argues that black women’s experiences of discrimination can be similar to those of white women or black men and can experience a unique combination of both subordinations. This analogy allows Crenshaw to point out the false neutrality of ADL protected classes and to demonstrate how they reflect only privileged members of said category. Because ADL structure through closed categories, such as race and gender, ADL are blind to experiences of intersectionality. While the protected classes are presented as objective they actually reflect the experiences of those that are only one degree of separation from total inclusion, those who possess only one characteristic that could be the cause for exclusion. In Crenshaw’s words “those who are privileged but for their racial or sexual characteristics”. The discrimination suffered by black women is broader than the legal categories discourse can express and this is why their needs are seldom addressed.\textsuperscript{132}

ADL does not only see the categories as constructed from mutually exclusive coherent classes, as I previously argued, they also understand the categories to be mutually exclusive in nature. When one is discriminated against for being black, one cannot also be discriminated against for being a woman because the law requires you to have a fixed coherent identity that can relate

\textsuperscript{131} Crenshaw, supra note 56 at 149.
\textsuperscript{132} Ibid at 149–150.
to a protected class. If you are both black and a woman it becomes unclear what stands at the root of the discrimination. Furthermore, the proclamation of abstract equality \(^{133}\) premised by the ADL scheme of mutual exclusivity \(^{134}\), forces the claimants to “pick as side”, to prefer one political position over the other. If one cannot be both black and a woman, one cannot be both feminist and anti-racist. What comes out is that through using ADL the black struggle becomes sexist, and the feminist struggle becomes racist. \(^{135}\) Crenshaw’s analysis urges us to broaden our critique of ADL and consider how the function of the categories in relation to one another further hinders the actual realities of marginalized communities within a hierarchal society. In fact, intersectional analysis is a critique of ADL single axis analysis and a call for a more complex reading of identities and practices subject to discrimination. The intersectional analysis \(^{136}\), empowers us to better account for experiences of multilayered identities and practices and enables us to bring to the fore elements of exclusion ADL struggles to express.

Nonetheless, intersectionality has been criticized for its heavy reliance on assumed inherent distinctions between the categories themselves, \(^{137}\) and specifically the categories “sex” and “gender”. \(^{138}\) From a deconstructionist point of view, Crenshaw’s intersectional analysis has been criticized for its reliance on categories themselves, arguing that categories cannot produce anything but “simplifying social fictions that produce inequalities in the process of producing differences.” \(^{139}\) This position would claim that categories are the product of discourse that creates categorical truth and not the other way around. \(^{140}\) A more pragmatic strain of critique argues that

\(^{133}\) Eng, supra note 44 at 1801/4611.  
\(^{134}\) i.e., that one cannot be both black and a woman,  
\(^{135}\) Crenshaw, supra note 109.  
\(^{137}\) McCall, supra note 76.  
\(^{138}\) Valentine, supra note 25.  
\(^{139}\) McCall, supra note 75 at 1773.  
\(^{140}\) Ibid at 1777.
Crenshaw’s intersectionality focuses on the complexity of relations among different groups and not the complexities within a single group, single category or both.\footnote{Ibid at 1786.} This critique goes on to claim that the “inter” focus of intersectionality does not allow representation of diversity and heterogeneity of experience to be represented fully.\footnote{Ibid at 1783.} Specifically looking at sex, gender and sexuality, Valentine suggest the intriguing idea that “age, race, class, and so on don’t merely inflect or intersect with those experiences we call gender and sexuality but rather shift the very boundaries of what “gender” and “sexuality” can mean in a particular context.”\footnote{Valentine, supra note 39 at 100.}

Following Valentine, I will suggest that a gender variant perspective on law demands an “intrasectional” analysis of the relevant protected classes. That is, I will apply the intersectional analysis to the protected classes themselves. I suggest that gender variance is a form of “intrasectionality” because theoretically and practically it is almost impossible to distinguish whether discrimination is a result of one’s perceived sex, sexual orientation or gender expression, or perhaps is a mixture of all of the above. Moreover, I argue that what constitutes the modes by which one is prescribed to belong to a specific sex, gender or sexual orientation, cannot be read separately from one’s race, class, and ability and so on.\footnote{Necessarily race, class, ability and other categories of subordination have also intrasectional dimensions. I partially explore these other dimensions in chapter 3.}

I will also argue, that having to “pick sides” whether inside the category, between “woman” and “man,” or outside between “gay” and “trans, presumes a correlation of identification that is not neutral but is reflects social borders of right and wrong practices and modes of being that connects to the ideology of heteronormativity. In order to understand the intrasectionality of
gender I analyze the facts of Lilach’s case with which I opened this chapter. Following the analysis I argue that the gender variant experiences of marginalization stem from existing outside of the structure of coherent identities, that they challenge the organizing principle of social and legal order based mutually exclusive categories by occupying “in-between” spaces. Thus, in order to accommodate their interest we need to look for the “in-between” spaces of the relevant protected classes, their inner connection to one another. In order to do so I will look at the protected classes that might be used in reference to gender variant people’s “sex”, “sexual orientation”, “gender identity” and “gender expression” to find that they are all heavily shaped by gender presentation. I will then discuss the effects of presentation on ADL to suggest that by understanding it we might be able to articulate an ADL claim that opens space for discussion of systematic exclusion.

11 Sex Discrimination and Gender Variance- Lilach’s “Funny” Femininity

When Lilach came before the tribunal she claimed she was discriminated against because of her gender identity and that this constituted discrimination on the basis of sex. Alternatively, she claimed that she was discriminated against on the basis of sexual orientation. Remembering that her employers referred to her femininity as “funny”, I wonder what factors (be they thoughts, beliefs, feelings or actual events) constituted what Lilach later termed as discrimination? How do they connect to her gender identity, to her sex, and to her sexual orientation? To answer these

145 I am not implying that trans people are more in-between gender than anybody else or that their identities are more or less stable than non-trans people and certainly I am not suggesting that trans people are less men or women than non-trans people. What I am saying is that in the close system of protected classes the reflect narrow understanding of sexed and gendered identities and practices, trans people full “in-between” because they do not follow the holy trinity of correlated sex, gender and sexuality.
questions we will first look at how ADL works in regard to a “simple”, classical case of
discrimination on the basis of sex and then think to what extent Lilach’s claim differs from it
(spoiler alert: not that much! but it is all a matter of perspective).

Let us consider a case in which a non-trans heterosexual woman is fired due to her being
a “woman”, and the tribunal rules this to be unlawful discrimination. The tribunal’s recognition of
discrimination against the woman is premised on the recognition that dismissal on the grounds of
woman-ness is a violation of the prohibition against discrimination the basis of sex. In other words,
according to the prohibition to discriminate on the basis of sex, the fact of a claimant being a
woman is an irrelevant characteristic the employer unlawfully took into account while making the
decision to fire the claimant. Yet, what actually happened in this scenario? How did the perpetrator,
from his/her point of view, identify the claimant as a woman? I will argue that from the
perpetrator’s point of view all that can be recognized is the claimant’s performance of gender.
Based on gender signifiers, the perpetrator deduces that the subject is a woman and that her gender
performance reflects a biological sex. Hence, the woman was not discriminated against because of
“sex” but because of her gender performance.

The subject – the woman discriminated against – perpetually generates her identity by
marking herself as a woman in speech, dress, style of hair and other signifiers. These external
markings are the only signifiers available to the perpetrator. In practice, the perpetrator only
observes the performance of femininity, which is in effect – to paraphrase Judith Butler – a
performance of a performance, since the perpetrator cannot detect the biology or ontology of the

146 Judith Butler, “Imitation and Gender Insubordination1” (2006) 1 Cult Theory Pop Cult Read 255.
subject's sex separately from the markings offered by the performance itself. Under these conditions, sex is denied an existence independent from the signifiers of gender performance. The woman who is the subject of discrimination does not inhabit her femininity as a role, but continuously constitutes "femininity" by repeatedly imitating it as a gender identity. The tribunal, however, is limited in its ability to bring this dynamic to bear in its legal considerations. The inability of the juridical system to recognize discrimination on grounds of sex as amounting to discrimination on grounds of gender performance is evidence of its disregard of gender performances as the epistemological basis for the category of sex itself. In other words, an intrasectional look inside the sex category finds gender presentation at its core, inhabiting the space between the legally recognizable man and the legally recognizable woman.

Using the lens of drag, Butler’s own paragon of gender performativity, to return to Lilach’s case, can enable us to go on and make the claim that sex discrimination is about gender performance. Exposing the fallacy of the social deduction of an ontological body onto which we project the performative meanings of gender, Butler looks at the drag queen’s show, as a scene where the imitation of gender is openly revealed. When one looks at the drag queen’s show one looks at a biological male preforming as a woman. The difference between the drag show and everyday gender performances, for example seeing a woman walking down the street, lies in this extra knowledge one has: that the drag queen’s biological sex and gender performance do not correlate. Yet, in everyday life we do not know whether the woman in the street is female or

---

148 Butler has been heavily criticized for using drag and trans people more broadly metaphorically and not accounting for the actual materiality of their bodies and lives (see for example: Namaste, supra note 8. Butler herself has integrated this critiques in later works such as: Judith Butler, “Doing justice to someone: Sex reassignment and allegories of transsexuality” (2001) 7:4 GLQ J Lesbian Gay Stud 621. More importantly Butler’s work has enabled numerous articulations of trans subjectivity. Building on the critiques and yet inspired by the work, I will take Butler’s drag analogy back from the realm of abstract theory to use it to describe legal proceedings regarding an actual transwoman’s story of exclusion.
149 Butler, supra note 30 at 175.
not, we just deduce that from external signifiers of femininity. Butler argues the drag queen does not imitate femininity but she imitates an imitation of femininity performed by women in everyday life. Drag is not a gender performance of biological sex, rather it is a performance of a performance. However, there is no other authentic performance, whether in drag or in everyday life. When we walk down the street we do not stop and check the chromosomes of people we see, we note their gender signifiers, their speech, dress, style of hair and other measures, and deduce they are women or men. These signifiers are constituted by behaviors we imitate repeatedly, it is the imitation that make them coherent, i.e. readable from the outside as an identity. However, this signifier is all we can note. We have no proof of the existence of such a thing as “biological sex” outside gender presentation. Hence, there is no independent meaning to “sex” outside gender performance. We are always looking at an imitation of an imitation, and this constant imitation is what constitutes “sex” as ontological.

Lilach’s case and cases like it reveal to the tribunal the “truth” that drag shows expose, by forcing the tribunal to analyze a case where the imitation is apparent. Due to the framework of ADL, when the tribunal faces charges of discrimination, it must first shift its perspective outside, to locate the subjective point of view of the perpetrator and from there judge whether or not a distinction was made, and if so, whether this was made on the basis of a relevant difference. When Lilach brought her case before the tribunal she claimed she was a victim of discrimination on the basis of sex. Ostensibly, the tribunal needs to decide whether Lilach is a woman who has been

150 Ibid at 174.
151 Ibid at 180.
152 It should be noted that Butler clarifies that even though gender is performativity it does not mean it is a role one can take on at any point. Behind the imitation there is no free willed subject, but rather what makes you a subject is your ability to have coherent performance, accessible only through the imitation process.
153 Butler, supra note 30 at 178.
treated differently than a man, but actually it is her womanhood that is contested by the perpetrator, her “in-betweeness” is what stands before the tribunal. In order to decide whether or not her claim holds, the tribunal needed to differentiate between dismissals because one is a transwoman and dismissal because one is a non-trans woman. The difference is that in the case of the transwoman the perpetrator knows that her gender performance is an imitation without a “biological truth” behind it. The transwoman is discriminated against exactly when the perpetrator encounters her “fakeness”, i.e., that there is no correlation between her sex and gender presentation. For example, in Lilach’s case it is possible to “pinpoint” the negative animus that grew out of Lilach’s presentation because Lilach’s employers stated that they knew she was a transwoman but felt her femininity was “funny”. Thus, the discriminated transwoman, like the drag queen, reveals the falseness of the sex category because she fits the same prerequisite of her anatomy not correlating to her gender presentation. The transwoman’s failure of coherence in presentation is at the basis of her discrimination, thus proving that there is no “authentic” core to the legally protected class besides the repetitive imitation of gender signifiers. Yet, this is not only true to the transwoman, she is not more “fake” than the non-trans woman, she does not engage in imitation any more than the non-trans woman. Thus, her claim exposes the significant role gender performance plays in the ADL protected category of “sex”. Lilach’s claim exists in-between the legally protected classes and thus facilitates an intrasectional look inside the protected class itself, not only exposing the false premise of the dichotomy but also revealing the space in between the mutually exclusive

---

154 In Lilach’s case he knew because she was in transition, in other cases this knowledge can come from failing to pass properly or from coming out as trans or from your identification documents or from someone who used to know in the pass, ext. In any case gender variance people are discriminated against when the perpetrator knows they are gender variant, otherwise they could not have been discriminated on these grounds. 155 Yet, although clear negative animus is often present in gender variance discrimination, it is not necessary in order to claim that one has been treated differently because of their gender insubordination. Both under Canadian law and Israeli law, which will be discussed further, negative animus is not a necessary condition in discrimination claims. It is necessary to claim that the perpetrator knew the victim is gender variant, for it is not possible to claim one was discriminated without such knowledge.
categories as holding gender performativity.

In summary, from the perpetrator’s point view one can only comprehend gender presentation\(^{156}\) and it is in fact the presentation that motivates the perpetrator’s decision making process. However, this presentation is not evident to any pre-legal, pre-social inner truth about one’s “sex”, it is the presentation that constitutes the ontological status of the protected class of sex. Hence, when the law prohibits discrimination on the basis of sex it prohibits discrimination on the basis of presentation. In practice, a non-trans heterosexual feminine women can be discriminated against because her womanhood is understood as signifying and reaffirming the hierarchy that produces her subordination. Likewise, gender variant people might be discriminated against because they fail\(^{157}\) to signify their participation in this social system.

Therefore, I argue that discrimination on the basis of sex, specifically when directed at gender variant but also when directed at non-trans individuals, is discrimination on the basis of gender presentation. As follow from this, the basis for comparison in sex discrimination should shift. In addition to considering whether a woman is treated differently than a man, we should also consider whether an individual was treated differently than someone whose gender presentation is coherent. Let us keep in mind that coherent gender presentation connects to proper citizenship, hence coherent gender presentation is not only about being perceived as masculine/heterosexual/male/men but also white, middle class and able-bodied. It should also be noted that the non-trans heterosexual feminine woman might also be considered as not having

\(^{156}\) In a classic sex discrimination event, the perpetrator sees a women and discriminates against her. But the perpetrator never sees her “sex”, may it be birth assigned sex or social gender, what s/he can spot is her presentation, the way she dresses, acts and behaves. The perpetrator concludes from her presentation of gender that she is a woman and was assigned as female at birth, s/he never checks “what she has in her pants” before making this judgment, not to mention s/he can never see her chromosomes.

\(^{157}\) Intentionally or not.
coherent gender when her acts or omissions deviate from her social role as subordinated to men, for example, when she tries to cross the occupational segregation walls.\textsuperscript{158}

Yet, I will argue that presentation is not only at the core of discrimination on the basis of sex. Trans and gender variant individuals use a variety of protected classes to make their claims not just “sex”. Lilach herself argued that her discrimination was also discrimination on the basis of sexual orientation. Moreover, as a result of a decade of trans liberal advocacy, in Ontario and other jurisdictions worldwide, we now have protected classes designed for trans people specifically, such as gender expression and identity. I argue that all these different protected classes can also be understood through the lens of presentation. I will also argue that the using presentation could have a disturbing impact to the protected classes’ coercive power over heterogeneous experiences of identity and practices.

\section{12 Other Dissenters of the Holy Trinity}

Looking at the list of protected classes in the Ontario human rights code or the American ENDA proposition or the Israeli proposition for amendment of the Israeli interpretation statute,\textsuperscript{159} one can easily see how they reflect categories of identity. “Sexual orientation” is designated for gays and lesbians, “gender identity” and “gender expression” for transgender people. These categories represent deviations from the “holy trinity” of normative sex/gender/sexuality. An intrasectional look inside these protected would reveal that in the spaces between the mutually exclusive

\textsuperscript{158} And of course men are also subjected to their own forms of gender policing!
\textsuperscript{159} All refer to “sex” and “sexual orientation” and “gender identity” and “gender expression”
categories that make them, gender presentation is abundant. This is why, I will argue, it is almost impossible to know whether one’s motives for discrimination were homophobic, transphobic or sexist. Any deviation from the “holy trinity” makes one less of a subject, and the di-subjecting is the privatized embodiment of the social mechanism of exclusion that fuels discrimination. Moreover, these deviations are often not straightforward at all but rather queerly combine different aspects of sex/gender practices and identities shaped by other dimensions of subordination such as race, class and ability. This leads me to question that very need for these different protected classes, and to ask how could we better use them to promote marginalized interests?

Closed identity categories are a threat for heterogeneous experiences of identity and practices, as they pose coercive power over the imagined community they represent. Functioning as a “straitening device”, identity categories conceal intragroup power relations and social stratification. Their universalizing trait renders invisible the needs and struggles of those at the margins of the intragroup hegemony, which are usually parallel to general social hegemony. That is, the interests of those in the group who are in line with social hegemony (in everything but the characteristic that makes them part of the group), take up a disproportionate part of the agenda. These concerns grow when we consider that other members of the group face far more complicated mechanisms of expulsion because of their intersectionality. Furthermore, the ones who are the hegemonic members of the protected class of sexual orientation and gender identity and expression are precisely those who follow or can articulate their demands in accordance with the normative model of genders. Their claims for inclusion do not question the social system of stratification that

161 E.g., while trans advocates in Israel joined the global movement and worked to remove trans identities and practices from psychiatric diagnostic manuals, little attention was given to the fact that those diagnosis allow trans people with no accesses to the job market due to transphobia to claim social security money for mental disability.
facilitates the exclusion. Typically, they ask for inclusion within that system based on their sameness. Yet, they are the ones best fit to bring forward a sameness claim, because their identities and practices coincide with hegemonic experiences.

However, even though they are highly problematic, I am not arguing that one should not use the sex/gender/sexuality protected classes, but that one should understand them as reflecting presentation and bring forward demands that recognize this function of ADL. An intrasectional look inside these sub categories would reveal that presentation plays a major role in how they are translated into ADL. In the following section I will argue that all these different protected classes can be understood as demanding the tribunal to compare the treatment the victim received to that given to someone whose presentation is coherent to the socially accepted norms of good sexual/gendered citizenship.

12.1 Gender Identity and Gender Expression- Thank You for Admitting We Exist

There is no need to discuss at length how “gender identity” and even more so “gender expression” relate directly to gender presentation. The above analysis of “sex” as protected class applies to these protected classes as well. From the perpetrator’s point of view, your gender identity can only be read through your gender presentation. Gender expression as a protected category refers directly to gender presentation. Therefore the proposed shift in the basis of comparison is relevant to these protected classes as well, because when determining whether the perpetrator discriminated against an individual for their gender identity or expression, we consider whether an individual was treated
differently than someone whose presentation is coherent.

Moreover, considering that everybody has a gender identity and everybody expresses their gender, it seems that these categories should not apply just to trans people. Their existence indicates that previously the law refused to recognize gender variance discrimination, claiming that it cannot be articulated within existing protected classes. That is, the existence of gender identity and expression as distinct protected classes reflects an assumption that “sex” as a protected class only refers to “real” women, revealing that sex discrimination only applies to the allegedly ontological differences between feminine/female/women and masculine/male/men. Lacking the ability to read gender variance into the protected class of “sex” testifies to the ideological framework concealed in the legal “sex” category and to the tribunal’s role in upholding the borders of gender. From this perspective the enactment of the protected classes of “gender identity” and “gender expression” does not address the hierarchal social system of gender but collaborates to it, upholding an ontological difference between gender variant people and everybody else.

However, gender expression and identity, as protected classes, can be used to promote a more structural discussion when they are understood in relation to gender performativity. A plaintiff, trans or non-trans, can use these categories to claim s/he were discriminated against based on their gender presentation, i.e., their dress, speech, manners and other gender signifiers. That is, the plaintiff can argue that s/he was treated differently than a person whose gender is coherent to the social norms. In this way the plaintiff would need less to “prove” that they belong into a certain category but would focus on exposing the privileges granted to those whose gender presentation coheres to the social norms, promoting a legal debate on how those social norms structure hierarchies of normativity and how this normativity is reflected in the labor force.
12.2 Sexual Orientation- Are You a Boy, a Girl or a Faggot?

Lilach did not claim she was discriminated against based on her sexual orientation by mistake, she claimed it because the lines between sexual and gender deviation and between sex and gender, are blurry. Practices that constitute both deviations are connected to performativity in a broader sense; one that accounts for how normative heterosexual coherence is constituted. Moreover, these categories are intertwined in reality. I argue that sexual orientation is a form of gender variance precisely because gender variance is inextricably connected to sexuality. Intrasectional analysis of sexual orientation as a protected category can suggest an inner connection between the protected classes that make up the “holy trinity” and the “in-between” spaces of presentation they share, allowing us to conceptualize the uses of a discrimination claim on the basis of presentation, and to imagine who we might find in the “in-betweens”.

Prohibition of discrimination on the basis of sexual orientation is supposed to protect gay, lesbians and bisexuals from discrimination on the basis of their different sexuality, i.e., they should not be discriminated against on account of who they chose to have sex with. Much like the perpetrator in the case of the transwoman, the perpetrator here never sees the victims have sex in order to identify that the victim is engaging in non-heterosexual sex. The perpetrator sees “something” that is a proxy for the victims sexuality, yet what is that something? Much like in the previous discussion, a significant part of the knowledge the perpetrator has over the victim is

162 I cannot think of any trans person who was not a part of LGB community or had not engaged in what would seem, from a heterosexual point of view, as non-heterosexual sexuality in their lifetimes, I highly doubt this is even possible. The new generation of gender independent kids who get access to hormone replacement therapy which enables them to go through one puberty (as opposed to trans people who transition post puberty) might prove me wrong. In fact, these kids, if they wish for, could easily be post-trans, because they would never transition and have fewer “life stops” than people transitioning as adults.
deduced from the victim’s presentation.

Here, like in regard to trans people, performativity is a broad term. It can consist of feminine or masculine behaviors that indicate non-heterosexuality. Yet, this is not all that constitutes performativity. When Butler talks about gender performativity in “Imitation” she is not yet considering trans identities and practices but actually talking about gay identities. Butler’s claim is that heterosexuality is compulsory in that it forces the subject to participate in an endless cycle of repetition of the heterosexual norms as a precondition for coherence that constitutes the subject, and that gay identities are also formed in relation to that imitation mechanism that creates gender presentation.

In this context, as noted before, although Butler talks directly about “bodily gestures, movements, and styles of various kinds”, from her own description of the repetitive gender act, it is clear that all actions that signify one as having a coherent identity constitute presentation. That goes for a man acting out his heterosexuality by making sexist jokes at lunchtime. Alternatively “coming out” to colleagues or having their gayness revealed by rumors or social media, can be considered as acts that constitute your gender as incoherent.

Returning to ADL, when the perpetrator makes unlawful decisions based on someone’s sexual orientation, it is likely that they discriminate against them based on their presentation. The perpetrator can “use” the information transmitted through the gender signifiers to deduce that the victim is gay and based on this assumption the perpetrator discriminates on the basis of sexual

---

163 Butler, supra note 146.
orientation. Moreover, LGB subjects are discriminated against because their sexuality deviates from the socially accepted norms of sex/gender/sexuality, meaning that they do not conform to one (or more) piece of the heteronormative puzzle of masculine/male/man sexuality attracted to feminine/female/woman. For example, calling someone a “faggot” or asking someone if they are “a boy or a girl” both aim to signify that one has trespassed the borders of sex/gender/sexuality.

The LGB individual insubordination is revealed by their “failed” imitation, for example when the butch lesbian wears “masculine” attire or when instead of bringing ones wife to the office party the gay man brings his partner. Hence, when LGB subjects are discriminated against for their sexual orientation their exclusion can be understood as related to their gender performativity, in its broader sense. That is not to say that discrimination could not be based on actual aversion/disgust/abjection with the idea of gay sex, but that the fantasy of gay sex and the reality of performativity might not always be so easily separable. Therefore, like “sex”, when considering discrimination on the basis of sexual orientation, we do not simply try to decide whether a gay man was treated differently than a straight man, but we are also deciding whether an individual was treated differently than someone whose gender presentation is coherent.

13 Shifting the Basis of Comparison

I have argued that ADL protection of sex, sexual orientation, gender identity and expression can all be better understood through the idea of performativity. Subsequently, I argued that the residue of gender performativity is present in the in-between spaces of the mutually exclusive categories

164 Butler would note that since the imitation has no origin the concept of failing to imitate is contested by itself.
that comprise the protected classes. Now I will address the possibilities this analysis opens up. These possibilities cannot answer all the concerns around the use of ADL that the transgender movement is debating, but they might open up a small “in-between” space that can harness the ever growing use of ADL by trans people (as well as other LGB individuals and organizations) to serve the interests of marginalized individuals.

The division into the sub categories of gender/sex/sexuality itself enforces the claim that the characteristic represented in the protected class is exclusive and that they not inextricably connected, creating and promoting the illusion that sex, gender and sexuality have nothing to do with each other. The normative model of sex, and gender and sexuality this axiom sets forth, allows access to legal protection only to those who can articulate their identities and experiences within these models. Protection based on your gender identity is easily available to a person who has received recognition of his/her gender insubordination\textsuperscript{165} by medical institution, i.e., was diagnosed with gender dysphoria, a recognition that is granted by expressing “fierce and consistent desire” for gender normativity. A white educated transman working as an software engineer at IBM and immersed in “proper” discourses of transitioning as a way of reintegrate into society with his “true” self and supported by his longtime female identified partner, most likely will find a sympathetic ear in tribunal in case of unlawful dismissal. That is because his identity can be perceived as coherent, in line with the laws conception of sex/gender, appearing as neutral characteristic and not as signifiers of the mechanism of social stratification.

On the other hand, the chances are lower for getting legal protection against an unlawful

\textsuperscript{165} To the gender role attached to his/her birth assigned sex
dismissal from a law paying job of a non-passing black gender variant woman who identifies occasionally as trans and occasionally as gay, who has no education or capital due to lack of family support and has a history of sex work. In fact, her chances of accessing the law to begin with are much smaller, not to mention getting legal representation or having time and money to peruse legal action. Yet, even if her case would end up in tribunal it would be challenged by her apparent lack of coherence. For example, her employer might, as in Lilach’s case, claim that she “scares the costumers” making the decision to let her go appear reasonable. Moreover, this woman would have to frame her claim as either arising from her “sex”, “gender identity”, “gender expression” or “sexual orientation” when in fact all these categories collapse into each other in her lived experience and are shaped by her affective history of race and class, more than they are informed by academic or medical discourse.

In both cases, when we take a deeper look, questioning the artificial boundaries between sex, gender and sexuality and consider them as complementary components of the dominant heterosexual norms, one cannot be sure what went on inside the perpetrator’s mind, what sort of information propelled his decision? How can we know what kind of trespassing the borders of gender/sex/sexuality is visible to the perpetuator, which s/he then unlawfully considered in his/hers decision? Does s/he consider the transwoman to be a non-masculine man? A homosexual? A non-feminine woman? A transsexual? Is she discriminated against because of her sex? Her gender? Her gender presentation? Her sexual orientation? Does her class or race impact how the perpetrator perceives her presentation? There is actually no way to answer these questions, precisely because coherent gender presentation must always reflect a heterosexual correlation between sex, gender
and gender presentation of an hegemonic member of society, thus deviation from coherence can reflect any deviation from any of these categories.

As I have suggested earlier in the context of gender identity and expression, shifting the basis of comparison by understanding the role performativity comes into play in discrimination could facilitate an expansion of the legal discussion. Instead of comparing between man/woman straight/gay trans/non-trans, the tribunal would compare between the victim and someone whose gender presentation is coherent. Remember, the non-trans heterosexual feminine woman might also be considered as not having coherent gender when her acts or omissions deviate from her social role as subordinated to men. Likewise, gender variant people, trans, gays, lesbians and bisexuals might be considered as not having coherent gender when the fail to signify their participation in this social system of normative sex/gender/sexuality. Hence, by allowing the shift in articulating legal claims, referring to the presentational dimensions of the discrimination, the tribunal, in its search for the perpetrator point of view, would not be troubled by the coherence of the victim but would have to evaluate the privileges that come from having coherent gender presentation.

The current inability of the law and juridical system to recognize discrimination on grounds of sex, sexual orientation, gender identity and expression as amounting to discrimination on grounds of gender performance is evidence of the disregard of gender performances as the epistemological basis of the categories themselves. That is, in the current legal situation, tribunals are searching to uncover whether the victim was read by the perpetrator as belonging to a protected

166 We can consider how different culture presentations might also be read by the white western subject as less or more famine or masculine, when s/he considers them through his/her single culture imagination of the world. However this is beyond the scope of this thesis
class by virtue of the victim’s coherent identity. Instead I suggest that it is the lack of coherence that should be the starting point, leaving the tribunal free to search for and discover the social norms the perpetrator had in mind.

That said, this formulation too has its limits because it is still set inside an individualist framework, not allowing direct discourse about systematic disparities. However, it does allow us to use the available tools of ADL to have a legal discussion that does not revolve solely around the identity and practices of the victim, but focuses on the social norms, i.e., the social ideologies of hierarchical distribution of resources and opportunities that created their exclusion in the first place. This rephrasing of the legal analytical tools of ADL seems to be particularly acute with respect to gender variant rights claimants because they have multi-layered identities and practices\(^{167}\) and thus face multiple intertwined grounds for exclusion.\(^ {168}\)

By placing the heteronormative norms of good citizenship in the center of the legal debate, the law might move away from its fixation on coherence as the only framework from which claims can be understood. This would not only allow more claims to be made, it would facilitate a broader systematical discussion within the framework of ADL. I am not suggesting that shifting the basis of compression would alleviate the economical and other obstructions that are negatively impacting the ability of marginalized gender variant individuals to make legal claims.

Instead, I suggest that rephrasing legal demands is a way to promote a legal discussion about systemic aspects of their exclusion, in hopes of utilizing individual claims to promote the

---

167 Valentine, \textit{supra} note 25.
168 Spade, \textit{supra} note 12.
interests of a wider and more heterogeneous group of gender variants. In the following chapter I will apply this understanding of the function of ADL to actual cases dealing with discrimination of gender variant individual, in order to understand how the law works in practice, as opposed to how it could potentially work. In chapter three I will apply my theory of gender variant perspective on legal categories, i.e. how the law works through coherence and presentation, to the case of discrimination of Mizrahi-Jews in Israel, looking to see if a broader claim about ADL can be made from the gender variant perspective.
Chapter 2
Winds of Change? Canadian and Israeli Case Analysis

1 Opening Comments

This chapter will provide critical legal analysis of cases where trans persons claimed to have been discriminated against because they are trans. This analysis will use the framework of chapter one to try and map the ways in which tribunals construct the trans subject and the protected classes through ADL. I will try to understand what role performance plays in trans right claims, specifically in judicial reasoning of decision. I will specifically look for traces of the complex value system of sex/gender which categorizes all of us at birth and follows us throughout life. I will look for places where trans identities and gender identities are essentialized, by portraying the trans experience as moving from one distinct pole to another, as moving from one gender to the other.

I have picked a heterogeneous body of law, from Canada and Israel, in a time spam ranging from 15 years ago to current year, all cases are post the rise of the transgender political movement. My goal is to use this body of law to follow the very recent shift in legal discourse that implements ideas of trans “inclusion”, based in the reasoning of “sameness” despite a specific inherent characteristic. Due to the limits of what is possible in this thesis, my review of the body of law of trans rights claims would be partial. The legal review is not meant to portray a full picture, but
rather to expose some recurring themes, and to analyze them in light of the gender variance legal and performative lens this thesis sets forth.169

My hypothesis, as follows from chapter one, is that by assigning trans persons rights based on a closed system of exclusive categories which are allegedly pre-social, and correlate to essential and inherent characteristic that account for differences in practices and abilities, the legal system ensures that these rights constitute an effort to take part in the socially accepted order of sex/gender. The legal discourse today has not accounted for the ways in which performance constructs these allegedly per-legal/pre-social “truths” the law relies on, even though trans rights claims are inextricably linked to gender performance.

Tracing the link between medical and legal discourses and using Oren Gozlan’s psychoanalytical framing of the “hallucination of gender certainty,” I will try to stress the ideological investments which make it difficult for the law to account for performance. In order to understand how tribunals see trans right claims, one must understand the link between law and medicine in relation to trans subjectivity. The law uses medical understandings of the phenomena as an objective set of criteria. Yet, the complex relationship between the medical institutions and trans persons is far from being neutral.

The medical institutions have a history of pathologizing trans persons, and serving as “gatekeepers” to trans persons’ demands to access medical technologies, in a quest to “make sure” only

169 I have chosen four Canadian cases from the beginning of the 2000’s till very recently. I have picked one case in every year that talks directly about trans persons and discrimination on the basis of their trans-ness (that is protected under the “sex” category at the beginning or “gender identity” in more recent cases). The cases I have picked, except for the most recent case, are well cited cases that seem to reflect major milestones in Canadian trans legal struggle. I have also deliberately picked cases from different jurisdictions, both territorial and subject-matter. In respect to Israeli cases, I have reviewed the only two major milestone decisions given so far as well as Lilach’s case.
“real” trans persons, that is, trans persons who could successfully be “real” men/women would have such access. Quickly going over the history of trans pathology, I will suggest that medical understanding of trans persons, in spite of great progress, keeps seeing the experience of dysphoria and distress as merely the result of a subjective individual’s discrepancy of sex and gender, detached from the effects of the social punishments imposed daily on trans persons because of their insubordination, deliberate or not, undermining the social prohibition on crossing the borders of sex/gender/sexuality.

Using the critique of medical discourse, I will show how the legal discourse, focusing on the inner truth of being trans, disregards the ways social value is attached to different configuration of sex/gender coherence, and continues to construct sex/gender certainty even in light of the instability put forward by trans rights claims. Where possible, I will offer alternative interpretation to the narrative of the legal cases that accounts for the role performance played in the harm suffered.

2 The Medical Institutions and Trans Subjects

Gender Variance has a history of medical pathologization, going alongside the history of modern medicalization of sexual behavior, described in Foucault’s work on the history of sexuality. As discussed in chapter one, gender and sexual variance were closely knit together in the medical discourse of deviance. Foucault describes western culture’s move into policing of gender and sexuality through discourse, where a social norm of the heterosexual couple was installed as the only model of sexuality. Heterosexuality is reserved by definition to does who belong to one of the mutually exclusive gender categories. The deviant was someone who did not act according to
that paradigm, and the deviant’s existence was a matter of public and medical debate. The focus on few “celebrity” deviants was instrumental in creating the illusion that variance is very rare.\textsuperscript{170} Homosexuality was seen as “gender inversion”, where only masculine lesbians were considered to be “true” lesbians and only feminine gay men were considered as “true” homosexuals.\textsuperscript{171} As part of the rise of the modern gay rights movement\textsuperscript{172} in the mid-20th century, a new model of homosexuality was endorsed, a gender normative model of homosexuality that focuses purely on same-sex desire, in which homosexuals are non-trans men who are attracted to other non-trans men and lesbians are non-trans women who are attracted to other non-trans women.\textsuperscript{173}

The creation of a “dichotomous system of classification based on sexual object of choice rather than gender status”\textsuperscript{174} stood in center of the new “gender normative” gay identity. As I suggested in chapter one, it seems that the gays have outsourced the “deviant” part of their identity to the “newly”\textsuperscript{175} emerging category (at that time) of transsexuals.\textsuperscript{176} This is evident in the fact that at the same moment homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders (DSM) of the American Psychiatric Association, transsexuality was first listed

\begin{flushleft}
\textsuperscript{170} Pat Califia, \textit{Sex Changes: The Politics of Transgenderism} (San Francisco, Calif: Cleis Pr, 1997) at 12.
\textsuperscript{171} Minter Price, \textit{supra} note 38 at 145.
\textsuperscript{172} This movement is historically considered to have started in the USA and later exported to other parts of western world and its ideas have shaped the global identity of gayness.
\textsuperscript{173} Minter Price, \textit{supra} note 38 at 147. Interestingly Price minter brings forward evidence of gender and sexual plural culture prior to Stonewall that flourished in working class African-American and immigrants communities in New York. In the culture, sexual and gender variance was part of everyday life and was not based on same-sex desire but on one’s gender presentation.
\textsuperscript{175} As Price Minter (\textit{Minter Price, supra} note 38.) describes, gender variance was always a part of the “deviant” identity and it is not new at all, what is new is the gay “gender normative” model separating from the community and thus leaving behind anybody who was not able to fit in that new model, that group of gender variance people later emerged with their own claims, but there is nothing new about them.
\textsuperscript{176} Crenshaw (\textit{Crenshaw, supra} note 56.) describes how white women gained accesses to white male spheres, such as the job market, not by bringing about “a fundamental reordering of male versus female work, but in large part by shifting their “female” responsibilities to poor minority women”. This description echoes the move of gay white men, who, in order to be normative, and thus be considered as subjects, have separated themselves from gender variance, shifting the “inversion” to them. Also, continuing Valentine this might be the process of privileged middle class Transgender claims for inclusion, based on coherent normative identity, as opposed to less privileged part of the community, people who are trans but also poor/racialized and so forth..
\end{flushleft}
in the DSM. Yet, as described above, trans experiences were not “new” to science but had been seen as part of the research of the sexual deviant.\textsuperscript{177}

Since the end of the 18\textsuperscript{th} century, science has replaced religion as the main site of reproducing and perpetuating social norms. From the middle of the 19\textsuperscript{th} century it was the medical science specifically that became a major instrument of defining everyday life.\textsuperscript{178} From this time, growing parts of medical science were devoted to designing the known models of “healthy” gender and sexuality, meaning a sexual relationship between a male-masculine-sexual dominant-man and a female-feminine-sexual subordinate-woman.\textsuperscript{179} Unsurprisingly, at the same era science was also used to promote a wide arrange of conservative social norms, such as scientific racism “proving” that white Christians are superior to others, Blacks, Jews and Arabs.\textsuperscript{180} It was an allegedly rational movement that tried to find, through scientific research, answers to social phenomena it presumed to be rooted in a “true” and “objective” “natural order of things”. This context sprouted the early notions of what would become, post-world war II, the trans phenomena and movement.\textsuperscript{181}

In the early 20\textsuperscript{th} century Dr. Magnus Hirschfeld was one of the first advocates of LGBT issues including trans persons. His Berlin Institute for Sexual Science, which can be described as the first LGBT NGO in the world, offered mental and medical support and worked with authorities to end harassment of gay and trans people. Hirschfeld saw gender and sexual variance as rooted in biology, hence as an unavoidably human occurrence, one that society should accept as part of the

\textsuperscript{177} Valentine describes how the struggles of gay activist to remove homosexuality from the DSM was based on a claim that homosexuality cannot be “seen” on the public body, while other forms of gendered deviance were more “visible”, that is, one can be diagnosed and the other could not. Valentine, supra note 39 at 54.
\textsuperscript{179} Califia, supra note 170 at 14.
\textsuperscript{180} Stryker, supra note 178, chap 1. The temporal link of the history of racism, orientalism and trans/gay pathology will be explored in depth in chapter 3 when I will compare the Zionist movement to gay liberation and Mizrahi political identities to trans political identity.
\textsuperscript{181} Stryker, supra note 178.
“natural order of things”. Hirschfeld’s book “The Transvestites” was the first book devoted to describing trans experience and practices. His center served as the hub of trans people and progressive medical experts “who set the stage for the post-World war II” trans emergence and diagnosis. Among those who attended the institute was also the young Harry Benjamin who came to be a pioneer of development of gender affirming surgeries procedures in the mid-20th century.

3 Sex/Gender/Reassignment/Realignment/Procedures

Although early version of sex/gender/reassignment/realignment/procedures (SGRP) were performed in the early 20th century (mostly in Europe), only in the middle of the century did they become widely common procedures for trans people, or more accurately, for those of them with accesses to the right doctors and right narratives. The publication of Christine Jorgensen’s autobiographical account of her surgery was the first major media event that brought GSRP to public awareness and introduced the possibilities of pharmaceutical and surgical interventions to trans people worldwide.

Jorgenson, a former American GI born and raised in NYC, apparently discovered the possibility for surgical intervention by reading about such research in the newspaper.

182 Ibid at 37–39.
183 Califia, supra note 170 at 15.
185 Susan Stryker Lecture - MMCCS Public Lecture Series (2013). Although obviously this story has more exposure in North American society, it was so sensational it reached trans people in other parts of the world, as I have been told by elderly community members in Israel (though they claim to be much more influenced by the visit to Israel in 1964 of the French singer Coccinelle). This is also clear from Susan Stryker’s research, which posits Jorgenson as the most famous person in the world for a while, receiving much more media coverage than ever before of after. This is no doubt also connected to Stryker’s claim that Jorgenson served to enshrine the US’s status as the world leader and source of hegemony post WWII by the idealization of scientific research. Jorgenson’s worldwide publicity can be understood as another export of US and western superiority through “progress”, i.e. America can do the impossible, even change ones sex! (Even though her surgery was done in Sweden).
Consequently, she did everything she could to get access to those procedures, including enrolling in a school for medical technicians. Eventually, she found doctors in Sweden who agreed to perform the operation. Upon returning to the US post-surgery she could not find work and decided to sell her story to the newspaper. The story went global and her book followed.\textsuperscript{186} Susan Stryker argues that Jorgenson was the most famous person in the world for some time in the mid 50’s.\textsuperscript{187} As a result of Jurgenson’s immense publicity, gender variant persons from around the globe started seeking access to medical technologies and turned to the medical institution.\textsuperscript{188} It seemed that around the globe gender variant people discovered that modern medicine could fulfill their desires for self-affirmation, as the possibilities of “sex realignment” became part of the gender variant intelligibility.

The growing requests for access to sex/gender realignment procedures (SGRP), surgical and hormonal, allowed the medical institution to further entrench its position as the authority to “supervise” gender crossing.\textsuperscript{189} The social order of sex/gender was too strong and the state’s institutions were too invested in keeping it, to allow people to follow their desires without justifications that can be understood as continuing to confirm the social order. Moreover, the medical institution and its ethos of using knowledge to “cure” was not about to give its decision making power to the autonomy of individuals it saw as patients, let alone individuals society considered to have a mental disorder. Instead it needed to develop criteria for diagnosis and protocols for treatment.

\textsuperscript{186} Ibid.
\textsuperscript{187} Ibid.
\textsuperscript{188} Stryker, supra note 178 at 44–46.
\textsuperscript{189} Califia, supra note 170, chap 2.
Dr. Harry Benjamin, an endocrinologist and sexologist who promoted Jorgensen’s book, became the “go-to” doctor for trans people in the US and from abroad. Benjamin’s 1966 book “The Transsexual Phenomenon; a Scientific Report on Transsexualism and Sex Conversion in the Human Male and Female, his most well-known and definitive work, was the first set of standards of care for trans people, setting the stage for the present diagnostic criteria. The book, phrased within the medical, psychological and social discourses of its time, can nevertheless be read as relatively progressive even today. Benjamin argued that trans people are not mentally ill but suffer from a biological disorder that should be treated by modern science, i.e., science should be utilized to allow trans people to live in the gender they prefer. However, his views, although sympathetic and advanced for the time, were still paternalistic and he still saw the medical institutions as the sole legitimate authority to grant access to these new benefits of modern science, based on the discretion of doctors. Benjamin popularized the term “transsexual”, describing it as “a deep-seated and more or less intense urge suggesting a disharmony of total sexual sense, a sexual indecision or disassociation of the physical and mental sexuality.”

In his book, Benjamin divides the phenomena into three categories of “severity”. His system of differentiation between kinds of gender variance based on their severity is still evident in legal reasoning today. According to Benjamin, the first group consists of those “who merely want to ‘dress’, go out ‘dressed’ and be accepted as women”. The second group consists of those

---

191 I have tried to explain my colleagues within the trans movement that in order to be able to read Benjamin innovating contribution, despite it obvious drawbacks, one needs to read it like a 1950’s cookbook, where the social content is dubious in retrospective but the recipes can stand the test of time.
who want more than to ‘dress’, and seek treatment such as hormonal therapy, but do not wish to alter their genitals. He remarks that these people rarely get help from doctors and often clash with society and the law. The third group, the “transsexuals” are the ones who have the greatest sex and gender roles disorientation and in depth emotional disturbance.

According to Benjamin, only those who belong to the third severe category of “disharmony” are true “transsexuals”, for whom psychotherapy is of no use and who should be treated with hormonal and surgical means. The transsexual is described as one who is disgusted by their own genitals, hates their body forms, hair distribution, masculine habits and attire, “He lives only for the day when his "female soul" is no longer being outraged by his male body, when he can function as a female - socially, legally, and sexually. In the meantime, “he” is often asexual or masturbates on occasion, imagining himself to be female.” This desire is described as persistent desire that starts in early childhood and continues fiercely throughout one’s life. Benjamin is the first to refer to trans experience as “being trapped in the wrong body”. Benjamin’s standards of care became the primary source of knowledge for medical authorities worldwide, long after they were published, for example they are referred to by the 1986 Israeli protocol for public funded GSRP. Harry Benjamin opened the gate for gender variant individuals to access GSRP.

---

194 Ibid at 13. In contrast to major modern day medical protocols Benjamin believed that individuals should have access to hormonal therapy even if they do not want to have surgery. This description also recognizes the extreme vulnerability of persons who cannot pass, whose gender performance does not cohere.
195 Interestingly, Benjamin, following the sexologist John Money, distinguishes between sex and gender. This distinction is supposedly attributed to the feminist discourse of the 70’s. However, as I will further discuss, Benjamin’s book became the guideline of how trans people described their identity, experiences and desires in order to gain access to SRS procedure, hence trans people have been using this distinction before the feminist movement did.
196 Benjamin, supra note 193 at 15.
197 Benjamin talks only about Male to Female transsexuals but his protocols where later used also on Female to Male.
198 Benjamin, supra note 193 at 53. It should be noted that unlike researchers that followed Benjamin, he himself think that hormonal therapy should be available also to group number two, those who do not wish to alter their gentiles.
199 Ibid at 8.
200 Israeli Ministry of Health, Notice No. 39/86, sec 1.
4 Standardized Protocols

Following Benjamin, other research elaborated the diagnosis and developed treatment protocols. From the beginning of the 1970’s, the researchers Person and Ovsey started to define more subgroups of “primary” transsexual, such as those whose gender identity was ambiguous as children. They also define subgroups of “secondary” transsexual, who must not get accesses to GSRP, especially those who childhood gender ambiguity formed into homosexuality. In 1973 Norman Fisk coined the term “gender dysphoria”. Gender dysphoria was supposed to reflect a more progressive attitude toward GSRP, referring to a disconnection between ones sex and ones gender.

Soon the protocol of treatment became standardized. In 1975 the International Classification of Disease (ICD) published by the World Health Organization (WHO) included the term transsexuality for the first time. In 1979 the Harry Benjamin Gender Dysphoria Association, a professional organization devoted to understanding and treatment of gender dysphoria, officially incorporated the same year, published its first standards of care. A year later the main principles of those standards of care were incorporated into the DSM, when the third version of the DSM first referred to GSRP and defined transsexuality as following: "A persistent sense of discomfort and inappropriateness about one's anatomic sex and a persistent wish to be rid of one's genitals and to live as a member of the other sex. The diagnosis is made

---

204 The organization changed its name in 2007 to the World Professional Association for Transgender Health. It also changed is goal which is now defined as “to promote evidence based care, education, research, advocacy, public policy and respect in transgender health.”
205 Although an American manual it is widely used throughout the world together with the ICD for it is considered to be a more detailed manual of treatment while the ICD is a diagnostic tool.
only if the disturbance has been continuous.... for at least two years.206

Thus emerged the standard procedure often referred to as “real life test”, a period in which the person seeking medical technologies is evaluated to conclude whether or not he should be granted access. As follows, one of the main instruments to diagnose “true” transsexual is through the “real life test”, a period in which one lives in their “designated gender” in order to test his readiness for surgery. That is, one is judged by their ability to perform gender in “real life” before they get access to surgery that allegedly “changes” their sex, realigning it with their true inner gender, which is concluded from their success in preforming it.207

The real life test reflects a radical version of my argument about the relation of ADL and performance. Trans people are directly instructed to perform gender properly in order to access medical technologies in a situation when it is given that this performance does not correlate to any biological “truth”. Only if they are able to “fake” this “truth” by looking as if their sex/gender coheres to the satisfaction of the medical institutions would they be granted access to medical technologies that would allegedly correlate their performance and “inner truth”.

The fourth version of the DSM (1994) replaced the term “transsexual” with the term “Gender Identity Disorder” (GID), which reflects an inherent essential incongruent, dysphoria, in the subjective feelings of “femininity” and “masculinity”. 208 The dysphoria is distinguished from other superficial forms of gender insubordination such as “tom boy” girls or sissy boys.209 The new term continues to present trans experience as a disease, by virtue of its classification. It also

207 Idan Segev, LE DESENCHANTEMENT DU GENRE, UN REGARD CRITIQUE SUR LA CLINIQUE DU TRANSSEXUALISME (Work for Masters Degree Psychonalitic, Paris Diderot University,:.
continues to hand over complete control to the medical institution in deciding the acceptable and unacceptable gender insubordination, which is seen as justified only when arising from an inherent and essentialist dysphoria. The implications of connecting access to GRSP with the notion of dysphoria, de facto continued to give preference to a specific trans narrative. Due to the fact that the dysphoria, the center of the gender variance diagnosis in DSM IV, is still at the heart of the DSM in its newest addition, I will further analyze its implication on trans subjectivity in the following pages.

5 Gender Dysphoria and the Trans Narrative

The fifth version of DSM (2014) replaced the GID with Gender Dysphoria, no longer a mental disorder but a temporary, clinically significant distress associated with the condition of gender nonconformity.210 The discourse of inclusionary trans politics211 is evident through the document and stand out especially with the incorporation of the term “transgender” and refers to the transgender “umbrella”. Interestingly, as I elaborated in chapter one, both the term “transgender” and the concept of “transgender umbrella” grow out of the trans political movement’s desire to define itself outside the scope of medical institutions. That is, the medical discourse has been impacted, if not appropriated, the trans political discourse. Considering the failed efforts of the global trans movement to eradicate the diagnosis altogether, the discourse adopted by the DSM V might be seen as lip service by the APA, justifying its decision to keep pathologizing trans identities and practices. Moreover, perhaps there is a lesson to be learned here about the limits of discursive impact, meaning that conservative normalizing standards can be written in

210 Association & others, supra note 21 at 451.
211 Despite the fact that trans advocates demand to delete the gender identity from the DSM completely and were not successful in that.
“progressive” language. In any case, I believe that the discourse adopted by the DSM V as well as the history of the removal of homosexuality and inclusion of transsexuality in the DSM IV points to the political nature of the medicalization of gender and sexuality.

The new DSM represents a much more liberal approach when it describes different ways in which gender dysphoria can be manifested and broadens the strict script of “trans narratives”. For example it defines gender dysphoria in adolescents and adults as:

“A marked incongruence between one’s experienced/expressed gender and assigned gender, of at least 6 months’ duration, as manifested by at least two of the following:
1. A marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).
2. A strong desire to be rid of one’s primary and/or secondary sex characteristics because of a marked incongruence with one’s experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).
3. A strong desire for the primary and/or secondary sex characteristics of the other gender.
4. A strong desire to be of the other gender (or some alternative gender different from one’s assigned gender).
5. A strong desire to be treated as the other gender (or some alternative gender different from one’s assigned gender).
6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one’s assigned gender).

B. The condition is associated with clinically significant distress or impairment in social, occupational or other important areas of functioning.”

While the new terminology further clarifies that it is gender and not sex that is at the heart of the phenomena, the dysphoria, the lack of correlation, is still the center of the diagnosis. Moreover, the new DSM clarifies that gender dysphoria should be distinguished “from simple nonconformity” “by the strong desire to be of another gender than the assigned one and by the extent and pervasiveness of gender-variant activities and interests.” That is, the spotlight is still turned to the “inner truth” that causes inner distress and to the ability of the medical institution to ease this suffering. Given that these standards guide doctors (and other mental health
professionals) in their diagnosis of gender variant persons, and that the recognition of such institutional functionaries is still needed in most cases in order to receive state recognition, gender variance still needs the approval of the medical institution in order to be legitimate in the eyes of the state and to be granted access to medical technologies. Gender dysphoria still continues to mark the border between “meaningless” gender insubordination and a clinically significant distress that should be recognized and aided.

Trans persons are still required to “prove” their “dysphoria” over a period of time and are still not considered as subjects whose informed consent is sufficient, but ones in need of external oversight. Even though the borders of “allowed” gender nonconformity are changing, by virtue of their existence, these borders preserve the role of medical professionals as the gate keepers of gender. Gender dysphoria continues to give the medical institution the first right of deciding the nature of gender nonconformity, one which entitles support and "repair" by way of access to health care, or one deemed unworthy of recognition and access. The “trans narrative”, as put forward by Benjamin, is very much alive and de facto, in order to obtain medical diagnosis, trans persons are still expected to be more “normal” than “normal people”: the better they adopt gender roles in their most narrow way and reflect them through their performance, the greater their chance of being diagnosed. Dean Spade has described the function of the GID, a description still very relevant to the new term Gender dysphoria:

"The diagnostic criteria for GID produces a fiction of natural gender, in which

---

212 Even in recent developments allowing trans persons to change their sex designation without surgical intervention in certain jurisdictions, one still needs to bring approval from at least one doctor or mental health professional who may still rely on these standards in making their diagnosis.
213 Spade, supra note 22 at 25.
214 However, it should be noted normalcy itself is changing, and if once trans persons could not identify as gay or lesbians if the wanted to be diagnosed, today is gay and lesbian are “the new normal”, this is almost never a problem.
normal, non-transsexuals grow up with minimal to no gender trouble or exploration, do not cross-dress as children, do not play with the wrong gendered kids, do not like the wrong kind of toys or characters. This story is not believable. Yet it survives because medicine produces it not through a description of the norm, but through a generalization account of the norm's transgression by gender deviants.”

Even though the medical protocols and diagnosis have changed over the years, the scarlet thread that connects them all back to Benjamin is an essentialist understating of the phenomena, stemming from a pre-social inherent truth and the preference of a single narrative. This narrative is Benjamin’s narrative about a gender dysphoria that develops from early childhood, grounded in a feeling of wanting to “fix” your “wrong” body in order to create coherence with an inner truth. The diagnosis is still based on the individual autobiographical account, which is heavily connected to adhering to sex stereotypes and expressing aversion towards one’s genitals.

Spade claims that the major successes with trans legal advocacy was achieved only when the rights claimants adopted the medical model, that is that legal recognition of one’s right to gender variance is inextricably connected to their ability to acquire a medical approval. From the law’s perspective, the essentialist nature of the phenomena, the fact that it is not just a passing state of mind but is pivotal and critical to the ability of persons to define themselves, makes it “real”. This “realness” allows trans plaintiffs to be categorized by the court, to allegedly cohere to this or that protected class. Yet, it is the incoherence that is at the heart of gender variant

215 Spade, supra note 22 at 25.
216 Ibid at 17.
experiences and practices and this incoherence, when readable from the outside gaze, casts trans people as less of a subject deserving equal treatment. By holding on to the medical discourse, the courts are trying to create objective criteria to assert who is deserving to be protected and who should be left alone to be policed by society itself. By making these differentiations, the courts are upholding the illusion of gender/sex stability and thereby strengthening the power of sex/gender as an administrative category of (mal)distribution of resources and opportunities.

6 The Hallucinations of Gender Certainty

In their understating of trans experiences through the medical perspective, tribunals continue to hold tight to the correlation of sex and gender as an epistemological source of pre-legal “truth”. Yet, the medical discourse is not objective at all and is entrenched in socio-political aspirations for population control through stability, through framing of the deviant vs. the normal, as I have noted in chapter one, and as argued by Spade. That is, the medical understanding of the trans phenomena is very much rooted in what Oren Gozlan refers to as “the hallucinations of gender certainty”, the idea that gender is a stable category trans people are excluded from, and are therefore on a quest to find their “true” gender. In order to categorize trans persons the law turns to the medical institution, which sees the trans experience as a condition to be “fixed”.

The medical discourse of dysphoria reinforced the notion that there is “something wrong” with trans persons that is all right with non-trans persons. In this reasoning, the thing which is wrong with trans persons is evident in the fact they want to “reassign” their “sex” so it would go along their certain gender. In fact, in order for their gender nonconformity to be recognized, trans persons must prove their certainty in their gender. In this process gender is presented as certain
and not as the product of the constant effort, of trans and non-trans, to align oneself with certain norms, to affectively deny their own in-between spaces of sex, gender and sexuality.

When the courts use this ideological paradigm of trans-ness, they work together with medical institutions to reproduce the hallucination of gender certainty. Gender certainty in the law continues to portray social differences as pre-legal, a position which entrenches the gendered (mal)distribution of resources and opportunities as a given state of affairs and not a constantly recurring harm. That is, in the context of trans experiences, the hallucination of gender certainty serves to correlate gender to sex in ways that reinforce the idea that social hierarchies of gender are reflective of differences in characteristic and abilities. Indeed, the idea of gender certainty strengthens the notion that the correlation of sex and gender holds some “inner truth”. However, the option of sex/gender transition challenges one of the law’s main organizing principles, the idea of a normality that can be recognizable to the other as result of coherent presentation.

Contrary to seeing trans-ness as a problem to be “fixed”, Gozlan theorizes trans experience as a psychic position. He turns the pathologizing perspective upside down, instead of asking what one needs to feel in order to wish for sex/gender transition, he asks why everyone needs to feel certainty in their genders. That is, instead of asking why trans individuals hold on to coherent notions of their own gender, he points out that everyone’s gender/sex is a “conflictual attempt to both signify and eradicate differences”.217 Gozlan reveals that everyone, not just trans people, fight with the lack of coherence between the psychic and the body, between desire and knowledge.218 He argues that the universal trait of gender/sexuality is that it is always transformative and in

218 Ibid at 928/3286.
transit,\textsuperscript{219} that “there is never a complete knowledge of oneself, there is never a complete gender or a normal self”\textsuperscript{220}. Gozlan argues that dimorphic gender simultaneously enacts and veils the anxiety embodied in realities of sexual differences.\textsuperscript{221} Sex/gender transition brings forward not only the constant lack of coherence but also the reality of human experience being in transition, despite considering ourselves and our narratives to be stable.

As I noted in my opening comments in chapter one, in respect to what I have titled “the trans paradox”, Gozlan suggests that when desiring transition, the trans person encounters the constantly fluid nature of gender.\textsuperscript{222} Gender is not stable as claimed by hegemony,\textsuperscript{223} but rather, bodies are represented as stable by conforming coherence to a specific configuration of gender/sexual articulations. Nevertheless, the trans person is allowed to be a part of society if they articulate certainty in their “new” gender.\textsuperscript{224} In order to legitimate their gender deviance, as a precondition for accessing medical technologies and/or receiving legal recognition, the trans person must aspire to take part in the same gendered structure which constituted them as deviant, all while affectively knowing that the social concept of gender masks gender’s inescapable transitionality.

The medical-legal linear understanding of trans experience, from dysphoria to medical intervention, further reveals the investments in creating and upholding the pretense of gender certainty. The idea that transition can transform you into being “normal”, reinforced by the

\textsuperscript{219} Ibid at 265/3268.
\textsuperscript{220} Ibid at 1083/3268.
\textsuperscript{221} Ibid at 333/3268.
\textsuperscript{222} Spade, supra note 12 at 110.
\textsuperscript{223} What constitutes trans identity is the discovery of discrepancy in the correlation between gender and sex, and a realization that the system of two all-inclusive mutually exclusive categories is too narrow to reflect one experience.
\textsuperscript{224} Yet, as we will shortly see, even this certainty, which grants entry to medical technologies does not automatically grant recognition as a member of a certain “sex”, insofar that sex is correlated with gender and gender performance.
privileges coming with transition (such as legal recognition), is thus another hallucination, revealing sex/gender transition, as all other human transition, to be a constant state of being. Transition is supposed to “cure” the trans instability reflected in lack of coherence, but the fact that transition cannot create “real sex”, insofar as that “sex” is a biological “truth”, reveals the inherent instability of gender and coherent identities more broadly.

As I suggest before, this illusion is necessary both for the social order (law), for our imagined communities (transgender) and for our individual understating of ourselves in relation to the others constituting those communities. It is not surprising that the law adopts the medical discourse that evaluates the authenticity of trans demands to access medical technology based on their ability to re-integrate into the given gender order of society. This happens precisely because the law is also a tactic of stability, of keeping those social orders in place. The law quickly adopts measures that can be presented as “objective”, such as medical interventions, because they are thought to represent absolute standards immune to the subject’s manipulation. The legal-medical discourse about trans persons, as Gozlan shows us, is limited by its own investment in the “hallucinations of gender certainty”.

In what follows I will provide legal analysis of different cases dealing with discrimination of gender variant individuals. This collection of legal texts from different jurisdictions might seem eclectic at first, but through its diversity, I wish to look at how gender certainty is produced via trans right claims. I will suggest that gender certainty stands in contrast to addressing gender performance in these cases, an understanding that might facilitate a shift in the basis of comparison, to focus on the differential treatment associated with cohering to socially accepted norms of sex/gender presentation.
7 Canadian Legal Cases Review- Introduction

I have chosen four cases that resonate the themes I have described above. In analyzing the cases I will focus mainly on the facts and arguments that relate to performativity in order to suggest an intrasectional analysis of the cases, that is, I will deliberately look for intersections of experience and practice within the protected category used by the tribunal. I will juxtapose my intrasectional findings with the legal reasoning and its own interlock with medical discourses and socially accepted norms. The cases relate to different aspects of trans experience, including: incarceration, gender-segregated spaces, access to proper ID and access to medical treatment. The cases come from different jurisdictions, local and federal human right tribunals and a provincial supreme court. I have ordered them chronologically. Though I am not trying to portray a linear narrative of progress, it is noticeable how the discourse of the trans political movement is gradually infiltrating the legal discourse.

In all four cases the plaintiffs are women, a fact I assume is related to the relative difficulty of transwomen to pass compared to transmen. In an American national survey on transgender discrimination published in 2011, 225 respondents were asked whether others could tell that the respondents are transgender even if they do not tell them. Only 16% of MTF transwomen reported others can never tell they are transgender, while 31% of FTM transman reported others can never tell they are transgender. 226 The data points out the relation between performance, and specifically

225 Jaime M Grant et al, Injustice at every turn: a report of the National Transgender Discrimination Survey (National Center for Transgender Equality, 2011). Moreover, transwomen identity is inherently intersectional marginalized, as trans persons and as women. That is, if the coherent gendered members of society, the one who has to most access to privileges is a non-trans man (who is also white, middle class, able and so forth), then trans women gender performance is at least twice removed from that ideal citizen.

226 Ibid at 27.
incoherent performance that suggests the transitionality of sex, and discrimination in relation to gender variance.

I have tried to show how the tribunal’s willingness to consider sex as transitional is accompanied by an insistence upon gender stability. While reading the case analyses, I invite the reader to bear in mind the possibility of accounting for incoherence I suggested in chapter one, and to think how the same factum would be understood differently if the basis for comparison would be if the courts would compare the treatment given to the plaintiff to one given to a person whose gender performance coheres to the socially accepted norms of sex/gender.

8 Synthia Kavanagh

The case of Kavanagh v. Canada (Attorney General), 2001 CanLII 8496 (CHRT) deals with the application of Synthia Kavanagh to the Canadian human right tribunal against the policy of the Correctional Services of Canada (CSC) in regard to placement of transwomen inmates who have not undergone SGRP to construct genitals. The application also contested CSC policy of prohibiting access to SGRP for incarcerated individuals. Because this decision aims its attention on the anatomy of trans women, it allows me to explore how the socially accepted norms of sex, gender, and sexuality are policed through the connection of medical and legal discourse with respect to trans bodies. I will suggest that while the tribunal is talking about anatomy, it actually uses the performativity of transwomen as an indicator of their abilities and characteristics. In doing so I will focus on what I read as performative elements of the facts, findings and reasoning as well as the traces of Ms. Kavanagh’s actual lived experience. Even though this decision is 14 years old, it seems outdated even for its own time in making no efforts to referring to trans persons as subjects, specifically those incarcerated. It perpetuates stereotypical if not sexist and homophobic
understanding of trans experiences. However, this decision eventually granted access to SGRP, to some extent, to incarcerated persons. Also, this decision brings forward some clear notions of how legal texts construct gender certainty and how law itself, although high invested in it, can hardly conceptualize the borders between sex, gender and sexuality and is left, de facto, only with performance.

8.1 Facts and Judgment

This case deals with the prison placement of Ms. Kavanagh and her demand to access SGRP while imprisoned. Ms. Kavanagh was convicted of murder in 1989, when she had already been living publically as a woman for six years. Because she did not “complete” her transition, that is, she had not yet undergone genital reconstruction surgery, Ms. Kavanagh was not recognized as a woman by CSC and was placed in a men’s facility. She requested again and again to be transferred to women’s facilities, but her requests were denied. She was also denied hormone replacement therapy for four years and despite her “frequent requests” was denied access to surgery, though she had been already approved for surgery before her incarceration.227

According to her testimony,228 backed by numerous letters she sent at that time, after she was taken off hormones she became “consumed with the pursuit of treatment”,229 and as a results of the denial of proper treatment, acted up, self-mutilated, turned to drug use, hunger strike and

228 It should be noted that Ms. Kavanagh arguments are almost completely missing from the decision, there is some reference to her testimony, but it is always accompanied by “external” evidence.
229 Kavanagh v. Canada (Attorney General), supra note 227, para 128.
attempted suicide. Moreover, Ms. Kavanagh, like many other trans inmates across the globe, spent a lot of her time in segregation. The CSC itself admits “her time in administrative segregation resulted from a combination of Ms. Kavanagh's Transsexualism and disciplinary reasons”. According to her own account, she acted up after she requested to be put in segregation for her own protection and was denied.

Eventually, Ms. Kavanagh filed a human rights complaint to the Canadian Human Rights tribunal, against the Canadian Human Rights Commission and Attorney General of Canada claiming she was discriminated against on the basis of her sex and disability in the denial of access to medical technology (both surgical and hormone replacement therapy) and because she was placed in a men’s facility. Her complaints were settled and she received access to surgery and hormones, and was placed in a women’s facility. The decision is focused on her initial placement and on the policy regarding placement of pre-op trans persons and their right to access to surgery. At the time of the application, the CSC policies placed pre-op transwomen in men’s facilities. The policy also completely banned the access to SGRP to prisoners, albeit in court the CSC claimed they did make exemptions to that based on experts’ diagnosis.

Applying the Canadian Human Rights Act, RSC 1985, prohibition to discriminate on the basis of sex and disability, to c 20 — 28 of the Corrections and Conditional Release Act, SC 1992,

---

230 Ibid., This methods of resistance, especially hunger strikes and self-mutilation, have been documented to been used by trans women denied access to therapy in different occasions. For instance, the first transwomen to receive access to SGRP in Israel in the 1950’s, Ms. Reena Natan, have used the same techniques to force the government to approve her requests (see: Iris Rachmimov).
231 Spade, supra note 85 at 36–7.
232 Kavanagh v. Canada (Attorney General), supra note 227, para 131.
233 Ibid.
234 Ibid, para 7.
235 Ibid.
236 CSC were so invested in gate keeping that they deliberately only sent inmates to assessment at a conservative institution, in order “to limit the number of inmates approved for sex reassignment surgery”.

the tribunal finds that discrimination on the basis of “transsexualism” constitutes sex discrimination as well as discrimination on the basis of disability\textsuperscript{237}. The tribunal finds that the complete ban on access of inmates to SGRP as constituting discrimination,\textsuperscript{238} and orders CSC to formulate a new policy. However, the tribunal did find that the CSC policy of placement-according to genitals is valid. The tribunal states that even though pre-operative transwomen should be kept in men’s facilities “with other inmates sharing their anatomical structure”\textsuperscript{239} the CSC should formulate a policy “that ensures that the needs of transsexual inmates are identified and accommodated.”\textsuperscript{240}

Yet, in order to decide whether or not the CSC policies amount to discrimination on the basis of sex, the tribunal found itself busy with defining who transwomen are, what they want to be and what (or who) they desire, while de facto disregarding transwomen's autonomy on these matters. The tribunal and the respondent seem to be deeply disturbed by the question of who transsexuals are. What are their inherent characteristics? How can we positively identify them? In other words, the tribunal and the respondent are trying to locate an inner-truth of gender performance of transwomen.

8.2 The Trans Narrative

The decision opens with description of Synthia Kavanagh in accordance with the well-known trans medical narrative, a framework which is intertwined throughout the decision as a socially accepted

\textsuperscript{237} Kavanagh v. Canada (Attorney General), supra note 227, para 135.  
\textsuperscript{238} Ibid, para 181.  
\textsuperscript{239} Ibid, para 196.  
\textsuperscript{240} Ibid, para 197.
justification for Ms. Kavanagh’s need and desire for SGRP. That is, the decision reconciles Ms. Kavanagh’s gender disobedience by placing it within the regime of gender, as an inherent pre-social and pre-legal truth. From an early age she felt that “something was not right with her” and down the road was diagnosed with GID, which is according to the tribunal “a condition where her biological or anatomical sex did not correspond to her gender identity, that is, her subjective sense of herself as a woman.” In other words, the tribunal says that the medical institution has given recognition of her transsexual coherence, that is, she had proved her gender insubordination is reflecting of an inner truth by living as woman full time for long enough. Yet she did not “complete” the procedure of “sex reassignment”, she had not “truly” changed her sex. Right at the beginning of the discussion, the Canadian Human Right Tribunal situated the trans subject as one who differs unwillingly, and only due to a medical condition, from the correlation of sex (which is rooted in biology) and gender (which is subjective). The tribunal understands gender transition as moving from one stable point to another and thus is mainly concerned with which point exactly marks one as belonging to a different stable gender category than the one s/he was assigned at birth.

8.3 Experts Evidence

In what seems to me like an attempt to anchor the tribunal’s reasoning in “objective” evidence, the tribunal bases its finding in respect to “Gender Identity Disorder and the appropriate treatment thereof” on expert evidence. The tribunal uses four experts: Dr. Diane Watson on behalf of the

241 Ibid, para 1.
242 Ibid, para 3.
243 Ibid, para 11.
244 This is evident in the tribunal’s decision to devote a significant part of the decision to allegedly medical analysis of gender identity disorder and the trans phenomena more broadly, to base its reasoning on that analysis and to attribute the tribunal’s knowledge on the subject to “expert evidence” brought forward by doctors.
245 Kavanagh v. Canada (Attorney General), supra note 227, para 11.
Canadian Human Rights Commission, Dr. Robert Dickey, Dr. Stephen Hucker, and Maxine Petersen on behalf of CSC. According to the tribunal, all have expertise in the field of GID. Whereas Dr. Watson seems to bring forward a more progressive approach that takes into account the needs and desires of trans persons, the experts brought on behalf of the CSC seem to adopt a very conservative attitude.

The tribunal, based on the Dr. Watson’s evidence, describes what Benjamin and later researchers referred to as the division between primary and secondary transsexuals, pointing to those suffering from ‘high intensity’ GID and referring to the DSM IV. All experts agree that Gender dysphoria is as a distress felt by transsexuals who are “unhappy” with their “biological sex”, whose bodies are “incongruent with their subjective sense of who they really are.” To make sure one does not confuse sexuality and gender, the tribunal draws on the expert evidence to makes it clear that sexual orientation is distinct from GID and states that sexual preference does not change with transition. For example, the tribunal explains that a “biological male” who is attracted to men would still be attracted to men after being “surgically reassigned as a woman”. This connection of sexuality and gender according to heterosexual norms later returns as a key idea of the court’s reasoning.

The tribunal is fixated on transwomen’s sexuality and sees it as an important criterion in deciding where they should be incarcerated. Dr. Watson claimed that transwomen inmates in

---

246 Interestingly, Maxine Petersen is a transwomen herself who transitioned while working as a psychotherapist at the Gender Identity Clinic at the Clarke institute. She is quoted arguing that “most gender patients lie” (J. Michael Bailey, The Man Who Would Be Queen: the science of gender-bending and transsexualism. Washington: Joseph Henry; Oxford: Oxford Publicity Partnership, 2003: 205) and defended the demand that trans persons go through a real life test (Viviane K. Namaste, Invisible Lives: The Erasure of Transsexual and Transgendered People. Chicago: University of Chicago Press, 2000: 199-201). Obviously she is not responsible for the medical-legal power structures she is defending.
248 Ibid, para 15.
249 Ibid, para 17.
advanced stages of hormonal therapy should be kept in women’s facilities. She believed that they could complete their “real life test” there and would not pose a threat to the other inmates because of their sexuality. Moreover, she argues that transwomen on hormone replacement therapy are unable to have erections. In support of her argument she testifies that Ms. Kavanagh is not sexuality interested in women. When the tribunal confronts Dr. Watson with the “shocking” fact that Ms. Kavanagh had sexual relations with women in the women’s facility, Dr. Watson is forced to “admit” that she might be bisexual.\(^{250}\)

Contrary to Dr. Watson’s opinion, the more conservative experts claimed that most transsexuals in federal prisons are attracted to women. The experts reach this conclusion based on their claim that transwomen who are attracted to women are not aggressive enough to commit federal crimes.\(^{251}\) Their logic is that transwomen who are attracted to men are feminine and thus less likely to commit serious crimes while transwomen who are attracted to women are masculine and thus more likely to commit serious crime. Hence, transwomen who commit federal crimes are attracted to women and therefore they threaten other non-trans women and should not be incarssated with them.\(^{252}\) Underlining these arguments is the heteronormative connection between sexual attraction and masculinity/femininity and the connection between masculinity/femininity and ones abilities and inclinations, assuming individuals who are attracted to women are masculine and individuals that are attracted to men are feminine. It also reveals the social assumption that certain characteristics are essentially connected to masculinity and femininity.

\(^{250}\) Ibid, para 96.
\(^{251}\) Ibid, para 100.
\(^{252}\) Ibid, para 100.
The experts also disagree on where the real life test should optimally take place. In Dr. Watson’s opinion the ideal setting for the real life test is at women’s facilities, where the feminine environment could help the transwoman to live fully “as a woman”. Yet, as the tribunal rejected the possibility of keeping transwomen in women’s facilities pre-surgery, the focus shifts to the possibility of concluding the test in men’s facilities. Regarding this option the other experts assert that real life test cannot be performed inside men’s facilities because transwomen would get a lot of sexual attention from other prisoners, who otherwise would have been straight (were they not in prison, that is). Therefore, they conclude that this would not force transwomen to face the harsh realities of what life in non-prison society looks like for transwomen. This position contradicts their position that transwomen in federal prisons are more likely to be attracted to women and therefore should be kept in men’s facilities. Seemingly, both expert positions reflect the questionability of the Real Life Test all together, in exposing how it actually tests one’s ability to perform gender roles and not one’s compatibility to SGRP. The experts are actually disagreeing where such performance would be more “authentic”. Their arguments reveal that the real life test is about adopting gender roles in their most socially accepted narrow way, as a way to “prove” to the outside medical gaze that one is “truly” the person s/he wishes to become.

8.4 Reasoning

With respect to the proper incarceration environment for transwomen who have not undergone genital reconstruction surgery, the tribunal finds that they should be kept in men’s facilities because they might pose a threat to non-trans women inmates. This reasoning is anchored in the expert’s debate over transwomen’s sexuality, described above. After considering the different

253 Ibid, para 65.
expert opinions, the tribunal finds that it cannot conclude what the sexual orientation of transwomen is. The tribunal states that the “sexual orientation of transsexual inmates cannot be determined with any degree of certainty”. Yet, when read in context, this remark seems to mean that the tribunal cannot be sure that transwomen are not attracted to women and not that they are not attracted to men. It sides with the conservative experts’ opinion when it concludes that pre-surgical transwomen pose a threat to non-trans women inmates because there is no guarantee they will not function sexually even with hormone replacement therapy. The tribunal decides there is no room to force non-trans women inmates to live with someone with anatomy different to theirs, because they cannot choose to leave. The tribunal thus sees pre-op transwomen as non-trans men, when it concludes that non-trans women inmates would have difficulties with pre-op transwomen because of their post trauma related to sexual violence they suffered at the hands of men. This reasoning begs the question- why does the tribunal state at the beginning of the decision that sexuality and gender are separate spheres only to later anchor its reasoning regarding gender in the instability of transwomen sexuality (as if other inmates sexuality is stable)?

In regard to access to medical technologies, the tribunal seems to be greatly worried with the possibility of conducting the “real life test” in prison. The tribunal describes a linear process of “progress” in respect to GRSP. In considering whether or not transwomen inmates should get access to these procedures, the tribunal is troubled by the ability to complete the real life test in a prison environment, including the initial stage of psychotherapy, followed by hormonal therapy and concluded in surgery “for properly screened candidates.” As noted, the experts disagreed on the question of whether real life test can be evaluated in a prison environment, and if so in which

254 Ibid, para 161.
255 Ibid, para 156.
environment (that is in men’s or women’s facilities). Dr. Watson said it can and should be conducted in a women’s prison, which offers an affirming feminine environment. The conservative experts argue that it cannot be done at all in a prison environment because transwomen prisoners should not be kept with other women to begin with and due to the fact that in men’s prisons they allegedly get disproportionate affirmation for their gender. After considering both arguments, the tribunal rejected altogether the claim that the real life test can be performed inside the prisons, because trans persons need to be able to interact with both men and women in order to fulfill the requirements of the real life experience.256 This reasoning still leaves open the question of what the real life test is actually testing. Why is it important that one interacts with both men and women? How is performing normal gender and sexuality connected to fulfilling the real life test requirements?

With respect to the CSC policy of completely denying accesses to GSRP for inmates, the tribunal finds that even if the real life test cannot be performed in prison, in some situations, such as if the inmate completed that requirement prior to incarceration, there should be some flexibility given that “sex reassignment surgery is a legitimate, medically recognized treatment for Transsexualism, in properly selected individuals”.257 The tribunal then orders the CSC to formulate new policy.258 The tribunal also finds that trans inmates are particularly vulnerable within the larger inmate population, and special policy should be drafted for them. This seems to recognize the difficult situation in which trans inmates find themselves in the gender-segregated environment

256 Ibid, para 178.
257 Ibid, para 182.
258 Ibid, para 198.
of prisons. This difficulty echoes the battles of trans persons in any gender-segregated facility, like bathrooms, which the case of prison brings to extreme.

8.5 Analysis and Critique

The use the tribunal makes of the expert evidence, connecting legal and medical discourse to imagine a specific, intersectional invert\textsuperscript{259} trans abject, sheds light on the tribunal’s investment in keeping the border of heteronormativity clear by controlling the possibilities of trans gender performance. The tribunal’s analysis of gender variance on which it rests its reasoning, implies that there is a biological sex which correlates to gender which correlates to sexuality, and even if some people may have some inherent problem with one of those components, they are nevertheless separate and in correlation. To make that clear, as parts of its reasoning and based on the conservative expert evidence, the tribunal brings forward this bizarre description of transwomen:

\begin{quote}
“Male heterosexual transsexuals tend to be masculine in appearance, and do not ordinarily have a history of early feminization. (2) These individuals develop an attraction to female anatomy, specifically female anatomy on themselves. Heterosexual transsexuals or 'autogynephiles' are attracted to women, and become lesbians after sex reassignment surgery. In contrast, homosexual male transsexuals tend to be more highly feminized than heterosexual transsexuals, and manifest feminine characteristics and symptoms of Gender Identity Disorder.
\end{quote}

\textsuperscript{259} Which is both a gendered invert and a sexual invert.
earlier in life. Male homosexual transsexuals remain 'androphilic', or attracted to men, after sex reassignment surgery”. 260

That is, there are mutually exclusive categories of sex (male/female), to mutually exclusive categories of gender (man/woman), mutually exclusive categories of gender expression (feminine/masculine) and categories of sexuality (homosexual/heterosexual). This binary closed system tries to portray itself as flexible in suggesting the possibility of “mixing and matching”, yet this “mixing and matching” is also done through narrow correlation. Moreover, by formulating the correlation between sex and gender in relation to surgical status, gender certainty is guaranteed. Based on this puzzling premise, the tribunal makes its inquiries into the discriminatory effect of inmate placement based on surgical state of genitalia.

The tribunal constructs the trans experience as existing solely inside the dichotomous system of mutually exclusive categories of gender and sexuality. Yet, it is seems that the tribunal is focused on “fixing” transsexuality. The medical institution and the tribunal as its agent have to serve as the gate keeper for surgeries so not all people who “mimic transsexuality” 261 will storm the operating room demanding unjustified changes to their body. This screening is made by the “real life test”, that is the transsexual person must prove they can be “true” men/women in order to get access to the irreversible procedure. 262 Obviously I am not saying these procedures are reversible or that one’s ability to give informed consent should not be considered, but I am suggesting that in stressing the irreversibility, the tribunal reveals a concern with instability of sex

260 Kavanagh v. Canada (Attorney General), supra note 227, para 18.
261 Ibid, para 19.
262 Ibid, para 24, 28.
binaries. In its decision to allow SGRP access to those who completed the real life test prior to incarceration, the tribunal wishes to allow those who have proven the “essential” origins of their gender nonconformity by preforming gender coherence in “real life” to “complete” their transition from one exclusive sex category to the other. In so doing, the tribunal is keeping the border of sex/gender clear and coherent by allowing trans people to perfume gender only in a very specific way, exposing the role of performance in the tribunal’s reasoning and its role in allocating rights and autonomy to trans inmates. It is worrisome that throughout the text there are numerous references to the danger presented to other inmates by trans inmates without any reference to the dangers trans inmates are exposed to systematically, where trans inmates in prison are far more likely to be exposed to violence of all kinds, including sexual violence.263 Ms. Kavanagh testified that she was “regularly beaten, sexually assaulted and ridiculed.” The tribunal only notes that transwomen are a particularly vulnerable group of inmates. The tribunal imagines transwomen as sexual deviants who want and receive sexual attention, not considering the constant danger of sexual assault they are exposed to in those facilities, which is highly notable in Ms. Kavanagh testimony. The tribunal sees transwomen as potential offenders because they might be attracted to women and might still be able to have erections, assuming not only that all other inmates are straight but suggesting that the ability to have an erection is an indicator of likelihood of sexual assault, exposing the tribunal to be more invested in heteronormative sexuality than concerned with women inmates’ needs.

263 Spade, supra note 12, chap 5.
8.6 Anatomy or Performativity?

The tribunal’s recognition of the struggles of trans persons (in its comment on their vulnerability) and its opposition to the complete ban on access to SGRP are significant. However, these achievements might be a double edged sword when they are linked to “anatomy”. By paying lip service to vulnerability (by recognizing it), the tribunal authorizes and ratifies the policy of prison placement in accordance to “anatomy”, which at the very least contributes to trans inmates’ particular vulnerability. Moreover, placement according to anatomy assumes there is some inner truth to anatomy about one’s characteristic and abilities. The tribunal is obsessed with the genitals of transwomen and their erection ability (or lack thereof), and uses these hypotheses about their “anatomy” to make assumption about who these women “really” are, what they truly want and how they would act. This reasoning is in line with homonormative politics, correlating between one’s biology, their gender, and performance, only here it uses biology to force a gendered position rather than assuming biology based on gender.

Insisting on the normative superiority of anatomy, the tribunal forces transwomen into an in-between position, from which they can never escape, because what constitutes their trans-ness is their otherness and not sameness to persons who have similar “anatomy”. The focus on surgery reaffirms the social structure of sex/gender by allowing gender nonconformity only when it a part of a supervised process of moving from one coherent sex/gender/performance position to another. Thus, under the guise of recognizing trans inmates’ needs, the tribunal is protecting the border of sex/gender/sexuality, producing the hallucination of gender stability. The tribunal’s protection of the borders of gender, made in response to Ms. Kavanagh’s appeal for protection from sex discrimination, exposes the fact that Ms. Kavanagh’s claim exists at the intrasection of the legally
protected “sex” category, between the coherent man and woman, in the in-between space, which I have argued to hold gender performativity.

Would looking at gender performance give us a better understanding of the tribunal’s concerns with transwomen’s anatomy? Is it possible that the tribunal is actually concerned with gender variant incoherent performance? Recall that the tribunal is dealing with two main issues: prison placement for transwomen who have not undergone genital reconstruction surgery, and access to SGRP for other inmates. On both of these issues, the tribunal takes a stand that appears to be influenced by the gender performance of the inmates. Recall also that I have linked ADL and the real life test by arguing that both demand the trans person to perform coherent gender (or more accurately, to signify the wish for gender coherence in their narrative and public acts) as a precondition to recognizing and legitimizing the trans person’s incoherence. The tribunal uses what it believes to be an anatomical “truth” to limit one’s ability to perform incoherent gender, that is, to prevent individuals from identifying with a gender identity that is not aligned with their birth assigned sex, unless one has already “proven” their ability to comply with the rules of gender post transition.

As noted before, the tribunal reasons its placement decision by arguing that post-op transwomen would not trigger the trauma of sexual violence in non-trans inmates, whereas pre-op trans women would.264 In practice, the tribunal only allows proper placement and medical care for those who it believes to be less “visible” in their gender transgression. Its finding regarding placement suggests that in its mind, the tribunal imagines post-genital-surgery transwomen as

264 Ibid, para 158.
passing better than pre-genital-surgery transwomen, even though genitals have nothing to do with passing.

The tribunal, when declaring that the “sexual orientation of transsexual inmates cannot be determined with any degree of certainty”, is revealing that it is confused by the question of whether transwomen are feminine or masculine. It is not surprising then, that the tribunal mixes the question of gender with the question of sexuality, because as I noted in chapter one, from an intrasectional point of view, both things are supposedly interlocked with one another and with one’s “ontological” sex. That is, one’s gender performance (femininity and masculinity) is supposedly evidence of one’s gender and sexuality, which are evidence of one’s sex.

One can argue that performativity did not play a role in the decision to place Ms. Kavanagh in a men’s facility, because Ms. Kavanagh was already “living as a woman”, that is, she apparently looked “like a woman”. Yet, as I have suggested in chapter one, trans performativity is often charged with the viewers’ knowledge that one is trans, transmitted to the outside gaze by failing to pass, whether because one has an external feature that exposes one’s gender variance or whether because one’s official documents mark one as belonging to a sex category different than the gender they perform or wheatear because one was “outed”. In any case, once the outside gaze “knows” one is trans their performance is immediately perceived as incoherent, because their birth assigned sex, gender and sexuality do not correlate. In Ms. Kavanagh’s case it was this incoherent performance, the knowledge that her genitals do not correlate with how she looks, that stood at the center of the decision to place her in a men’s facility and deny her access to SGRP.

What would have happened had the tribunal considered whether Ms. Kavanagh was treated differently than someone whose gender coheres to socially accepted norms of gender and sexuality? No doubt such a cohering person would be placed according to his self-identification
and would receive any medical care relating to a “life cycle” medical event, such as elderly care or pregnancy care. Moreover, considering the link the tribunal makes between anatomy and performance, this conclusion is strengthened by the fact that post-genital-op transwomen could be placed in women prisons and those who completed the real life test prior to incarceration would have access to SGRP. In conclusion, the tribunal’s devotion to connecting what Ms. Kavanagh (and other gender variant persons) have broken, the link between anatomy and performativity, suggests that when the tribunal is protecting transwomen by using the sex category of ADL, it is primarily protecting the category of sex from gender incoherence.

9 Kimberley Nixon

The case of Vancouver Rape Relief Society v. Nixon et al., 2003 BCSC 1936 is one of the most well analyzed Canadian cases with respect to trans discrimination. Many scholars have written about it and I do not purport to add something new to their thorough critical work. Yet, as this
is one of the most cited and central Canadian cases, I will analyze it with a focus on my own formulation of the relation between ADL and performance, looking at the way gender coherence and certainty is constructed in the reasons for the judgments of the supreme court of British Columbia. Although this case has been thoroughly analyzed, the mere fact that Ms. Nixon was identified as trans, that she failed to pass, that her lack of coherent performance hampered her attempt to join an actual and symbolic collective of women, has yet to be fully accounted for. Attempting to understand this aspect of her case, I will bring forward traces of performativity in the judgment.

9.1 Facts and Proceedings

Kimberly Nixon, a transwomen who had legally changed her sex after undergoing SGRP, asked to volunteer in the Vancouver Rape Relief Society (VRRS), a feminist, anti-racist, pro-choice, pro-lesbian, women only collective providing support for women who have been victims of sexual violence. Following Nixon’s statement that she agrees with the VRRS’s political beliefs, she was invited to a training session. Shortly after she arrived, one of the facilitators of the training, Ms. Cormier, “immediately identified Ms. Nixon as someone who had not always lived as a girl or woman, based solely on her appearance.” Ms. Nixon was called aside and asked about this, when she confirmed that she is trans she was asked to leave. In other words, Ms. Nixon failed to pass, to present her gender as coherent. Ms. Nixon’s incoherence signified to Ms. Cormier that she is not a “real women”. As a result she was excluded from the VRRS. That is, based on how Ms.

267 Nixon first filed a complaint to The British Columbia Human Rights Tribunal (2002 BCHRT 1, [2002] BCHRTD no 1) which agreed with her, however an application for judicial review on the British Columbia Supreme court was filed, accepted and upheld in the Court of Appeal for British Columbia. The Court of Appeal decision did not add any substantive analysis to that of the Supreme Court decision in the context I am analyzing, it mainly ratified the legal analysis of the Supreme Court. That is why I am referring mostly to the Supreme Court decision.

268 Vancouver Rape Relief Society v Nixon et al, 2003 BCSC 1936 (available on http://canlii.ca/t/1g4c8), para 9.
Nixon looked to Ms. Cormier, based on Ms. Cormier’s identification of Ms. Nixon’s incoherent gender performance, because Ms. Nixon failed to pass as non-trans, she was excluded.

In August 1995, Nixon filed a complaint with the BC Human Rights Commission against VRRS claiming that they unlawfully discriminated against her. In 2002, the BC human rights tribunal sided with Nixon and ruled that by not respecting Nixon’s self-identification as a woman, VRRS discriminated against Nixon on the basis of her sex, in violation of the British Columbia Human Rights code, R.S.B.C., c. 210. VRRS appealed this decision in the Supreme Court of British Columbia, which overturned the decision in 2003. The Supreme Court’s decision was held in the British Columbia Court of Appeal in 2005. While the court of appeal found that VRRS did discriminate against Ms. Nixon, it found that it was exempt by s.41 of the code, “concluding that a group can prefer a sub-group of those whose interests it was created to serve, given good faith and provided there is a rational connection between the preference and the entity's work, or purpose”. Despite the fact that there is much to say about this case, and since, as I noted, this case and its reasoning have been the target of much critique, I will only focus on the analysis

---

269 Vancouver Rape Relief Society v. Nixon, 2005 BCCA 601 (available on http://canlii.ca/t/1m50v).
270 Vancouver Rape Relief Society v. Nixon et al., supra note 268, para 58.
271 A great overview of the critique can be found in McGill & Kirkup, supra note 266., under footnote 57: “Carissima Mathen, “Transgendered Persons and Feminist Strategy” (2004) 16:2 CJWL 291 at 292, explains the divisiveness of Nixon in these terms: Nixon's complaint has sparked painful disagreement within the feminist movement in Canada. Women, who have worked through issues such as the incorporation of lesbian or race-conscious perspectives into feminist theory, find themselves on opposite sides of a deep chasm. 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...threatens the very existence of "women-only" spaces. See also Christine Boyle, "The Anti-Discrimination Norm in Human Rights and Charter Law: Nixon v. Vancouver Rape Relief(2004) 37:1 UBCLR 31 at 44 (characterizing Nixon's claim as one of formal, rather than substantive, equality); Lori Chambers, supranote 45 at 311 (noting that the "outcome of her case has implications beyond the post-operative male-to-female (MTF) individual. At issue is when and how we draw lines around women-only space. If all sex/gender identification exists on a continuum, how are such distinctions to be made?"); Patricia Elliott, "Who Gets to Be Woman?: Feminist Politics and the Question of Transinclusion” (2004) 29:1 Atlantis: A Women's Studies Journal 13 at 14 (describing the Nixon case as raising 'questions about feminists' complex relationships to, and assumptions about, gender, sexuality, and support for diverse sexual struggles'); Barbara Findlay, 'Real Women: Kimberly Nixon v. Vancouver Rape Relief' (2003) 36:1 UBCLR 57 (documenting findlay's experiences as counsel for Nixon); Unmin Khan, "Perpetuating the Cycle of Abuse: Feminist (Mis)use of the Public/private Dichotomy in the Case of Nixon v. Rape Relief" (2007) 23 Windsor Rev Legal Soc: Issues 27 (noting that the shelter's reliance upon the public/private distinction undermines equality for trans women and non-trans women alike); Graham Mayeda, 'Re-imagining Feminist Theory: Transgender Identity, Feminism, and the Law' (2005) 17:2 CJWL 423 at 464 (arguing that the decisions of the British Columbia Supreme Court and the British Columbia Court of Appeal "seem to be a setback, in particular because they continue to confuse gender and sex and, therefore, uncritically affirm that biological criteria are a valid basis for differential treatment"); and Ajnesh Prasad, "Reconsidering the Socio-Scientific Enterprise of Sexual Difference: The Case of Kimberly Nixon" (2005) 24:2,3 Canadian Woman Studies 80 (concluding at 83 that "Nixon becomes part of the feminist..."
and the critique that relates directly to my augments regarding gender coherence in relation to gender performance. I will focus on the facts and reasoning relating to Ms. Nixon’s performance. I will argue that the court’s focus on Ms. Nixon’s socialization as a man is used to portray one’s sex as inner truth, ignoring the fact that it was Ms. Nixon’s failure to pass that stands at the heart of the events. I will argue that this “truth” about one’s socialization correlating to their birth assigned sex is still asserted from ones gender performance.

9.2 Parties Arguments Regarding Sex/Gender and Findings

VRRS’s argument throughout the proceedings was that it has the right to determine who is a woman for the purpose of their legal “women only” hiring policy. VRRS argued that they excluded Ms. Nixon because they believe “only persons who have been raised and lived their lives exclusively as girls and women are suitable as peer counselors for female victims of male sexual violence.” They go on to suggest that “someone who may still have some male characteristics though dressed as a female or a man disguised as a woman” might threaten their clients. That is, VRRS is suspicious that even tough Ms. Nixon might look like a women, her inner truth is different and consists of male characteristics. VRRS applies a single axis analysis and suggests that all non-trans women have the same gender experiences as girls and adults.

Ms. Nixon’s argument, on the other hand, also holds on to fixed ideas of sex/gender. She argues that because she is “medically and legally a woman” she deserve to be treated as all other

---

272 Vancouver Rape Relief Society v. Nixon et al., supra note 268, para 23.
274 Ibid, para 19.
women.\textsuperscript{275} Her counselor even stated that it is okay to demand women to show their birth certificate, which at the time was changeable only to people who underwent SGRP to change their visible genitals.\textsuperscript{276} That is, Ms. Nixon’s narrative of herself, at least the one presented at the Supreme Court, states that by accessing SGRP procedures she has moved from one stable sex/gender category to the other. She partially adopts the medical perspective that sees gender nonconformity as a medical condition that can be fixed.

As the Supreme Court points out, both sides agree that “sex” “is not limited to “male” and “female” but includes a continuum of personal characteristics which may manifest in individuals” and can include also “members of the sex not consistent with their anatomy”.\textsuperscript{277} Besides the interesting fact that the Supreme Court conflates sex and gender,\textsuperscript{278} in this description, sex is portrayed as an inner truth that might not always be visible on the body (anatomy), in which case some persons seek to surgically “reassign”\textsuperscript{279} their sex “by having their anatomy altered to conform to their self-perceptions or sense of their sexual identity.”  \textsuperscript{280}

Having agreed on the fixed nature of sex, what the parties de facto disagree on is the role socialization plays. Nixon holds on to her claim that she has always been a woman and underwent medical intervention to align her body with her inner understanding of herself. Actually, Nixon herself conflates sex and gender when she asserts that “she is always been female”.\textsuperscript{281} She claims

\begin{itemize}
  \item \textsuperscript{275}Ibid, para 24.
  \item \textsuperscript{276}Ibid, para 43–44.
  \item \textsuperscript{277}Ibid, para 25.
  \item \textsuperscript{278}A move that is not uncommon in trans right claims exactly because trans experiences question the binary division of sex and gender.
  \item \textsuperscript{279}The court uses quotes on this word and I wonder why, is it questioning the possibility to reassigned sex? In light of its judgment it seems probable.
  \item \textsuperscript{280}Vancouver Rape Relief Society v. Nixon et al., supra note 268, para 25.
  \item \textsuperscript{281}Vancouver Rape Relief Society v. Nixon et al., supra note 268, para 32.
\end{itemize}
that VRRS cannot treat her as a man because she was not anatomically a woman, that is, she asserts that what has changed is not her sex but her body.

On the other hand, VRRS argued that it had the freedom to decide who is a woman for their own purposes. VRRS believed because of the nature of their work with female victims of male violence, “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.” In the eyes of VRRS, because she was not born or raised exclusively as a woman, Ms. Nixon was not “woman enough” to be included.

Framing the question around socialization, the Supreme Court sides with VRRS. The Supreme Court find that VRRS had the bona fide belief that employment of only women who were born female, who were “women enough” in its beliefs, would benefit their clients by protecting them from the possible trauma of dealing with persons who might be described as male or “not woman enough”.

9.3 Supreme Court Reasoning

The Supreme Court’s reasoning focuses on what it believes to be a relevant difference between non-trans and trans women, their socialization. While the Human Rights Tribunal found that the actions of VRRS amount to sex discrimination, the Supreme Court was not convinced that this law was intended to refer to persons who underwent “trans-sexual surgery” [sic]. The Supreme Court

283 Ibid, para 28.
284 Ibid, para 29.
285 Ibid, para 118.
286 Ibid, para 118.
says that if the law had intended to include persons who undergo “trans-sexual surgery” \( [sic] \) under sex discrimination, it would have done so explicitly. In fact, the Supreme Court believed that this is not a coincidental oversight, but is rather meant to ensure that distinction based on pre “trans-sexual surgery” \( [sic] \) characteristics could stand as basis for distinction post-surgery.\(^{287}\)

Ostensibly, those characteristics the Supreme Court is referring to are the results of pre-transition socialization. The way the Supreme Court posits these characteristics as indicators of some truth constitutes them as what correlates sex to gender.

The Supreme Court finds that Nixon could not prove objectively that her dignity was harmed, that is, that a reasonable person in the circumstances of Ms. Nixon would consider his/her dignity compromised by the exclusion of VRRS.\(^{288}\) The Supreme Court agrees that no man would reasonably experience a loss of dignity if he was excluded by VRRS.\(^{289}\) Yet, it does assert that Ms. Nixon is not this reasonable man, because she identifies herself as woman and her “medical assessment resulted in her surgical reassignment consistent with her assertion of womanhood”.\(^{290}\) The Supreme Court found that it was the “characteristics resulting from her male sexual anatomy” that were at the basis for her exclusion, because Ms. Cormier could identify that Ms. Nixon “had not lived her whole life as female”.\(^{291}\) Therefore, and referring to the fact that VRRS is a private actor serving a “tiny part” of the provincial community,\(^{292}\) the Supreme court decided that no “male to female transsexual, standing in Ms. Nixon’s shoes, could plausibly say: “Rape Relief [VRRS] has excluded me. I can no longer participate fully in the economic, social and cultural life of the

\(^{287}\) Ibid, para 47-48.  
\(^{288}\) Ibid, para 122.  
\(^{289}\) Ibid, para 134.  
\(^{290}\) Ibid, para 135.  
\(^{291}\) Ibid, para 136.  
\(^{292}\) Ibid, para 145.
province.” That is, the exclusion is from the “backwater” and not the mainstream. An exclusion from a small “identifiable group” cannot constitute objective harm. To make that point, the Supreme Court draws on the fact that Ms. Nixon left another feminist collective because of transphobia without filing a complaint to argue that she did not feel harm to her dignity in that incident.

9.4 Analysis and Critique

In order to locate the role of coherence and performativity in this case, let us turn to the Supreme Court’s repeated emphasis on the characteristics resulting from Ms. Nixon male “sexual anatomy”, her socialization. The Supreme Court connects these characteristics with her history of not always being identified as a woman. Yet the Supreme Court admits that Ms. Nixon was identified as someone who has not always lived as a woman by failing to pass, and by confirming that failure when confronted. Ms. Cormier from VRRS decided Ms. Nixon is not “woman enough” based on her appearance. Therefore, this is a classical case where one’s incoherent gender performance led to a perpetrator to discriminate against them. Yet, instead of looking straight into Ms. Nixon’s performance the Supreme Court adopts the VRRS position that Ms. Nixon was not woman enough for their purposes. But what does it mean to be woman enough? According to the Supreme Court, it means to be socialized in a specific way.

While the Supreme Court appears to agree that gender is not pre-social and is transitional, it constructs socialization as an objective and mutually exclusive category correlating to sex. Either

293 Ibid, para 151.
294 Ibid, para 154.
one is born a female and is socialized to be a women or one is born male and is socialized to be a man. In this framework, “socialization” is mobilized to protect the essential truth of sex. As I have reviewed in chapter one, black feminists have long contested the ideal of a unified women’s experience, claiming that growing up as a black girl and being a black women is not the same as growing up as white girl and being a white woman. In the same vein, growing up with incoherent gender performance, such as being a sissy boy, is not the same as growing up with coherent gender. Socialization, like gender, is not one thing, yet the pretense of there being only two ways to be socialized serves to correlate gender back to sex.

One can argue that even if socialization is not a dichotomous experience, VRRS’s claim that the socialization of trans women and non-trans women is different still stands. However, this claim still considers the existence of a clear border between trans and non-trans women and considers the experience of non-trans women to be universal. Yet, as I have argued, to be socialized as a woman in South Korea is not like being socialized as a women in Kenya, nor is the socialization of women from different races, classes or abilities the same. Moreover, this claim assumes that there is more “truth” to gender arising from socialization that correlates to one’s birth assigned sex, than socialization of gender non-conforming child. Yet, what does unite these experiences is that they are both experiences of gender policing and discipline, in that there is no relevant difference between the experiences, in the sense that one is not more authentic than the other.

The Supreme Court utilizes socialization but only to re-correlate gender and sex. Yet, this “truth” deriving from one’s alleged socialization is still concluded based on her gender performance. Following Butler, in chapter one I argued that the legal sex category is inseparably
connected to presentation, that there is no “real” legal sex as much as there is no “real” sex. If sex is constructed through gender presentation and not vice versa, then socialization is also constructed through performance, insofar as it represents only one of two viable options of correlation to one’s sex. From a simple intrasectional point of view, if the Supreme Court’s reasoning stands, then VRRS could have potently expanded their argument to say for instance that butch non-transwomen cannot volunteer because their male characteristics might bring back the trauma of their clients. Hence, an intrasectional analysis further supports the claim that Ms. Nixon’s performance charged her “characteristics” with meaning and not vise versa. The Supreme Court is connecting some “characteristics” to biology, in ways that cannot be changed, presenting them as reflecting a more “internal truth” than surgical changes can provide. The Supreme Court suggests that the sex/gender of trans persons is less “real” than that of non-trans persons by drawing on the “alterative truth” of socialization, investing yet again in the hallucination of sex/gender certainty. In conclusion, the fact still remains that it was Ms. Nixon’s incoherent gender performance that led Ms. Cormier to decide that she is not “woman enough”. Ms. Cormier did not and could not see Ms. Nixon’s anatomy, she also did not know what kind of gender experiences Ms. Nixon had prior to transitioning. Ms. Cormier made her decision based solely on what she saw with her own eyes, Ms. Nixon’s gender performance, from which she concluded she not “woman enough”. Although the Supreme Court and the Court of Appeal find that VRRS actions were justified, their reasoning reveals the substantive part of performativity in the decision to exclude Ms. Nixon. If the court would have asked whether VRRS is allowed to treat people whose gender performance cohere to the socially accepted norms of gender differently than people whose gender identity is incoherent, it might have been bound to conduct a different kind of discussion, one that would account for the ways the alleged inherent truth of the correlation between sex, gender and sexuality serves to
justify social structures that incite, among other things, violence against trans and non-trans women.

10  XY

This case deals with the demand for accurate identification documents for trans persons and its connection to SGRP. By unlinking the right to have accurate documentation with undergoing SGRP, The Ontario Human Rights tribunal decision takes an honest look into the category of sex and enables me to consider some of the ways in which performance is linked to gender as an administrative category. Prior to the XY decision, granted in 2012, Ontario residents who wished to change their sex designation on their birth certificate because their “felt gender”/[sic]/ was different than the one assigned to them as birth, had to provide proof, corroborated by two doctors, that they underwent “transsexual surgery”/[sic]/.295 The applicant in the case under discussion here, a transwoman whose request for accurate documentation was granted only after she provided corroborated proof of surgical intervention, claimed that this legal demand discriminates trans persons on the basis of their sex. The tribunal accepted the application and found that the policy does discriminate on the basis of sex, yet it also stated that it sees no room for total abolition of the legal demand to get medical certification, only not one that indicates a surgical intervention. This decision demonstrates progress in respecting trans persons right to autonomy, because it allows them to choose whether or not to have surgery in order to be recognized by the state. However, it is embedded in the relation between medical and legal discourse of trans experience

295 As you may recall, this term is also been used by the tribunals in the cases of Ms. Nixon (there, trans-sexual surgery) and in Kavanagh. I note this because in connecting identity with a medical procedure, there is an implication that it is a surgery to repair transsexuality and bring trans people back to the realm of normality, strengthening the misconception of SGRP as creating “biological” male and females.
and reflects a narrow understanding and respect of trans people’s autonomy, as it still validates the medical institution’s power to corroborate trans people’s choices. Moreover, this legal text opens a window for looking at the relation between administrative actions and gender self-discipline, and how this relation is formed and informed by gender performance.

10.1 Facts of the Case

The applicant identified herself as a “Male-to-Female” transgendered person. She spent periods of her adult life living full-time “as a woman”296 and periods of when she “presented herself publicly as a man”, while “she continued to identify as female and to live as a woman in her private life”.297 Finally she decided to live fully “as a woman” at which point she also accessed hormone replacement therapy. She testified that her decision to present herself as a man in different periods of her life was connected to the fact that she could not obtain proper ID that would reflect her “felt gender”. She argued that she had been discriminated against, had violence directed toward her and that others had disrespected her gender identity,298 because she could not obtain proper ID. “She testified that she thought she would “die” if she tried to get a job or an apartment in the real world without identification to back up her female identity.” 299 Her desire for new ID portrayed not only as resulting from external forces but also from internal one, “the applicant testified that she felt a deep and compelling need300 to have official documentation that ‘backed up’ her gender” 301

296 XY v. Ontario (Government and Consumer Services), 2012 HRTO 726 (available on http://canlii.ca/t/fqxvb), para 43.
297 Ibid, para 50.
298 Ibid, para 142.
299 Ibid, para 49.
300 This phrase “deep and complying need” resonated trans pathology where access to medical technologies is directed at those who demonstrate a ‘fierce and demanding drive’ (see: Meyerowitz, supra note 190.)
301 XY v. Ontario (Government and Consumer Services), supra note 296, para 124.
The applicant knew that in order to obtain an identification document that accurately reflects her felt gender she must undergo “transsexual surgery”. Therefore, she contacted a surgeon in the United States who promised her that he had successfully helped people from Ontario in changing their sex designation. She then traveled to the United States where she had bilateral orchiectomy (i.e. removal of both testes). Sometime after returning to Canada, she applied to have her sex designation changed accompanied by a letter from her surgeon as well as her physician. The administrative authority then contacted the physician who had to assure them that she had inspected the applicant’s genitals and found that the surgery was sufficient to fulfill the legal requirement. Subsequently she was issued a new birth certificate, which allowed her to apply for new ID and OHIP (Ontario Health Insurance) card.

In 2009 the applicant filed a complaint to the Ontario Human Right Tribunal against the section 36 of the Vital Statistics Act, R.S.O. 1990, c. V.4 (“the VSA”), which has provided that anyone who wishes to change their sex designation on their birth certificate must provide medical certification that they underwent “transsexual surgery” [sic]. The applicant claimed that the requirements of s.36 infringed her right to equal treatment without discrimination with respect to services. The respondent was the Minister of Government and Consumer Services who is in charge of the VSA and the procedures carried out by its virtue, including changing sex designation on birth certificates. The Ontario Human Rights commission was also a respondent to the application.

303 Ibid, para 72.
304 Ibid, para 66.
305 As you may recall this term is also been used by the tribunals in the cases of Ms. Nixon (there, trans-sexual surgery) and in Kavanagh. I note this because in connecting identity with a medical procedure, it seems to imply that it is a surgery to repair transsexuality and bring trans people back to the realm of normality, strengthening the misconception of SGRP as creating “biological” male and females.
10.2 Parties’ Arguments

The applicant claimed that in the process of acquiring accurate documentation she was discriminated against on the basis of sex, sexual orientation and disability. She eventually decided to focus only on the sex discrimination claim, asserting that her gender identity is not a disability and that sexual orientation is not a relevant category. She claimed that she was treated differently from non-trans persons when she was burdened with providing proof that she underwent “transsexual surgery”, arguing that:

“When a member of the non-transgendered majority applies to the respondent for a birth certificate, he or she can expect to receive a birth certificate with an accurate sex designation, in the sense that it accords with his or her gender identity”.  

The respondent agreed that discrimination on the basis of one’s “status as a transgendered person” is discrimination on the basis of sex and/or disability. However the respondent disputed that the applicant suffered from such discrimination, arguing that she underwent the surgery for reasons unrelated to the legal requirement. Only after the completion of surgery did she ask the administrative authority to change her ID, and this request was granted. Yet the administrative authority did not ask the applicant to undergo the surgery but merely based their decision on the fact that she underwent such surgery.

306 XY v. Ontario (Government and Consumer Services), supra note 296, para 102.
307 Ibid, para 142.
308 Ibid, para 6.
309 Ibid.
310 Ibid, para 7.
The respondent further claimed that the right to substantive equality was not infringed because the requirement to undergo “transsexual surgery” did not “perpetuate disadvantage, prejudice or stereotyping against transgendered persons.” 311 This requirement is legitimate because it is made to insure “that registered vital event data is accurate and reliable”. 312 Alternatively, the respondent claimed that the demand to undergo surgery can be considered a “special program” under article s.14 of the Code, aiming at helping “transgendered persons who have had “transsexual surgery” that alters their “anatomical sex structure” because they suffer from severe Gender Identity Disorder and require surgery as part of their treatment.” In other words, the demand to undergo surgery is for the benefit of trans people themselves, therefore it cannot be discriminatory. 313

The respondent’s claim that the demand to undergo surgery is “reasonable and bona fide” and to change it would cause the respondent undue hardship. The applicant rejected the “reasonable and bona fide” argument, arguing that this discrimination is aimed directly at trans persons and that the respondent did not prove that it would cause undue hardship to change sex designation without requiring a proof of surgery. That is, “the needs of transgendered persons could be accommodated through far less invasive and less harmful means than surgery”. In support to this argument, the applicant showed that the Ontario Ministry of Transportation is changing sex designation based on a letter from a doctor that states that in his/her opinion it is appropriate to change the sex designation on the persons driver’s license.

311 Ibid, para 8.
312 Ibid, para 8.
313 Ibid, para 9.
10.3 Judgement and Reasoning

The tribunal sided with the applicant, finding that the demand to undergo surgery exacerbates the situation of transgendered persons as a historically disadvantaged group and thus perpetuates their disadvantage. Alternately, the demand is discriminatory because it perpetuates stereotypes about trans persons and their needs to have surgery “in order to live in accordance with their gender identity”. The tribunal also sided with the applicant in finding that the respondent did not prove it would have to go “undue hardship” in the case of removing the demand to undergo surgery. The tribunal stated that the legal requirement of the VSA is discriminatory because it conveys a stereotypical message that trans identities are only valid and deserving of recognition after having surgery, till then society can “disregard their felt and expressed gender identity and treat them as if they are ‘really’ the sex assigned at birth.”

The tribunal questions the idea of “transsexual surgery”. In an extremely interesting move, the tribunal states that “there is no basis in reality or in transgendered persons’ actual circumstances for the stereotypical idea that a transgendered person walks into the surgeon’s office “male”, for example, and comes out “female”. The tribunal concludes that the fact that the response deemed the applicant’s sex to have changed through the surgery is evidence of “the significance the respondent attributed to the applicant’s surgery, not the surgery’s actual significance.” The tribunal’s critique of the prerequisite of surgery for recognition of trans identity is even more clear when thinking about the actual surgery the applicant underwent, that did not construct new genitals and it is even more clear when considering that sex is determined by different traits, some

314 Ibid, para 16.
315 Ibid, para 172.
316 Ibid, para 213.
unchangeable, like chromosomes. Yet, the tribunal still recognizes the value of corroboration of vital statistics. The tribunal accepts the respondent’s claim that “the accuracy and reliability of registered vital event data is important”. However, the tribunal does not accept the respondent’s claim that the only proof of “transsexual surgery” would provide such accuracy. The tribunal suggests that the requirement for external corroboration by doctors should be sufficient.

Subsequently the tribunal finds that s.36 is contrary to the Ontario Human Rights code. In addition the tribunal finds that the “overall legislative scheme for issuing birth certificates under the VSA has a discriminatory impact on transgendered persons”, and directs the respondent to accommodate the needs of transgender persons. The tribunal does not tell the respondent how to better accommodate the needs of transgender persons in order to comply with the Code, but it does state that “respondent could fulfill its duty under the Code to accommodate the needs of transgendered persons by allowing them to change the sex designation on their birth certificates by submitting doctors’ certificates certifying that the sex designation on their registrations of birth should be changed”.

Accordingly, the tribunal ordered the respondent to revise its criteria within 180 days of the decision. The respondent did revise its criteria so that currently one needs only to have their request corroborated by a letter signed by a practicing physician or a psychologist that “has treated or evaluated the applicant”. The letter should “confirms that the applicant’s gender identity does not accord with the sex designation on the applicant’s birth registration” and is of the opinion of the physician or a psychologist “that the change of sex designation on the birth registration is appropriate”.

---

317 Ibid, para 252.
318 Ibid, para 253.
319 Ibid, para 296.
320 S.4 to the Application for a Change of Sex Designation on a Birth Registration of an Adult (available at: http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/007-11325E~1/@file/11325E.pdf)
As follows, even though this reasoning seems unconnected to performativity at first, I argue that what tribunal is noticing is the fact that trans people can pass without surgical interventions in their genitals, exactly because one’s genitals are actually not what is on public view. Regardless if one is trans or non-trans, the outside gaze can only see their gender performance. However, the tribunal fails to fully recognize the role of performance in constructing sex and gender, and does not let go of the demand that one get medical approval that they have “changed” their gender, that is, the tribunal continues to validate the structure by which only certain acts of gender non-conforming are justified as medical necessity authorized by doctors.

10.4 Analysis and Critique

The tribunal in XY dares to make far-reaching interventions into the regulatory regime of sex/gender as an administrative category. However, in its insistence on the need for corroboration of gender, the tribunal is unable to follow through with its own conclusions. Still, this intervention allows us to look deeper into the category of sex to discover how performance is linked to gender as an administrative category. The tribunal’s critical analysis of SGRP and ID as constituting social identities exposes what I referred to as the hallucination of gender transition.

Although it does not refer directly to performance, by offering a critical reading of SGRS, the tribunal reveals the role performance plays in this controversy. Tribunal states that surgery does not have actual significance with respect to purposes of the VSA but only one attributed to it by the respondent. This argument echoes my argument with respect to sex discrimination, that the perpetrator never actually sees the victim’s sex, but that sex is concluded from the victim’s presentation. Following that logic, the surgery does not only have significance to the applicant’s sex in its own right, but is also charged with significance Vis a Vis the category of sex by the
respondent. As sex is given meaning through gender performance, to return to Butler, the “transsexual surgery” is given meaning through “administrative performance”. As I suggested before, SGRP is presented as a “cure” for gender variant incoherence, but because it cannot create “real sex,” it actually reveals the inherent instability of gender and coherent identities more broadly.

However the tribunal, asserting that all information must be “corroborated”, still holds that no one can say they are this or that without an authority’s external approval. That is, while it is willing to let go of the demand for surgery, it is not willing to let go of the gate keeping of gender boundaries. The applicant herself adopts this logic when she brings forward the example the policy of changing sex designation on driving licenses based on a letter from a physician. Why is it that the tribunal is able to recognize the hallucination of gender transition and the right of trans persons to have their “felt gender” recognized, yet does not recognize trans persons’ right for gender self-determination? Perhaps it is because giving trans people’s full autonomy over sex designation is tantamount to making the state give up on its power over gender as an administrative category for population control.

The double edged sword that is inclusion is apparent in this decision. The tribunal sees the question of access to ID as a question of recognition, the applicant herself stressed that trans persons need appropriate ID that verifies their gender in order for others to respect it. By rejecting the course of argument connected to disability, she is claiming that trans identities are

321 XY v. Ontario (Government and Consumer Services), supra note 296, para 224.
322 Spade, supra note 12 at 144–5.
323 XY v. Ontario (Government and Consumer Services), supra note 296, para 125.Par 125
324 Ibid, para 142.
normal (and not a disability). By abandoning the claim she has been discriminated on the basis of sexual orientation she constructs gender identity as a separate category from which “sameness” can be advocated. The heart of her argument is that she is being affected differently by the VSA than non-trans people because of the “special characteristics” of transgendered persons.” 325 The applicant describes herself as someone who has always felt different, 326 that she was “living a lie” when presenting herself as a man, that those “special characteristics” reflect inherent, stable and unchangeable truth.

On the other hand, it is also evident from the decision that the sex category plays a significant role in administrative control. The respondent describes how registration at birth later affects your registration throughout life, 327 as the tribunal notes, “the respondent’s undisputed evidence in this case establishes that Ontario birth certificates may be used to gain access to many benefits and services”. 328 The power of sex as proxy for gender as a regulatory scheme is also evident in the respondent’s claim that the current policy is a “special program” for those with sever GID. Because, as mentioned above, this discourse of “severity” insures maximum supervisory power to the authorities over gender insubordination, legitimizing only those who can perform gender compliance.

The applicant did not only subjectively feel that her identity would not be respected without proper ID, the state actually constructs that registration as a pivotal site of citizenship. When

325 Ibid, para 145.
326 Ibid, para 42.
327 XY v. Ontario (Government and Consumer Services), supra note 296, para 35., interestingly in this description it is noted that vital statistics began to be recorded in the 19th century, exactly at the period Foucault is positing as the beginning of the rise of the modern disciplinary powers of sexuality, strengthening Foucault analysis of population control.
328 Ibid, para 87.
recognition is linked to citizenship in this way, it grants legitimacy to others to mistreat the unrecognized. I read the applicant’s desire to have her “felt gender” recognized by the state as a survival tactic, as the way in which population control power is transformed into intersubjective discipline and into self-discipline, leading to the subjective belief that she cannot be herself without the state’s recognition, driving her to take whatever steps necessary, including surgery. In this context, the applicant’s “consent” to a policy that still requires medical approval (brining a letter from a physician) can be seen as a “lesser of two evils” tactic.

The XY decision demonstrate that focusing solely on the end game of recognition without critically accounting for the systematic harm to trans and non-trans persons, brought about by the administrative use of gender as a category of (mal) distribution, has limited effect. While the tribunal is bravely questioning the links between administrative sex and gendered experience, it is not questioning why sex/gender is an administrative category to begin with, and it does not doubt the need for external corroboration of one’s felt gender.

A deeper look into these questions might grant us a glimpse at the mechanism of coherence and performance. Even though this is not clearly stated, I argue that the tribunal’s critique of genital SGRP as a pre-condition for state recognition is motivated by the fact that one can pass without such surgery. That is, one can perform their “felt gender” without such surgery. Moreover, it is easy to argue that the applicant has been treated differently than someone whose gender performance coheres to the socially accepted norms of gender/sexuality. The applicant herself makes this claim when she states that she had been treated differently than non-transgender persons in the demand that she undergo surgery. The tribunal itself adopts this claim when it finds that the “whole regulatory scheme” of issuing ID has discriminatory impact on transgender persons.
Yet, I am more interested in the ways this case links ID and coherent performance. Remember that the applicant sought to have surgery in order to enable her to receive accurate documentation that would allow her to stop “presenting as a man”. The applicant felt vulnerable as long as her ID did not correlate to her gender presentation, because the lack of correlation placed her in constant danger of having her incoherence exposed. The applicant feared, and rightfully so, that she would be outed by her ID, that she would “fail” to pass as someone who coheres to the rules of gender, now flexible enough to include a state supervised and authorized specific kind of coherent gender nonconformity. In XY case, and others like it, using one’s ID is a public act of incoherent gender performance. Therefore, I argue that the applicant sought medical intervention in order to be able to perform her gender more coherently.

The application and the decision did not contest the role of coherent performance, the vital importance of compliance with the “hallucination of gender certainty”. Instead, they demand to include trans persons in the regime of gender coherence, by adjusting it to recognize a narrow trans claim that accepts gender as an essential inner truth. I am not suggesting that the plaintiff’s “felt gender” was not subjectively true. Rather, I am suggesting no one’s gender objectively exists, that it is a performance that is charged with social value by means of population control and intersubjective discipline that moves us to self-discipline. Nevertheless, the decision continues to deny the role of performativity by promoting the idea that only those who can perform gender to the satisfaction of the medical intuition, are eligible for recognition.

The actual lives of trans persons in general and the applicant in particular are not devalued solely because they do not have the right ID, but also because their performance (in its broad sense that includes all public acts) does not cohere to the socially accepted norms of gender/sexuality.
When this incoherence is exposed, in part because they do not have the right ID, they are considered to be less of a subject. The ID is not an “innocent bystander”, for it reflects that connection between administrative violence and what is referred to as hate crimes. The ID signifies that individuals do not have autonomy over gender, thus legitimizing privatized acts of punishment for unauthorized gender/sexual nonconformity.

11 Angela Dawson

Angela Dawson, a local Vancouver celebrity, known as “roller girl” for her habit of directing traffic on rollerblades, claimed she was discriminated against by the Vancouver police in several events where her gender identity was not respected. Ms. Dawson claimed that this series of events is evidence that the VPB systematically discriminates against trans persons.\(^{329}\) In a very recent decision, given in March 2015, the tribunal dismissed several of the complaints yet found that in three incidents in 2010 Ms. Dawson was discriminated against when she was referred to in her legal name and when she was refused post-surgery care while held in prison. The tribunal also found that the Vancouver Police Board (VPB) have systematically discriminated against trans persons because it did not have a clear policy on how to identify and deal with trans persons. This decision brings forward highly inclusionary language constructing gender, for better or worse, as “intensely personal”.\(^{330}\) Yet, as much as this decision can be considered to be progressive, in this decision as in the previous ones I have reviewed, there is a stark discrepancy between the lack of discussion of gender performance and the fact that Ms. Dawson’s incoherent gender performance played a key role in the harms inflicted upon her. I reading my review of the case, I ask the reader

\(^{329}\) Dawson v Vancouver Police Board (No 2), 2015 BCHRT 54 (available on http://canlii.ca/t/ggzx4), para 47.

\(^{330}\) Ibid, para 1.
to ask herself, to what extant can the harms inflicted on Ms. Dawson be understood as an extreme forms of gender policing? And to what extant can Ms. Dawson’s actions, including her decision to bring forward her complaint, be understood as gender disobedience?

11.1 Facts of the Complaint

After a series of “run-ins” with the VPD (Vancouver Police Department) in 2013, Ms. Dawson filed a complaint to the British Columbia Human Rights Tribunal concerning six different incidents, which occurred between August 2009 and July 2010. Ms. Dawson claimed that the police discriminated against her on the basis of her sex\(^{331}\) in breach of s.8 to the British Columbia Human Rights code with respect to services. She also claimed that this series of events is evidence of the VPD’s systematical discrimination against trans persons. The respondent in the case was the Vancouver Police Board, which is in charge of the VPD and its employees, i.e., police officers. The tribunal found only three of the incidents to amount to discrimination and dismissed the rest.

In what follows I will review those three incidents that were found to amount to discrimination.

Ms. Dawson identified as “female” from her early teens.\(^{332}\) She ran away from her abusive home at the age of 16,\(^{333}\) and since then, like many other trans women, has spent years of her life in and out of jails.\(^{334}\) The court chooses to refer to Ms. Dawson as “trans”, commenting that she identifies at time as “transsexual” and at times as “transgender”.\(^{335}\) Ms. Dawson was in frequent contact with

\(^{331}\) Ibid, para 36.

\(^{332}\) Interestingly, she was born intersex and was ascribed male at birth on the insist of her father, that is, she was not ascribed sex based on her visible genitals. This fact is also interesting because it defers from the common portray of trans people as have gender opposite to their sex, because as an intersex person Ms. Dawson “sex” is not determined, further raveling how sex and gender are constituted through performativty and not vice versa.

\(^{333}\) “‘Roller Girl’ Angela Dawson wins $15K damages from Vancouver police”, online: <http://www.cbc.ca/1.3009637>.

\(^{334}\) Dawson v. Vancouver Police Board (No. 2), supra note 329, para 21.

\(^{335}\) Ibid, para 39. The Multiple aliases of Ms. Dawson is not surprising but reflective of what I described in chapter one, following Valentine, of the multiplicity of gender variant experience and practice in the margins of the community.
VPD employees, i.e., police officers, due to her habit of directing traffic on roller blades in downtown Vancouver. She was often referred to by police personnel by her legal, male, name, albeit they all knew her as Angela. She had long alerted the VPD that she intended to “seek a policy-based remedy; specifically an order requiring the VPB to take steps and implement a program to ensure that it treats transgender individuals in a manner consistent with their right to be free from discrimination.”

11.2 Incidents and Findings

In March 2010 Ms. Dawson underwent gender reassignment surgery\footnote{Ibid, para 95-106 This is yet another evident of how recent this decision is, when it refers to genital surgical medical technologies as gender reassignment surgery and not “transsexual surgery” or “sex reassignment surgery”, positioning gender as the heart of the phenomena.} after which she required intense aftercare for a long period.\footnote{Ibid, para 28, 30.} The post-operative care included a procedure that needed to be carried out every few hours.\footnote{Ibid.} Shortly after her surgery she was arrested for breaching probation. She told the police personnel who arrested her that she needs to go home to preform post-operative care before she can accompany them.\footnote{The decision specify that this procedure is dilating the vagina, yet I do not see a need to refer to that again and again and would use post-surgery care instead.} They refused to let her do so and told her that the prison nurses would take care of her. Yet, in jail,\footnote{Surprisingly the decision does not mention Ms. Dawson prison placement, that is, whether she was placed in a man or women facility. Perhaps the police jail in Vancouver holds both men and women.} even though Ms. Dawson repeatedly mentioned her medical needs to everyone she came in contact with, she did not receive medical attention.

The nurse refused to equip her with the proper equipment or to refer her to the hospital. According to the statement of the nurse, which refers to Ms. Dawson frequently as male and uses
quotes around the word “vagina”, Ms. Dawson did not let him inspect her genitals and he did not find conclusive “on-line” [sic] information about the post-operative care. As the tribunal notes, the nurse did not believe she was telling the truth about her medical condition, although, as the tribunal notes, it is unclear why one would seek such medical care in any other situation. The nurse refused Ms. Dawson request for medical help and did not report this to anyone. Ms. Dawson did eventually give in and showed the personnel members her healing parts, yet even that did not drive them to help her. A more sympathetic nurse who came in the morning offered her “gloves and Vaseline”, none of which is relevant to the care she needed. Ms. Dawson found that the suggestion itself added to her deep humiliation.

The tribunal found that Ms. Dawson experienced an emotional and psychological trauma as a result of her interaction with the prison personnel, especially the medical personnel. Ms. Dawson claimed that she was marginalized and dehumanized when the medical personnel did not believe she was “a woman with a vagina”, this attitude created a discriminatory barrier to her access to medical treatment. VPB claimed that Ms. Dawson was treated like any other woman in jail, a claim Ms. Dawson rejected by pointing out that the nurse wanted to inspect her vagina in order to decide if it was “real”. I would add that no other women would have to prove their vagina is real in order to get access to medical care. Ms. Dawson also claimed that even if she was treated like any other woman, she was still discriminated because she is a trans woman who underwent surgery connected to her trans status. That is, she needed different treatment than non-

---

341 “I wonder what was in his mind about Ms. Dawson such that he concluded it was in her interest to lie about the sex-reassignment surgery and seek to obtain the means to undergo vaginal dilations if she did not have a vagina” Dawson v. Vancouver Police Board (No. 2), supra note 327, para 124.
342 Ibid, para 116-118
343 Ibid, para 119.
344 Dawson v. Vancouver Police Board (No. 2), supra note 329, para 126.
trans women. The tribunal sided with Ms. Dawson and concluded that the adverse impact of her experience was related to her “trans status” and that she was in fact discriminated against. 346

In another incident in June 2010, while still under need for regular post-operative care, although less intense, a stranger picked a fight with Ms. Dawson while she was rollerblading. 347 When she called the police to the scene, the police refused to help her because they claimed they could not get enough information from Ms. Dawson about the person who harassed her. Instead, the police found that Ms. Dawson held a threat to public safety and she was taken into custody. In the report of her arrest, the officer, who knew her from before as Angela, identifies her as M and referred to her by her male name. Ms. Dawson stressed to the police officers that arrested her that she needed to perform post-operative care, 348 though she did not mentioned it again in jail. In custody, she did not receive medical help and upon her release was treated with disrespect. 349

The tribunal also found that the denial of access to post-surgery medical treatment was discrimination on the basis of her sex. 350 The tribunal found that she was discriminated against when she was mis-gendered on the basis of her trans status. 351 The same was found in regard to another incident earlier that month when she received a ticket where she was referred to in her legal name and as a male. 352

347 Ibid, para 170.
348 Ibid, para 182.
349 Ms. Dawson claimed that she overheard the police officer say “that freak can go” (Dawson v. Vancouver Police Board (No. 2), supra note 327, para 186.). The tribunal did not accept that claim (Ibid.) but did accepted the officer that testified that “when she did not leave the jail, he took her rollerblades out and said that they were leaving, which caused Ms. Dawson to follow him and leave as well,” Ibid, para 187. The tribunal make no further remark on this incident although it is shows deep disrespect to Ms. Dawson and strengthen the claim that she was treated as a freak.
350 Dawson v. Vancouver Police Board (No. 2), supra note 329, para 204.
351 Ibid, para 203.
352 Ibid, para 223.
11.3 Systematic Discrimination

In addition to Ms. Dawson specific complaints, Ms. Dawson claimed that her repeated of mis-gendering points to a systematical discrimination by the VPB. Ms. Dawson claimed that by not using one’s preferred pronouns\textsuperscript{353} and name, the organization is causing them harm. She strengthens the argument by pointing out the administrative barrier in changing one’s sex designation.\textsuperscript{354} The VPB claimed that there is great significance for positive identification for administrative reasons.\textsuperscript{355}

The tribunal found that the VPB has no policy about how to identify trans people. There is no policy regarding the circumstances under which officers should use the name and pronoun preferred by trans persons. The only available policy of the VPB in regard to trans persons is the search policy, which the tribunal chose not to review.\textsuperscript{356} The tribunal ordered the VPB to adopt policies “that recognize and prevent discrimination of identification of trans people” as well as train their officers in how to implement such policies.\textsuperscript{357}

\textsuperscript{353} The legal text uses the word gender, but it actually refers to pronoun.
\textsuperscript{354} Dawson v. Vancouver Police Board (No. 2), supra note 329, para 240.
\textsuperscript{355} Ibid, para 241-2.
\textsuperscript{356} Ibid, para 260. I suggest below that by not reviewing the policy the tribunal contradictions its own findings. This is clear by the tribunal decision to not critique the only trans related policy, the search policy. The tribunal does cite the policy which grants authority to question trans people in case of uncertainty that the “claim of being transsexual is legitimate”. The question that be asked are:

  i. What name appears on your identity documents?
  ii. What is your gender identity?
  iii. Have you disclosed your gender identity to your friends and/or family?
  iv. What steps are you taking to live full-time in a manner consistent with your gender identity? How can you demonstrate that you are living full-time in your gender identity?
  v. Have you sought or are you seeking medical or professional guidance from a qualified professional? If so, can you give me the names of these people and their professional designations?
  vi. What medical steps, if any, have you taken to help your body match your gender identity?”

These question reflect a very narrow understanding of gender variant experiences and make legit only those who were privileged enough to follow the linear medical protocols of treatments. Only those who cohere to cohere to the trans identity designed by pathology get to access to minimal privilege of deciding who is going to search their body.
\textsuperscript{357} Dawson v. Vancouver Police Board (No. 2), supra note 329, para 271.
This recent case is evidence of great achievements in recognition that the trans movement has made in recent times, as well as demonstrating some of the limitations of the liberal discourse of gender variant practices. The decision puts forward inclusionary discourse as we know it from the gay and lesbian liberation movement. It opens with describing gender as “intensely personal”, in other words, saying that gender, like sexuality, is private. The tribunal uses this premise to question the common description of the “sexes” as opposite and mutually exclusive 358 and even replaces the term sex designator with the term “birth gender”. 359

Yet, Ms. Dawson’s acts that brought about her frequent friction with the VPD, namely controlling the downtown Vancouver traffic on her rollerblades while preforming incoherent gender, are clearly a public act of gender insubordination 360. Moreover, both the nurse’s questioning of Ms. Dawson’s gynecological needs and the repeated use of her legal name by officers who knew her preferred name, indicate that Ms. Dawson’s discrimination was connected to her incoherent gender performance. That is, in using Ms. Dawson’s legal name the officers marked her lack of correlation between her sex, gender and gender performance. The prison nurse concluded that she was lying about her situation simply because she did not look like someone who has a vagina. In all the incidents reviewed above there exists a strong element of gender

---

358 Ibid, para 1.
359 Ibid, para 219.
360 Conscious or not.
policing, of setting boundaries for Ms. Dawson’s acts of gender insubordination in the public space.

Figure 2: Roller Girl (Angela Dawson) directing the traffic in downtown Vancouver. M 5, 2012 (John Lehmann/The Globe and Mail)

However, yet again the tribunal does not refer to Ms. Dawson’s performance. Instead, motivated by what seems like a sincere desire to promote trans inclusion, the tribunal mixes and matches sex, gender, and trans status. Yet, it does not do so in intrasectional ways that would allow it to reveal performance as an overlapping element that charges the categories with meaning, but rather to posit gender as free standing inherent personal “truth”. Recall that the tribunal found that misgendering Ms. Dawson was related to her trans status, while preventing her from access to medical treatment was related to her sex. Why is that? I am inclined to suspect that the tribunal correlates the lack of access to medical care with the thing that needs medical attention, which is Ms. Dawson’s vagina. In other words, the tribunal sees Ms. Dawson’s post-operative genitals as signifying bodily “truth”.\(^{361}\) On the other hand, the tribunal reads misgendering as relating to trans

\(^{361}\) Although here the biology is altered by surgical means.
status, that is, to one’s private subjective understanding of themselves, an inner coherent truth. In this way, the tribunal is still keeping both sex as an objective essential truth and gender and as subjective essential truth, while correlating them.

As I suggested in chapter one, following Eng, economic systems, liberal and neoliberal, attach ontological status to rights as property. I am worried that undersetting gender as private will reinforce the significance of gender coherence. This focus on gender as signifying inherent truth to be found, casts trans as another closed category, denying the intrasectional role of gender performance in charging one’s sex, gender and sexuality with socially normative meaning. Moreover, portraying gender as internal truth might be used to conceal race, class, and other categories of identity and practice, that are inextricably connected to experiences of gender variance. Thus, it continues to render kosher administrative practices of deciding who is really trans in relation to their ability to demonstrate coherence by their willingness to comply with the social system of sex/gender.

The fact is that Ms. Dawson, like many others on the margins of the trans community, does not identify as solely one thing or the other, as can be noted by the tribunal’s reasoning for using the term trans.\footnote{Dawson v. Vancouver Police Board (No. 2), supra note 329, para 39.} She was mistreated not only because she is a women and because of her trans status, but because her presentation did not cohere with the socially accepted norms of sex/gender, which rendered her less of a subject whose self-identification and needs are to be respected. For this reason, the nurse conditioned her access to medical treatment in proving she indeed has a vagina. Because her performance revealed her incoherence, that is, that her “biological” sex,
gender and gender presentation do not correlate, the nurse wanted proof to what we all assume when we decide someone who has a feminine gender performance is a women, that she has a vagina. The officer used her legal name as a punitive action in response to her acts of disobedience, marking the “falseness” of her performance. However the tribunal, seeking to include trans persons, holds yet again to the hallucination of gender certainty and constitutes Ms. Dawson as a coherent subject.

12 Israeli Legal Cases Review- Introduction

Unlike the Canadian legal system, the Israeli legal system has yet to produce a substantive body of law in respect to gender variance. Yet, as it is happening globally, in recent years there have been some very interesting decisions from different tribunals, including the High Court of Justice. In what follows I will discuss three Israeli cases that resonate the main themes I have analyzed in respect to Canada. I will first return to the case of Lilach, which opened chapter one, then I will review a recent high court of justice decision regarding prison placement, and I will close with the case of Marina Meshel, which has been recently concluded.

13 Lilach

Lilach’s lawsuit shows the use of tactical use of inclusionary legal discourse where the facts points to the performative nature of the harm. Lilach filed a suit in the regional labor court in Tel Aviv after her employers’ demonstrated hostility towards her decision to adopt a feminine gender presentation. They made it clear that she can only come to work if she is commits to dress “as a

363 Plonit v. the Respondent, supra note 1
man”. Lilach claimed that she was discriminated against, in violation of the Employment (Equal Opportunities) Law, 5748-1988, which prohibits employers from discriminating between job applicants or employees due to their sex and sexual orientation, amongst other things. Lilach’s case rested, inter alia, on the argument that the legal prohibition to discriminate on the basis of sex is also a prohibition to discriminate on the basis of sex change.\textsuperscript{364} Alternately, Lilach argued that she was discriminated against on the basis of sexual orientation, based on comparative law and the Israeli Equal Employment Opportunities Commission’s legal opinion that stated that “gender orientation” is part of sexual orientation.\textsuperscript{365} Lilach’s case never reached a decision because her former employer agreed to settle and paid her 30,000 NIS.

Lilach’s case was one of the first of its kind in the country and it adopted as legal strategy an inclusionary language. It went as far as not only trying to include gender variance in the category of sex but also in the category of sexual orientation. Her argument focused on the fact that she was in the process of sex/gender transition which includes also a name change and hormone replacement therapy. Lilach included in her statement an opinion by a local expert and long term activist, Ms. Nora Greenberg, who specialized for many years in counseling and individual support for issues of gender identity. This opinion stressed the plaintiff’s deep need to see herself as a female, and stated that “her appearance and attire are necessary components in the process of dismantling and integration of a new identity, which is experienced by the plaintiff as real.”\textsuperscript{366}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{364} \textit{Ibid. supra note} 1 (Statement of Claims, para 33)
\item\textsuperscript{365} \textit{Ibid}, para 43
\item\textsuperscript{366} \textit{Ibid}, (Statement of Claims, para 30)
\end{enumerate}
\end{footnotesize}
However, Lilach was clearly discriminated against for lack of coherence, which is evident in the fact that she was in the process of transition, a moment of substantial incoherence. Moreover, her employer stated that it was her gender performance that motivated their decision, when they stated her femininity was “funny”. Being one of the first two trans ADL lawsuits in the county, Lilach made a reasonable choice to make an argument that can be read by the court. She used two categories that were already recognized by law, sex and sexual orientation. Moreover, she choose to settle and receive money over a legal decree about the inclusion of trans identity within the bounds of the law, in doing so she did only deter future employers from discriminating trans persons, she also proved to the community that such conduct is punishable.

14 Ploni(t)\textsuperscript{367}

Omer’s case reflects the current global public debates around trans subjectivity, between conservative voice who cling to medical discourse that portray trans-ness as problem to be fix, and liberal voices who recognize trans people’s right for autonomy and the hardship that come along with gender incoherence. Omer, a young undereducated transman from the peripheral south of Israel was convicted in the district court of Bee’r Sheva, alongside two, of his friends in the armed robbery of a gas station.\textsuperscript{368} Omer stated in the media as well as in the district court, as part of his sentencing hearing that he took part in the criminal act because he wanted to prove that he is a real man. He further stated that he could not find employment because of he his transgender.\textsuperscript{369}

\textsuperscript{367} In Hebrew Plonit means Jane Doe, while Ploni means John Doe, even though the High Court of Justice recognized Ploni(t) is a trans man it continued to refer to him in female pronouns and to call him Plonit. I will refer to him as Omer (pseudonym).
\textsuperscript{368} CrimC (BS) 11610-08-10 The State of Israel v Goreno (July 15, 2012), Nevo Legal Database (by subscription) (Isr.)
\textsuperscript{369} Aviel Meganzi, “’Lo Esrod Kele’, Transgender Lifney Maasar [I will not Survive Prisonn- Transgender Pre Incarceration]”, ynet (17 September 2013), online: <http://www.ynet.co.il/articles/0,7340,L-4430773,00.html>.
The three were sentenced to 15 months in prison and 12 months’ probation, and were also ordered to pay compensation in the sum of 5000 Nis. Omer, who was in the midst of GSRP was to be sent to a women’s facility. The three appealed the severity of the sentence to the High Court of Justice. In a very short verdict, only Omer’s appeal was accepted and the court decided to reduce his sentence because of his gender identity and the conditions of his intended incarceration.

14.1 The Appeal

In their appeal, Omer and his partners in crime argued that they were being punished harshly and that there are extenuating circumstances in the matter. Omer claimed that his punishment should be reduced because of the personal circumstances, since, as the Justice Neal Hendel of the HCJ describes it, “her feelings toward herself and her orientation are of a male”. The fact that Omer is trans would have significant impact on his incarceration due to the policy of the Israeli prison service in respect to trans persons. According to the policy that was submitted to court, “in any case in which an inmate’s identity is ambiguous s/he would be kept in solitary confinement for the safety of the inmate and his/hers social environment.” According to this policy Omer was supposed to be kept in solitary confinement inside a women’s prison because “he had yet to undergo a surgery to change his sexual identity and is still regard as a woman.” Therefore, Omer made a plea for his sentence to be reduced.

370 CA 5833/12 Plonit v the State of Israel (September 12, 2013), Nevo Legal Database (by subscription) (Isr.)
371 5833/12 Plonit v the State of Israel, 2013 CA (IL), para 3 Justice Hendel.
372 Ibid, para 8 Justice Hendel.
373 Ibid, para 6 Justice Hendel.
14.2 Majority Opinion

The majority opinion, written by Justice Hendel, frames the court as the protector of gender boundaries. Justice Hendel reduced the sentence because Omer would be kept in solitary confinement, but unlike other prisoners who are kept in solitary confinement, the reason for which Omer would be kept in solitary confinement is rooted in the “core of his inner world”. Adopting a clear linear medical discourse, Hendel focuses on the fact that Omer had begun the procedures for sexual reassignment including: “hormonal therapy, psychological and psychiatric therapy that are the basis for a preliminary sex change operation, which she\textsuperscript{374} underwent recently.”\textsuperscript{375} Justice Hendel’s willingness to recognize Omer’s unique position is linked with the fact that Omer received the recognition of the medical institution.

Justice Hendel talks about “the core of the inner world” and reveals that he is willing to recognize Omer’s gender variance because it reflects a stable and coherent inner truth.\textsuperscript{376} Omer’s nonconformity is supervised by the authorities and is not perceived as an act of autonomous insubordination. Justice Hendel does not recognize Omer’s right for self-definition, but rather adopts the opinion of medical professionals.\textsuperscript{377} Thus, Justice Hendel continue to link medical and legal discourse. Resonating the reasoning in the case of Ms. Kavanagh, this small legal victory is bought by reinforcing the pathology of trans persons and disrespecting their needs.

\textsuperscript{374} Here again the court refers to Omer as a woman.
\textsuperscript{375} 5833/12 Plonit v. the State of Israel, supra note 371, para 6 Justice Hendel.
\textsuperscript{376} Ibid.
\textsuperscript{377} 5833/12 Plonit v. the State of Israel, supra note 371, para 6 Justice Hendel.
14.3 Dicta and Analysis

On the other hand, Justice Salim Jubran’s opinion, which joins Justice Hendel opinion, grants, for the first time in Israeli law, a substantive meaning to trans persons’ right to autonomy. He writes:

“The right for equality of transgender persons, much like the constitutional right for equality of members of the gay and lesbian community, is a constitutionally protected right in accordance with the Basic Law of Human Dignity and Freedom. Therefore, the transgender inmate has the right to be incarcerated in same condition as other inmates, as much as possible. The protection of the right for equality does not apply only to those who completed the process of gender reassignment. The social and legal difficulties facing a transgender individual do not depend on the level of completion of the physiological process of sexual reassignment. Non recognition of one’s gender identity, as he himself sees it, is a harm to equality.”

In this short paragraph Justice Jubran explicitly enshrines trans people’s right for equality, a right that has yet to be declared in the Israeli legal system. Justice Jubran continues and declares that this right includes not only those who have completed SGRP. Unlike Justice Hendel who talks about sex, Justice Jubran uses the term gender. By that he signifies that he is up to date with current medical terminology. Furthermore, by stating that one does not need to complete a process, Justice Jubran actually implies that one does not need the recognition of the medical institution in order to be protected for their gender nonconformity. That is, the question is not whether one has

---

378 Who is also the only non-Jewish judge in the HCJ.
379 5833/12 Ploniit v. the State of Israel, supra note 371, para 5 Justice Jubran.
accessed medical diagnosis, but whether one has been treated differently because of his gender incoherence.

Jubran recognizes, at least to a certain extent, that trans persons are discriminated against when they fail to constitute their gender in accordance with the socially accepted norms, when they fail to pass or when their nonconformity is exposed in other way. This is consistent with the facts of the appeal, because Omer was to be sent to solitary confinement not simply for being trans, but for not “completing” a genital reconstruction surgery. In other words, Omer was to be incarcerated in solitary confinement because his genitals (which are allegedly a proxy for sex) did not correlate to his gender and gender presentation, rendering his gender performance incoherent. Hence, by protecting those who have not “completed” the process of transition, Justice Jubran is taking into account that the decision to be gender variant is not only a medical decision but a decision that impacts all aspects of one’s life and should not be looked on only through the medical perspective. By doing so, Jubran sets the stage for delinking the medical and legal discourse of trans experience and practices in Israeli law, and recognizing that trans persons are autonomous persons who can make informed decisions.

That said, Justice Jubran can also be read as participating in the inclusionary discourse, in that he implies that gender has some autonomous inherent truth. For example, in the inclusionary context, his opinion can be used to justify mistreatment of persons who transgress gender but do not to identify as transgender. In any case, Justice Jubran is in obiter dictum, while Justice Hendel brings forward a demonstration of conservatism that is a better reflection of the actual legal status of trans persons in Israel. In the end, none of the judges is critiquing the policy itself, which still stands, albeit the verdict has been used in other cases to reduce the sentence of transwomen. Omer,
however, never served his sentence as he was granted parole by President Shimon Peres for “humanitarian reasons.”

15 Marina Meshel

Lower court decision in Marina’s case put forward a performative analysis of the prohibition to discriminate on the basis of sex as including gender variance. Albeit, the upper court did not repeat the same analysis it nevertheless used it to declare that the given law does include protection from discrimination of the basis of gender identity, changing the legal rights of trans persons. Marina Meshel, a young trans woman who immigrated to Israel from Russia, was working as an online teacher of math for the Center for Educational Technologies (CET). Her job was to tutor girls’ only groups of students from orthodox high schools. The tutoring took place in a virtual environment. At a certain point, after two years of working as a tutor, Ms. Meshel was fired on the grounds that she discussed “social issues” with her students. She was dismissed following a meeting with her supervisors that took place after Ms. Meshel had mentioned in her report that she had a conversation about current events with her students.

Ms. Meshel claimed that in the meeting she was told she must choose between continuing to work for CET and coming out as a transwoman and a lesbian. In fact, the invitation to the meeting made reference to Ms. Meshel’s sexual and gender identity. CET denied this claim and insisted that it was Ms. Meshel’s decision to discuss “current events” in which she exceeded her

---

381 Apparently she had discussed with them a case of termination of the work of an unmarried teacher in an orthodox school who got pregnant using sperm donor.
382 Labor Dispute LD (TLV) 791-06-13 Marina Meshel v CET (May 13, 2014), Nevo Legal Database (by subscription) (Isr.)
authority that stood at the heart of the decision to dismiss her.\textsuperscript{383} Ms. Meshel filed a lawsuit in the regional labor court, claiming she was discriminated against because of her gender identity and sexual orientation, contrary to the prohibition to discriminate on the basis of sex and sexual orientation in \textit{Employment (Equal Opportunities) Law, 5748-1988}.\textsuperscript{384}

\section*{15.1 The Equal Employment Opportunities Commission Legal Opinion}

The Equal Employment Opportunities Commission joined the procedures as Amicus Curiae.\textsuperscript{385} In its legal opinion submitted to the court, the commission did not make any factual claim but rather stated that the term “sex” in the Employment (Equal Opportunities) Law 5748-1988 prohibits discrimination on the basis of gender identity.\textsuperscript{386} Moreover, the commission, referring to my paper on sex discrimination,\textsuperscript{387} argued that the term sex is not limited to one biological sex but also refers to gender identity and expression and to their compatibility with the socially accepted norms of correlation between sex and gender.\textsuperscript{388}

\section*{15.2 First and Second Ruling}

Justice Itskovitch, the presiding Judge,\textsuperscript{389} adopted the commission’s interpretation of the law and

\begin{flushright}
\textsuperscript{383} \textit{Ibid}, para 10.  \\
\textsuperscript{384} \textit{Ibid}, para 3.  \\
\textsuperscript{385} Equal Employment Opportunities Commission Amicus Curiae \textit{Meshel v. CET, supra} note 381.  \\
\textsuperscript{386} \textit{Ibid}, para 22.  \\
\textsuperscript{387} “You Scare the Costumers: Mechanism of Gender Policing in Anti-Discrimination Law” in \textit{An Other Sex- Israeli Queer Theory} (Aeyal Gross, Amalia Ziv and Raz Yosef Ed. Resling Publishing House)  \\
\textsuperscript{388} \textit{Meshel v. CET, supra} note 381, para 29 Equal Employment Opportunities Commission Amicus Curiae.  \\
\textsuperscript{389} Israeli regional labor court are courts of first instance and cases are heard in front of a panel of one state appointed judge who serves as presiding Judge, a representative of the employees public and a representative employers public.  
\end{flushright}
made reference to Justice Jubran’s dicta in the case discussed above. Justice Itskovitch claimed that the term sex in the law should be interpreted as “sex plus”. The plus represents any fact, characteristic or other feature that exceeds the protected category of “sex”. In the case of Ms. Meshel that can be the SGRP or her gender identity, which differs from biological sex or even the nonconformity to the socially accepted categories of “Men” and “Women”, however it is manifested. Justice Itskovitch found that that CET’s claim that Ms. Meshel used her position to promote a certain agenda was based on stereotypes attributed to Ms. Meshel because she was a transsexual and a lesbian. Furthermore, Justice Itskovitch believes that such claims were not being made towards individuals who are not trans and gay.

The two public representatives, even though they did not question Justice Itskovitch findings about the proper interpretation of the law, were not convinced that CET had mal intentions, albeit this is not a legal requirement. The law requires only disparate impact. Nevertheless, the public representatives overruled Justice Itskovitch two-to-one, and the lawsuit was rejected. Ms. Meshel has appealed the decision and it is which was deliberated in the National Labor court before a wider panel of three state appointed Judges and two public representatives.

390 Meshel v. CET, supra note 382, para 8 Justice Itskovitch.
391 Ibid.
392 Ibid.
393 Ibid, para 14.
394 Ibid.
395 The Israeli labor court system has two instances. The regional labor court in which the panel consists of one state appointed judge, who has legal education and experience, and two public representatives appointed by the minister of finance, who have no legal education and represent the employers’ public and employees’ public. In the higher instance, the National labor court, the ratio is reversed and the panel consists of three judges and two public representatives.
396 Meshel v. CET, supra note 382, para 2 Public representatives.
In early May 2015, the commission submitted their opinion to the court, in which it strengthens the position of Justice Itskovitch and reiterates its position that Ms. Meshel was treated differently than someone whose gender identity is consistent with the socially accepted norms of gender.\(^{397}\) In that same month, the court deliberated for one session, in which it encouraged the parties to reach a compromise agreement. Ms. Meshel agreed to withdraw the case in return for compensation, though she also requested the court make a comment that it believes that the legal prohibition to discriminate on the basis of sex and sexual orientation includes the prohibition to discriminate on the basis of gender identity. In a decision published in June 2015, the court overturned the regional court’s verdict, accepted the compromise agreement and declared it to be its own judgments.\(^{398}\) In so doing, the court, by way of judicial legislation, made gender identity to be a part of the Employment (Equal Opportunities) Law 5748-1988.

15.3 Analysis

Although the National court overturned the regional court’s verdict, it did adopt Justice Itskovitch’s findings, that the category of sex and sexual orientation include gender identity. Albeit the National court has made a very narrow statement because it refers to Itskovitch’s findings, I believe they should be read jointly. I want to devote some attention to the legal move the commission and Justice Itskovitch are advocating, a shift in the basis of comparison. In regarding this move as radical, I am far from objective, as it is the fruit of my own analysis, described in chapter one. Yet, Justice Itskovitch’s decision as well as both of the commission’s legal opinions

\(^{397}\) Equal Employment Opportunities Commission Amicus Curiae LA 23372-06-14 CET v Marina Meshel (Jun. 2, 2015), Nevo Legal Database (by subscription) (Isr.)

\(^{398}\) National Labor Court LA 23372-06-14 CET v Marina Meshel (Jun. 2, 2015), Nevo Legal Database (by subscription) (Isr.), para 1.
suggest that Ms. Meshel was discriminated against for gender incoherence and that her claims should be weighed against someone whose gender performance does cohere, who is not gay or trans, who does not have “sex plus” in anyway. This analysis allows the court not to deal with what Ms. Meshel said or did not say to her students about her gender and sexuality, but to ask whether a non-trans straight woman would have been barred from making any remarks about her coherent gender and sexuality.

This legal move shifts the focus far away from the intention of CET to the social regimes of gender and sexuality. This move does not permit the court to actually discuss the privileges that go along with coherent sex/gender/sexuality, as I have suggested, and in fact it did not. Thus, this specific legal text is not promoting the systematical critique I hoped would be enabled by such move. On the other hand, neither Justice Itskovitch nor the commission talked explicitly about coherence and performativity but rather pointed out the impact of incoherent gender performance. In other words, I am still optimistic that an explicit change of the basis of comparison might facilitate a discussion of systematical aspect of gender variant exclusion.

16 (Some) Conclusion(s)

The heterogeneous body of law from Canadian tribunals, as well as the budding of trans right claims in Israel, resonate the tensions faced by the trans political movement. On the one hand, there is a growing use of inclusionary language and values. On the other hand, coherence still plays a major role in the courts’ ability to recognize trans right claims. Not surprisingly, all the cases I have analyzed, however critical of certain aspects of trans pathology, still narrate the plaintiff through the known trans narrative of consistent dysphoria that starts at an early age and continues throughout life. Even though some discursive progress is evident, it seems that the legal system is
still invested in gender/sex certainty, willing to accept at most that sex is transitional only provided that gender is stable. In that, to great the current progressive discourse is still repeating Harry Benjamin’s differentiation of sex and gender.

On the other hand, from my review, one can note that the times they are a-changin. The XY decision and Ms. Dawson decision as well as the verdict in the case of Ploni(t) and Ms. Meshel, are sprinkled with radical notions of the gendered experience. Reviewing those cases, I have tried to point out what might be considered as first signs of recognition, even if not explicitly, of the function of gender performance with respect to social stratification in the form of exclusion. However, it is hard to predict how these sparks of change will evolve. Will they allow the system to incorporate gender variance by constructing it as inherent truth? Might they be used to promote the pretense of equality while disparities in life chances continue to grow? Perhaps they will only allow privileged gender variant people access to resources and opportunities? Or perhaps they signify the strategic potential use of ADL to exposes the social stratification hidden behind allegedly pre-legal and pre-social categories of identity.

The gender variant analysis of the hallucination of gender certainty has allowed me to critically read the legal cases and has propelled me to try and locate the harm suffered by the claimants in relation to gender performance. As we have seen in the case of Ms. Kavanagh, the legal system, focusing on the anatomy of trans and non-trans persons, forces trans persons into an in-between position from which subjective claim are muted. Ms. Nixon has exposed us to the function of socialization as an “unchangeable” truth that correlates sex to gender in order to constitute them both as “real”, rejecting the notion that it is performance that constitutes them as such. In XY’s case, we faced the boundaries of inclusionary discourse when the tribunal indeed admits that SGRP has no administrative meaning outside that meaning it is charged with by the
authorities, but insisting on gender stability, the court fails to critique gender as an administrative category. With the case of Ms. Dawson we got a chance to look into the near future of trans recognition, where gender variance, insofar as it is anchored in certainty, is becoming like sexual diversity, an intensely private thing. In Israel, as we have seen with the cases of Lilach and Omer, trans inclusion and gender certainty are being enmeshed into the legal system through different, sometimes contradicting discourses. Finally, the case of Marina can be seen as an initial attempt to change the basis of comparison in ADL to account for incoherence.

From this analysis, it seems that so far, even if a legal system can create a protected category for gender variance, it is limited to one’s ability to cohere to that category. The flexibility that allows inclusion is still not flexible enough to let go of gender certainty, as stability is an organizing principle of law. Yet, the law, in its honest attempt to protect gender variant persons, is finding itself having to deal with situations where exclusion is interlocked with incoherent performance, even while incoherence remains invisible in the face of the law, insofar as the legal system has an inherent difficulty to name it. For such a naming undermines the courts’ own role in regulating the category of gender itself, dividing us into men and women, defining what each category entails, and using this differentiation to regulate and control.

In order to explore the stakes of this invisibility and the potential of challenging it, the following chapter will turn to another category rendered invisible in the Israeli legal system, Mizrahi Jews. Using the gender variant perspective I have articulated in chapter one, and its application from the current chapter, I will try to understand how the imagined borders of gender, nation and race function as a fluid instrument in the allocation of social wealth and life chances.
Chapter 3
The Binding of Yitzhak: On Racial/Ethnic Performativity in Modern Day Israel

1 Introduction

Yizthak Mizrahi—a young Israeli citizen, on leave from his compulsory service as a border police officer, tried to go out to the nightclub with his friends. Yitzhak, accompanied by four other friends, three men (one of them Yitzhak’s cousin) and one woman, left their home in Moshav Ein HaEmek, a community of families who originally emigrated from Iraq and Kurdistan, and drove to Kibbutz Ramot Menashe, a gated collective community consisting mainly of Jews from Ashkenazi origins. Yitzhak’s cousin and one of Yitzhak’s friends who allegedly has “lighter skin” as well as the woman, were all granted entrance to the nightclub club without difficulties, whereas Yitzhak and his other “dark skin” friend were asked to wait. The two waited while others, coming from behind them in line, were granted entrance. They tried to talk to the bouncer to understand why they must wait and were eventually given the answer that they do not seem okay “in his eyes”. Finally, the bouncer told the two that the club owner did not approve their entry because “he didn’t like the look of them”.

399 According to Israeli linguistic Avshalom Kor in the early years of the Israeli state it was common that Israeli immigration officers changed the family name of individuals who immigrated from Muslim countries to “Mizrahi”, literally meaning eastern or Oriental. (see: http://www.ynet.co.il/articles/0,7340,L-4477619,00.html).
400 CA (Hi) 3724/06 Ramot Menashe v. Mizrahi (Jan. 7, 2008) Nevo Legal Database (by subscription) (Isr.), para 6-7.
401 Jews of western and eastern European decent.
402 A small non-cooperative community.
403 I will later question the importance of this factor and therefore I choose to use the word allegedly. I do not however question that Yitzhak Mizrahi might have darker skin than his friends, I am just not sure about the fact that this was the sole reason he was refused entry.
404 Ramot Menashe v Mizrahi, supra note 400, para 6-7.
405 Ibid, para 7.
406 Ibid.
The fact that Yitzhak was refused while his cousin was granted entry is an allegory to the tragedy of Mizrahim’s exclusion in Israel. Although refusing entry to a nightclub might not be a tragic instance by itself, it symbolizes the Mizrahim’s repeated attempt to enter Israeli hegemony only to find that the hegemony defines itself in opposition to them, and that in order for them to be included they are required to let go of what differentiates them, their Mizrahi-ness. The refusal to grant entry to Yitzhak points to the source of the Mizrahim’s exclusion (and identity formulation), not only because it reveals the falseness of the biological “truth” represented on the body that grants access to equality, but also because in Israel “our cousin” is also a condescending euphemism for Arabs (decedents of Ishmael, brother of Yitzhak son of Abraham). In Yitzhak Mizrahi’s case there is a reverse of the biblical order where Yitzhak is the rejected son, left out of the nightclub, located in the heart of Israeli hegemony, the Kibbutz, for failing to pass as Ashkenazi Jew and for “looking like an Arab”407. Yitzhak’s story is common to modern day Israel where within Jewish society there exists systematical discrimination against non-Ashkenazi people, although they make up the majority of the Jewish population.408

This chapter aims to apply the gender variant perspective on rights based advocacy to consider the role performativity plays in other forms of exclusion from resources and opportunities. In this chapter, I will attempt to use Mizrahi rights claims to expose the role performance plays in racial/ethnic discrimination in proximity to the way gender variant rights claims reveal the role of performance in sex discrimination. I chose to look at the case of Mizrahim

407 It is common in Israel to condemn someone for looking to “Mizrahi” by saying they look like an Arab.
408 This is only based on popular assumption and superficial surveys, such as a list of 500 most common last names in Israel (see: http://www.ynet.co.il/articles/0,7340,L-4477619,00.html). The Central Bureau of Statistics refuses to keep registry of ethnicity within Jewish population (classifying them all as “Jews”) and only keeps track of “country of origin” of the parents, that is, there are no records from the third generation onwards. No one actually knows the ratio between Ashkenazi and non-Ashkenazi, yet of the 10 most common family names in Israel only one is Ashkenazi.
in Israeli law as they are ethnically/racially situated between mutually exclusive categories of Israeli law, between Arabs and Jews. Mizrahim provide an “in-between” space of race/ethnicity that will allow me to consider the impacts of racial performance on ADL.

Continuing to explore questions of identity formulation, I will look at the emergence of Mizrahim as a collective identity and will map the similarities to the process of the emergence of the term/identity “Transgender,” as well as similarities in their dual function as both empowering and narrowing one’s ability to articulate themselves and create attachment. It should be stated at the outset that I am not suggesting that Mizrahim and gender variance are the same, but rather that identities and practices related to Mizrahi-ness and gender variance present similar challenges to the law. My aim in this chapter is to apply the gender variant perspective on law that I formulated in chapter one and used in my review in chapter two, to better understand the Mizrahi cases using ideas of performativity.

I will analyze current legal categories and cases dealing with discrimination of Mizrahim, and the critique of those legal categories and cases for refusing to recognize a protected class of “ethnicity”. I will try and apply an “intrasectional” analysis to the idea of Mizrahi ethnicity to identify the performative elements intertwined in the legal discussion. Combining my new inquiries into performativity with my inquiries from chapter one and two, I will argue that one of the frames by which the law functions as tactic of stability, presenting (mal) distribution as a given state of affairs, is by the use of legal categories in ADL.
2 Mizrahi Communities in Israel- Opening Comments

Resonating the Butler-Fraser dispute, the Mizrahi case demonstrate how lack of recognition and devaluated social status is linked to economic status by (mal) distribution of resources and opportunities. As noted, inside Jewish society in Israel Mizrahim suffer from systematical discrimination.409 The most profound aspect of this discrimination is connected to property rights. At the period of massive Jewish immigration to Israel, from the 1950’s to the 1970’s, Mizrahi immigrants, generally speaking, did not receive property rights over the land and homes they received from the state,410 whereas Ashkenazi immigrants did. They were also often sent to live in peripheral areas. In the years following immigration, Mizrahi youth were massively directed toward vocational education, and only a very few managed to get to universities.411 As a result, after three generations, the economic disparities in Israel between Ashkenazi and non-Ashkenazi are significant.412

While the Israeli census does not collect information about ethnic groups within Jewish society (except for collecting data according to country of birth), it is estimated that Mizrahim consist of about half of the Jewish population, even by conservative estimates.413 Today less than

409 It should be noted that other groups inside Jewish society, and perhaps most notably the Ethiopian Jews, suffer from much higher levels of systematical discrimination, which I will not discuss in this thesis. Moreover, I stress that I refer to Jewish society because the status of Palestine citizens of Israel is not only worse in terms of systematical discrimination but it is also embedded in the law in different ways, I will address that briefly later on.
410 As Claris Harbon shows in her paper (Claris Harbon, “Squatting and Invasion to Public Houses in Israel: Mizrahi Women Correcting Past Injustices” in Daphne Barak Erez, ed, Law Gend Fem (Nevo Publishers, 2006). Mizrahim were put into public housing, while Ashkenazim got rights to the same apartments. As a result the Ashkenazim could in time sell their houses and buy other, better, properties which they their children could inherit. Today 80% of the residents in the peripheral development towns are Mizrahim (Haaretz, http://www.themarker.com/news/1.1976460)
411 A high percent of those who made it into universities managed to do so by forcibly participating in educational programs similar to the infamous “charter schools”. A select few were “chosen” to leave their homes at the age of 12 and move to boarding schools (most notably the Boyer school in Jerusalem), where they were meant to “Europeanize”. Some of the most influential Mizrahim in Israel are graduates of such programs. However, as sociologist and activist Ortal Ben Dayan claims, these bright young Mizrahim were taken away from their communities yet did not come back to their communities as they were not supposed to, but integrated into Ashkenazi society. As a result, Ben Dayan Argues, an entire group of academic elite was “stolen” away from the Mizrahim and incorporated into Ashkenazi society. 412 Yifat Bitton, “Limits of Equality and the Virtues of Discrimination, The” (2006) Mich St Rev 593.
10% of tenured university professors in Israel are Mizrahim (6% in law schools), less than 1% Mizrahi women.\textsuperscript{414} While Ashkenazi immigrants have managed to pass property and capital by inheritance, Mizrahim did not, and therefore they hold a marginalized share of the national capital.\textsuperscript{415} Even though it seems that the income gaps have been decreasing significantly in recent years,\textsuperscript{416} your chances of being invited to an interview as an Ashkenazi are twice as high than as a Mizrahi (and four times than a Palestinian citizen of Israel).\textsuperscript{417} This might explain why Mizrahi are five times more unemployed than Ashkenazim.\textsuperscript{418} While Ashkenazi inherit capital, academic skills and opportunities, as well as better paid jobs and professional networks, Mizrahim did not. Unsurprisingly, Mizrahim are disproportionately incarcerated.\textsuperscript{419}

Yet, expect in some exceptional activist groups,\textsuperscript{420} up until recent years there was almost no public discourse that focused on Mizrahim as a collective.\textsuperscript{421} This is not to say that communities that can be considered Mizrahi did not retain their unique culture and mixed with one another.\textsuperscript{422} On the contrary, as I will describe later, in the margins of Israeli hegemony this excluded communities found common cultural and religious languages and created a rich cosmopolitan identity,\textsuperscript{423} a nation within a nation, often referred to as “the second Israel”. Over the past 20 years,

\begin{thebibliography}{99}
\bibitem{414} Anat Georgi, “BaKetzev Hanohehei, YiKach Le’Mizrahim 99 Shana Le’Hagia Le’Sivyon Muhlat [In the current ratio it would take Mizrahim 99 Years to reach complete equality]”, TheMarker (25.3.2013), online: <http://www.themarker.com/news/1.1976460>. My college Lilach Ben David have also argued in private debates, that almost 100% of Mizrahi professors have earned their degree outside Israel.
\bibitem{415} Harbon, supra note 408.
\bibitem{416} According to The Adva center, a non-partisan Israeli policy analysis center based in Tel Aviv, 2013 annual report on social disparities in Israel, Mizrahim employees make in average 18% less than Ashkenazim (yet 60% more than 48’ Palestinians), it should be noted that since 2000 the average income of Mizrahim has rose in about 15%. Shlomo Svisrski, Temonat Matzav [The Situation] (Tel Aviv: The Adva center, 2014).
\bibitem{417} A study presented at the College of Law and Business in Ramat Gan in January 2014, conducted by Tamar Kricheli-Katz and Yuval Feldman found that résumés with Ashkenazi names are twice as likely to be called for an interview as résumés with Mizrahi names, and four times more likely than résumés with Palestinian names (Tamar Kricheli-Katz & Yuval Feldman, Does Discrimination Behave Differently in Different Contexts? (the College of Law and Business in Ramat Gan, 2014.).
\bibitem{420} Such as the Israeli Black Panthers of the 1970’s.
\bibitem{421} This is not to say that communities that can be considered Mizrahi did not retain their unique culture and mixed with one another. On the contrary, as I will describe later, in the margins of Israeli hegemony this excluded communities found common cultural and religious languages and created a reach cosmopolitan (see: Ella Shohat the invention of Mizrahim), a nation within a nation, often referred to as “the second Israel”.
\bibitem{423} Ibid.
\end{thebibliography}
a new political Mizrahi intelligibility has rapidly grown and brought with it a wave of demands for inclusion and distributive justice.\footnote{Ibid at 13–4.} We are living in a Mizrahi heyday, where finally the discussion of Mizrahi exclusion is evident in the media and academia and is slowly creeping into the judicial system and the law books of Israel.

Before I move on and discuss the emergence of Mizrahi collective identity, I should clarify that much like the term transgender, Mizrahi it is a political self-proclaimed term that is meant to serve as an instrument for making collective demands. As in the case of the term transgender, not all people who are included in the “umbrella” term Mizrahim identify as such.\footnote{Ella Shohat, \textit{Taboo Memories, Diasporic Voices}, 1st edition ed (Duke University Press Books, 2006) at 14.} It is common that they identify with the country their family originally immigrated from (identifying, for example, as “Moroccan” or “Yemenite”). Others use the term “Sephardim”, describing Jews who are descendants of the expulsion from Spain in the 15\textsuperscript{th} century,\footnote{Starting at 31st of March 1492,} which led many Jews to flee to Arab and Muslim countries\footnote{Some fled to North Africa, while others fled to Ottoman Empire where were given refuge. Notably in those countries existed a local Jewish communities who have been look upon by the Sephardim. Over the generation the communities have assimilated into one another, so today they are all considered Sephardim.} (as well as to the Balkan and other parts of Europe). The Jewish communities of the Arab world had some relations to one another\footnote{Religious wise, the Sephardim continued to have Halachic relations (maintained similar tradition and followed the same developments). There also existed a range of Judeo-Arabic languages in the arab world, and some of the most iconic Jewish texts, such as the works of Rabbi Moshe ben Maimon, were written in Juddeo-Arabic.} but they did not see themselves as a collective nor were they described as such until the rise of Zionism.\footnote{Some evident suggest that the term “Arab-Jew” was used by western Jews to describe the Jews living under Ottoman Empire (Bierbrier, Morris L. \textit{The Sephardim of Manchester: pedigrees and pioneers}. Shaare Hayim, the Sephardi Congregation of South Manchester, 2006.).}

In Israel, not only is the Jewish people considered a unified “race,” but the hegemonic discourse denies its own ethnic/racial stratification and considers questioning this idea as a threat. Therefore, a Mizrahi discourse has long been condemned as “divisive” and contrary to the national
interest. Mizrahi individuals that speak out of their discrimination are typically portrayed “whiners,” who did not manage to make it on their own, unlike the “new Jews” who are self-made men. To understand why Mizrahiness as a separate category of experience and practice, although highly visible in public life in Israel, is systematically denied while simultaneously systematically discriminated against, one must go back to Zionist nation building concepts.

3 The Arab-Jew and the Israeli National Identity

Some similarities can be drawn between the attempt to create a gender variant “umbrella identity”, transgender, and the creation of a new collective Arab-Jewish identity, the Mizrahi. Mizrahi emerged out the Janus-faced mechanism of inclusion and expulsion brought about by the Israeli nation-state. In its investment in creating an imagined community defined by its borders, the Israeli nation building enterprise proves to be no different than others. In what follows I will review the history of Israeli national identity building in contrast to the Orient, the Arab, and show how it relates to the ongoing exclusion of Mizrahi identity and practices of Israeli hegemony.

In the European Orientalist imagination of the 19th century, the European Jews were the orient from within the continent and the Arabs the Orient from the outside. From the Eurocentric point of view, the European Jews were not the same as the Arabs, but both Jews and Arabs were

430 Resonating the North American neo-liberal discourse of poor people as those who did not try hard enough, and in fact Mizrachiness is also about class. Cossman, supra note 26 at 117.
433 In this European imagination, the Jew was imagined as an Eastern European Ultra-orthodox Jew. It is interesting to note that Jewish communities who wished to assimilate, such as the German Jews, also adopted a condescending view of Eastern European communities, describing them as primitive and backwards, as though they had been “kept out of time” and missed out on modernity (See Hochberg Gil Z Hochberg, In Spite of Partition: Jews, Arabs, and the Limits of Separatist Imagination (Princeton University Press, 2007) at 11., 11). Needless to say, this is the same way Christian Europe described the Arabs and Zionists described the Arab-Jews (and all other Arabs as well). This also resonates in the way modern secular Israel views Ultra-orthodox Jewish communities.
434 Ibid at 7.
visibly the other of the continental, imagined as a continuum of otherness which is reflected in the term anti-Semitism, hatred of all Semitic people. Scientific racism of the period which positioned Arabs and Jews as one race inferior to white Christian Europeans.

Against the background of anti-Semitism and inspired by the nationalist movement of Europe, the Zionist movement asked to create a “new Jew” that would leave Europe to go back to his “historical homeland”, paradoxically, as European colonizer. By leaving Europe to the Orient, the Jew would finally cease to be the Orient from within (for he is no longer “in”) and would become European. The new Jew, constructing himself as a European, saw his other in the Arab.

In order to make a nationalist claim, the Jews first needed to become a national/ethnic/religious collective, which they had not been for thousands of years. The Zionist claim toward the western nations, a right for Jewish self-determination in Eretz Israel, is based on a coherent all-encompassing Jewish identity that is at once nationalist, ethnic and religious. The all-encompassing Jewish identity did not account for the fact that not all Jews were European and a significant part of them were Arabs by culture and ethnicity. For centuries Jews have been living in the Arab world where they have had complex relationships with Muslim and Christian populations, speaking their own local dialects of Arabic, cultivating traditions and

435 Ibid at 13.
436 Shohat, supra note 420 at 7.
437 Ibid at 11.
438 If it is even possible to trace modern Jews back to biblical times.
439 The biblical name of the territory, the land of Israel.
440 Shenhav, supra note 417 at 16–17.
441 Although Jews found relative safety in North Africa and Ottoman Empire post expulsion from Spain, they did not have equal rights to the local Muslim population until western influence started to arrive. However, this also brought a new set of “western” anti-Semitic ideas. Such is the case of the infamous “Damascus affair” in which a disappearance of a Christian French monk brought forward accusation of ritual murder made by the French councilor. This blood liable incited the first “pogrom” (an organized racial attack on Jews) in the Arab world, in which the Muslims raided the Jewish quarter for weeks. The noble men of the community alongside children were arrested and tortured, some died and some were forced to convert.
costumes that combined local traditions and canonical Jewish rituals. In fact, it is claimed that Zionism did not include those Arab-Jewish communities in its early national formulation, seeing them from a European colonizer point of view, as “backwards” and detrimental to the fantasy of the “new Jew”. Yet, faced with WWII and the annihilation of European Jewish communities, alongside the complete halt in immigration from Europe to Palestine, the Zionist leadership sought to bring the Arab-Jews to Palestine. Having their loyalties contested in their origin countries in the Arab world as a backlash to the Zionist endeavors in Palestine, and in messianic hopes for a better future in the land of the Jews. The Arab-Jews came to Israel in massive immigration waves starting in the 1940’s through the 1970’s.

Yet, in Israel they found themselves again not a part of the homogenous new nation, not fitting in the image of the “new Jew”, and as representing of the other, the Arab, in their language, their looks, their culture and tradition. The state institutions forced them into a process of “modernization” in which they were seen as “backward” people needing to be reoriented toward the west. In a process named “the melting pot” Israel hoped to reshape Arab-Jews into:

---

442 Shohat, supra note 423 at 213–15.
443 As the war progressed information about the mass murder of Jews going on under Nazi regime started to accumulate. In 1942, troubled by the annihilation of Jewish communities in Europe, David Ben-Gurion presented his “One Million Plan”. Ben-Gurion marked the Jewish communities in the Arab world as a target for immigration, calling for the “quick annihilation” of Jewish- Arab Diasporas. The new, somewhat cynically instrumental, interest of Zionism in Jewish migration form the Arab world was not accompanied by a change in its patronizing viewpoint of those communities. Indeed, one of the main aspects of the “million plan” was the separation of immigrants from Europe and from the Arab world (Shenhav, supra note 417 at 34.)
444 Moreover, at the same time the Jewish right for self-determination was being exercised in Palestine, the Arab world was also moving toward nationalism, in part as a post-colonial response, inventing itself in accordance to Eurocentric definitions of the nation as a coherent unit. The other of those nations was Zionism. What Zionism and Arab nationalism discursively shared is the idea of a “pure” and “authentic” nation that is created by eliminating the foreign so that the nation can emerge in “all its native glory”. Thanks to the European colonialism and fascism, the Arab-Jews were caught between two rival essentialist forms of ethnocentric nationalism. Beside the implication of Zionism and Post-colonial Arab nationalism, Arab-Jews were also implicated by European colonialism in their home countries when they were separated in their rights and privileges from the local Muslim population, putting them in a “state of in-between” alienated from both colonizer and colonizers” (Hochberg, supra note 431 at 23.). I cannot go in depth do describe these developments in the scope of this thesis. Yet, we should bear in mind, as Hochberg argues, that “Europe (the West, Christianity) as the dominant political colonial force of the last few centuries has been quite successful in nourishing the unbalanced triangle relationship among the Arab, the Jew, and the West… Jews and Arabs were not the only differentiation colonialism promoted, but it has certainly been a central one.”
445 heavily endorsed by Zionist functionaries in overt and covert ways (see: Shenhav, supra note 417 at 33–4.)
447 Shohat, supra note 420 at 15.
“Israelis, modeled on the European Jew who have left Europe carrying with him it cultural heritage to reinvent himself as the one who redeems his historical home land from its own backwardness oriental existence.”

The state institutions deployed a series of population management instruments that were represented as “training for modernity” and were aimed at liberating the Arab-Jews from their oriental-ness.

The melting pot promised the Arab Jews that once they would melt away their Arabness they would be welcomed into the nation as equals. However, the Arab-Jews could never be that “new Jew”, insofar as what made him so new is that he was taking part in the European enterprise of colonialism in order to become European himself. The “melting pot” could only reconstitute Arab-Jews as the “new” others, for what had differentiated them in the first place was that they were not European. While Zionism successfully erased Jewish existence from the Arab world, as it erased Palestine, it obliged Arab-Jews to redefine themselves in relation to its hegemony, endorsing them to become the internal other of the “new Jew”. The melting pot thus situated the Arab-Jew in a position where they could never be recognized as belonging, if Judaism is now a collective ethnicity than the Arab-Jew is forever stuck in a sort of interethnic position.

The Arab-Jewish in-between position within Israel has had severe material implications, where Arab-Jews faced systematical discrimination from resources and opportunities.

---

448 Ibid at 15–6.
449 Such as educational integration programs, policies of city planning and population distribution, forced informational programs for mothers (and practically outlawing homebirths and midwives) and other programs aimed specifically at new immigrants from the Arab world (see Shenhav, supra note 417 at 156.)
450 Ibid at 152.
451 In addition to what I have described above, while Jews from Europe who arrived at the same time as Arab-Jews received property rights on their housing, Arab-Jews did not. One should note that post the end of the British mandate Jews owned less than 10% (including state lands) of the land and now they own more than 90% of the land is state land without any significant purchase of land (see Oren Yiftachel, *Ethnocracy: Land and identity politics in Israel/Palestine* (University of Pennsylvania Press, 2006). Oren Yiftachel). In other words, the property rights that were given are also questionable in historic perspective. Discrimination is also evident including discrimination in education, employment,
demand for coherent Jewish identity as a pre-condition for accesses to resources and opportunities constituted Jewish whiteness as property\textsuperscript{452} and lead to the fact that even three generations after immigration, there is extreme disproportion in wealth division in Israel, as well as in all other spheres of public life and culture.

The process of Israeli hegemonic identity formulation involves contrasting the hegemonic with Mizrahi-ness, insofar as Mizrahi-ness blurs the borders between the Jew and the oriental. Zionism’s formulation of the new “Jew” created a Jewish correlation between race/ethnicity. Constituting Jewish as an ethnicity well as religion in order to make nationalist claims, outcasts Arab-Jews to a permanent “in-between” position. Zionism needed to other its “in-between” counterpart to constitute itself as “normative”. The new holders of hegemonic power, European Jews, up until a moment ago excluded categories of being themselves,\textsuperscript{453} constantly constitute their own internal “other” in order to confer coherence on themselves. Israel’s road to recognition as nation state, as well as their ability to hold their power position by getting support from white western hegemony, is inextricably linked to the pretense of stable normativity, achievable by the process of creating new norms of “belonging” and “otherness”. “It is about the way subject are constituted as citizens and the way citizenship itself is constituted.”\textsuperscript{454} The process of constructing new boundaries of belonging and otherness effectively erases those deemed as others, for their experience of being other are drained from social value.

\textsuperscript{452} And Jewishness in general as a pre-condition to have rights, as a right to have rights.
\textsuperscript{453} And actually still in a struggle to consolidate their position.
\textsuperscript{454} Cossman, supra note 34 at 5. Coming from Israel/Palestine where the political status of individuals is heavily stratified and the government effectively control the population through different legal systems that constitute rights in a very different manner, I am aware of the universalism of the term “citizenship”. However, Cossman’s articulation of the constituting of the subject through citizenship allows me to go beyond the classical understanding of citizenship as mere bundle of political rights.
All-inclusive Jewish identity can be thought of in term of single axis analysis, that is that it created Jewish normativity tailored by the western citizen, outsourcing the role of “inner orient” to Mizrahim. Yet, paradoxically, the population management programs that constituted Mizrahi as other, that aimed at “modernizing” Mizrahim and that separated of them from European immigrants and settlers, created joint experiences and were a primary factor in producing and replicating their distinct ethnic identity.\textsuperscript{455} Similarly to the emergence of a transgender political identity and collective in response to the erasure of experiences and practices and against the exclusion from resources and opportunities created by gay liberation, Mizrahi identity emerged to counter the social stratification of Jewish society in Israel. Obviously there are enormous political, cultural, historical and conceptual differences between these two identities, yet reading them comparatively reveals surprising affinities, which produce further insights on the role of performance in ADL.

4 The Emergence of the Mizrahi

In order to survive the erasure and exclusion created by Zionist institutions, crossing national and region boundaries, in the 1990’s a new cosmopolitan Arab-Jewish identity emerged, the Mizrahi.\textsuperscript{456} Mizrahi was coined by leftist non-Ashkenazi intellectuals as self-determined political umbrella term for all Jews descendent of immigrants from Arab or Muslim countries, replacing previous institutionalized terms.\textsuperscript{457} After reading chapter one of this thesis, this must sound very

\textsuperscript{455} Shenhav, supra note 417 at 152.
\textsuperscript{456} Shohat, supra note 420 at 13.
\textsuperscript{457} Ibid at 13. It should be noted that much like in the case of trans intelligibility, there were different attempts to create a collective identity and political actions from the 70’s onwards, yet only in the 90’s these fragmented attempts have accumulated to a collective identity.
familiar, as “transgender” also emerged as a political identity and community in the early 1990’s. Transgender and Mizrahi identities aspired to create collective demands for multiple groups that had been considered separated until that point. Over the past 20 years Mizrahi has become the widest spread term by which Arab-Jews identify and make collective demands against the exclusion brought about by Ashkenazi hegemony.

Ella Shohat describes the emergence of Mizrahi identity in modern day Israel out of the ruins of Arab-Jewish traditions and practices in the Arab world. Mizrahi identity, built in contrast to Ashkenazi hegemony in modern day Israel, is trapped in the Zionist logic of Jewish ethnicity that is both nationalist and religious. Contesting only the ethnic component of this all-encompassing coherence, Mizrahi identity affectively continues to disable the connections between the Jewish and the Arab by denying their inescapable relation to one another.

Therefore, following my analysis of liberal trans politics, I suggest the term Mizrahi, as it constitutes itself in relation to Israeli-Zionist configurations, creates new boundaries of inclusion and exclusion. It does not contest the racial stratification of privileges between Jews and non-Jews in Israel/Palestine but merely asks for inclusion within the distribution of resources and opportunities for Jewish citizens. It does not question the nationalist normative model of identity but claims that all Jews are the same besides our different cultural and ethnic affiliations. In fact, as the scholar Lihi Yona emphasizes in public debates, while Mizrahi has become widely popular in Israel, the term Arab-Jew exists only in academic discourse and would not be accepted positively

458 Valentine, supra note 39 at 33–35.
459 Referring to Jews who have lived in the Arab world.
460 Shohat, supra note 420 at 13.
461 The idea of inescapable connection is taken from Hochberg, supra note 431 at 37–8. I should clarify that this connection Hochberg points out is not the same as the one I point to in relation to gays and trans (that the two identities cannot be separated in reality of living communities). As I will elaborate further, the similarities exist the in way these duos have been and are seen from the outside in relation to one another.
by the Mizrahi identified public, as they do not see themselves as Arabs.\textsuperscript{462} Shohat argues that Mizrahi are both dominators and dominated, at the same time disempowered as “Orientals” and “empowered as Jews in a Jewish state vis-à-vis Palestinians.”\textsuperscript{463} While Mizrahi as a political identity is indeed invested in resisting its own disenfranchisement, it does not account for the ways it is complicit in the oppression of Palestinians and continues the Ashkenazi denial by failing to reflect its position within the Arab space it emerged in. In other words, Mizrahim have chosen inclusionary politics over radical perspectives that question the system of racial/ethnic stratification.

However, I must be caution with critique because of the popular Israeli discourse which posits Mizrahim backward people who are as inherently more racist toward Arabs than Ashkenazi, who imagine themselves to be more liberals, as more Europeans, while they actually hold the decision making power in policy regarding Palestinians. Mizrahi activism is again and again is excused by the Ashkenazi left not caring for the Palestinian cause while the Ashkenazi continues to be absence from Mizrahi activism. That is, the Palestinian cause is used to mask the Ashkenazi’s left disregard of Mizrahi issues. More importantly, the Mizrahi outspoken racism should be understood in the context of their disposition between the Ashkenazi hegemony and Arab enemy. Mizrahi activism that does not wish to perpetuate Ashkenazi patronizing, cannot focus on blaming certain Mizrahi discourse for the injustices done to Palestinians, for it is only a survival tactic of racial stratification. Actions that challenge the Jewish Israeli social order, whether they say so explicitly or not, impact the social order of Israel/Palestrina and its racial stratification.

\textsuperscript{462} Moreover, “Arab” is used as derogate term against Mizrahi presentation. It functions in the same way as to ask a trans person “are you a boy or a girl?, i.e., to signify that they transgress the normal order of things, that they do not belong.

\textsuperscript{463} Shohat, supra note 423 at 332.
Despite my critique of the Mizrahi move for selective (Jewish) inclusion, one must understand that questioning the all-encompassing Jewish identity is in itself a daring move, because it question Israel’s claim for self-determination as nationalist ethnic collective. That is, the Mizrahi demands for inclusion might seem at first as carried out on the backs of Palestinians when in fact they bring forward new attachment between the two positions. Thus, revealing the falseness of racial/ethnic performativity and the mechanisms that constitute Jews and Arabs as mutually exclusive categories. Perhaps there is no need to demand Mizrahim to cohere to certain political fantasy of “Arab-Jew” and position themselves in one line with Palestinians, they will not do so. Yet their demands for inclusion bring forward the function of “arabness” in distribution of rights in Israel/Palestine, de facto binding them together.

In order to consider how Mizrahi demands for inclusion might bring forward a broader debate on the social value attached to certain hegemonic performances, I will now turn to discuss racial performativity and how it is connected to ethnic performativity. Building on those ideas I will turn to look directly at the law which is aimed to counter Mizrahi discrimination and the court cases that applied it, to analyze how Mizrahi inclusionary claims might open up a broader structural discussion.

5 Racial/Ethnic Performativity

In Racial imperatives: Discipline, performativity, and struggles against subjection, Nadine Ehlers puts forward an analysis of racial performance based on Butler’s theory of gender performance. Ehlers claims race is not inner “truth” reflected on the body but that racial performativity constitute race itself. I will further use Ehlers’ and Butler’s analyses to suggest the falseness of the separation of race and ethnicity.
Butler questions the assumption by which sex is biological and gender is social, as well as the idea that the correlation between them is what constitutes gender performance. Instead, Butler suggests that it is gender performance that constitutes gender as a marker of sex. That is, she claims there is no biological truth to sex that plays out through gender, but that both are discursively constituted through performance. In the same vein, Ehlers claims that racial performativity is what constitutes race as biological and not vice versa. Just as sex is not about your chromosomes, race is not about your ancestry. Both are charged with meaning by gendered and racial performances. This argument is contrary to the common understanding of race as more objective, and less socially produced, than gender. Gender is seen as the social manifestation of sex, while in respect to race no such pairing can be easily found; however, as Butler’s argues, sex is itself discursively produced, and the same point can be made about race. Moreover, as I will argue, ethnicity function in relation to race in proximity to how gender function in relation to sex, it is considered a social category reflecting ones biological truth.

Ethnicity too can and should be read in light of these interventions. According to the Oxford dictionary ethnicity relates to “national and cultural origins”. Merriam Webster defines “ethnic” as “of or relating to races or large groups of people who have the same customs, religion, origin, etc.” Ethnic groups are considered social categories where affiliation is based on shared ancestry, culture and history. That is, ethnicity is considered a cultural factor, whereas race is considered a biological one, hence the reference to race or ancestry in the definition of “ethnic,” much like the connection of sex and gender. Yet, ethnicity, exactly like race, is constituted by what Ehlers refer to as racial performativity, the same markers on the public body that allegedly point to an inner

---

truth about one’s race, are the markers that point to an alleged to inner truth about one’s ethnicity. As much as sex and gender are both marked on the public body by gender performance, so are race and ethnicity marked by racial performance. That is, from a performativity point of view, sex and gender are interchangeable and so are race and ethnicity.

Remember, in chapter one I offered a Butlerian analysis of the sex discrimination based on the idea of gender performativity. The concept of gender performativity suggests that sex is not an inner truth marked on the body by gender, but that gender markers constitute sex as ontological. One sees the presentation of femininity, marked by body shape, lack of facial hair, dress, speech, hair style, etc. and assumes the subject is biologically female and that in return makes her a women. The subject is designated as a “woman” from birth based on the subject’s visible sex characteristics. This classification is constantly forced upon the subject through administrative power, i.e., population management. Moreover, how a “woman” is supposed be, how she should dress, act, talk, etc. is also constantly thought and re-thought by society, i.e., intersubjective discipline. The subject is portraying its alleged “sex” by preforming gender, i.e., self-discipline. Only when this process coheres (when she is compliant with what she is supposed to be and how she is supposed to act), is the subject marked as a “woman” (that is a biological female) by the outside gaze of accepted discourse. The same set of gender markers is used to constitute the subject’s sex and gender. This is the process by which gender performativity is constituted.

Ehlers applies this analysis on race, while acknowledging that “performative compulsion of gender and sexuality that bring the subject into being are always already enmeshed within racial

reformative demands, and vice versa. The intersectional analysis have shown the connection between how one is gendered and how one is racialized. Being a black man is not like being a white man or a black woman or a black trans man. Much like all subject are designated sex at birth, subjects are designated a race, which functions as a normative administrative category. Society than attaches meaning to this factor that are re-inscribed again and again through intersubjective relations, that is society teaches the subject what it means to belong to a certain race.

Since all individuals are racialized, i.e., one is not a subject without a race (much like one is not a subject without a gender), in order to become a subject one needs to cohere to certain racialized norms, through self-discipline. Race is marked on the body by the things that mark gender such as hair style, diction, gait, etc., but also by skin pigments, and here remember how Yitzhak was seen as dangerous, allegedly because of his “dark skin”. Much like sex/gender performativity, the same set of markers are used by the outside gaze to conclude one’s race and ethnicity. For they are both discursively constructed and neither one is a socially constructed expression of the other.

While it is true that the color of your skin is a different factor than your hair style because one is changeable or controllable and the other is not, gender is also marked by certain unchangeable factors. Even though some gender markers can be changed through medical technologies of sex/gender realignment (for instance growth of facial hair for transmen using

466 Ibid at 7.
467 In the foreseen future, in cooperation with my colleague Lihi Yona, I plan to expand this argument to explore the possibility that any gender transition is a racial transition.
468 Ibid at 26.
469 One can argue that race/ethnicity do not function as gender/sex because there are more ethnic groups than social groups, that is, one can be black and west Indian and black and Afro-American, whereas one can only be a woman and female. However, my point is that the same set of markers used to identify one as black will be used to identify whether one is West Indian or Afro-American, the perpetrator would use the same “tool kit”. That is, the lines between race and ethnicity are not as clear as presented, much like the lines between sex and gender.
testosterone), others cannot (such as height). This is also true today to some racial marker such as eye color or hair texture (using specific contact lenses or chemical process that straighten curly hair). But besides the liberal question of self-control (the choice I have over how I look or present myself), my center of interest is in the social value attached to different configurations of external markers.

Coherence achieved through correlation sits as the heart of race/ethnic and sex/gender presentation. For this reason I am skeptical about the fact that performance can be reduced to one factor, such as skin. The concept of passing teaches us that configurations of performativity markers make up racial/ethnic or sex/gender performance. Racial/ethnic and gender/sex performativity work through correlation between a set of external markers and a set of internal markers. In focusing on one element of performance there is a danger of misunderstanding how performance functions to categorize people. To “achieve” blackness one has to have a certain skin, certain body form, wear certain cloths and talk in a certain way, etc., when the external markers correlate we assumes them to reflect certain set of correlating characteristics and abilities such as work ethic, physical abilities, tendencies.

Both in racial/ethnic performance and gender/sex performance, the perpetrator of discrimination only observes performance, which is in effect a performance of a performance. The perpetrator cannot detect the biology or ontology of the subject's sex or race separately from the markings offered by the external markers themselves. Therefore, sex/gender or race/ethnicity is denied an existence independent from the signifiers of their performance. More importantly, the physical markers are discursively produced by how they come to signify inner truth (that certain color says something about the person), which is the social value that is attached to certain body shape or skin color. The external markers, changeable or not, allegedly point to an “inner truth”,

and thus constitute that “truth” as pre-discursive. Social value is hierarchically attached to different configurations of external markers. Yet as much as your hairstyle cannot say anything about your abilities and qualities, neither does your skin color. Yitzhak does not constantly generate his skin color, but the meaning attached to his skin color is perpetually being generated and is read on Yitzhak not only from his skin color but by his entire performance, that is what differentiates him from his cousin. As Yizthak fails to “pass” as a member of a certain race/ethnicity or actually, as will be further discussed, he fails to distinguish himself enough from the non-hegemonic group by his performance.

I would like to suggest relative coherence that can account for the ways “in-between” groups and individuals are acutely read. This coherence is relative to other configuration of coherence and incoherence. Mizrahiness in Israel has a unique ethnic/racial position between the two exclusively mutually categories of belonging and otherness upon which the local society is build. This positioning distinguish Mizrahiness from other ethnic minority positions. Looking at trans and Mizrahi persons, it seems both are read by the outside gaze in relation to their proximity to the dichotomous racial/ethnic and sex/gender categories available. That is, one does not only lack coherence with hegemonic performativity, one is also cohering with another set of norms (one is not only not white but also black). Yet in regard to those who are situated “in-between” the mutually exclusive categories, one can find her/himself not white enough and too black, or vise verse. Yitzhak was considered dangerous, not because the bouncer thought he is Palestinian, but because he failed to mark himself as close enough to the (Ashkenazi) hegemonic coherence standards and because his presentation marked his proximity to another race/ethnicity (arabness) that is correlated with danger.
Catherine Rottenberg argues that gender performativity is inherently different than race performativity because in gender what I want to be (a woman) and who I am supposed to be (a woman) alien, while in regard to race black people are supposed to be black, but due to social hierarchies they aspire to be white. While I do agree that there are deep differences between the two kinds of performativity, which are beyond the scope of this thesis, it seems that Rottenberg fail to account for the ways non-white people, though they might aspire to access white privilege by adopting white behaviors, are also invested in their own notions of race, and that whiteness is also constituted by non-whiteness. I believe that a bigger difference in the ways these performances function lies in the fact that race/ethnicity is much more group oriented than sex/gender. Race/ethnicity allegedly stems from your ancestry, while gender/sex comes from you individual match of chromosomes. Racial markers might, as I will suggest later in the context of the Mizrahi transitional space, tell us something about how groups self-discipline, while gender markers are more oriented toward the individual. However, these distinctions are not that clear and they become even more blurry when considering in-between categories of law.

6 In-Between of Mizrahim

If gender variant rights claims expose the role of performance in sex discrimination, Mizrahi people might do the same in regard to racial and ethnic discrimination. When talking about gender variant claims, the court is dealing with a case where the “pre-legal” correlation of sex and gender is broken, because trans people are discriminated against exactly when they fail to pass as subjects whose sex and gender cohere. Yet, as we saw in chapter two, the law often has trouble recognizing

471 Because there are more racial/ethnic attachment available.
gender variant exclusion as related to the social norms embedded in coherent gender performance. The law continues to see the legal category of sex as first and foremost relating to non-trans heterosexual individuals. That is, legal sex is seen to reflect a pre-legal coherence between one’s birth assigned sex, gender and sexuality. From that legal perspective trans people are situated “in-between” the legal “man” and “woman”. I claimed in chapter one that the law itself, when focusing on the perpetrator’s point of view is focusing on performance. Therefore I concluded that gender variants are discriminated against for incoherent presentation and not because of their “sex” or “gender identity” or “gender expression” or “sexual orientation”. The focus on performance revealed that gender variant “sex” is not more fake than anybody else’s. From the legal perspective of ADL and its use of the perpetrator’s point of view, everyone’s “sex” is constituted by the outside gaze. Gender variant claims allowed me to suggest that performance is intertwined with ADL more broadly. In order to explore this argument, I will now turn to review the use of ADL in Israel by Mizrahim.

In order to understand Mizrahi discrimination claims in Israel, one must understand their “invisible” status under Israeli law. Racial equality standards in Israeli law, even if only minimally enforced, are seen as relating to differences in treatment between Jews and non-Jews. The construction of Israeli law is rooted in the Zionist perspective of a unified Jewish identity in which the national/ethnic/religious have fused to create, de-facto if not de jure, a Jewish race, referred to as the “Jewish People”. Harbon argues that in the way the Israeli legal system designed its laws and interpreted them it adopted the idea of the “melting pot”, i.e., promoting a principal of one state for the Jewish people. This ethnocentric mechanism offered an all-

473 Chetrit, supra note 444 at 23–6.
encompassing legal rhetoric that is rooted on the similarities of Jewishness as common
denominator that unified different groups to justify privileging the Jewish majority in Israel.474

Harbon shows that the hegemonic discourse of the Israeli legal system excludes the Mizrahi
narrative in order to conceal aspects of a collective Mizrahi identity because it threatens the
founding ethos of the state itself.475 As I discussed in chapter one and two, the law is an instrument
by which the state creates identities that are legitimated and cohere to the social order, while it
excludes other identities, thus marking them as non-legitimate.476 The Israeli legal system is built
upon the national/religious ontological differentiation between Jews and non-Jews that hides the
racial/ethnic dimensions of separation between Jews and Arabs. On the other hand, arabness is
what constitutes Mizrahi as other (than Ashkenazi), yet recognizing the Mizrahi arabness would
question the Zionist ethos.

The Mizrahi’s entry into the Jewish mainstream went together with a process of self-denial
of the Arab dimension of their identity.477 This might explain why even the current Mizrahi
demands for inclusion are not made in the name of Arabness, but are anchored in a separate
category of being which keeps rejecting Arabness. Yet again, the element that differentiates
Mizrahim and Ashkenazim is exactly their racial/ethnic background. As much as the Ashkenazim

474 Harbon, supra note 408 at 475. ... The notion of all-inclusive Jewish identity is evident in some of the most basic legal arrangements that
make Israeli citizenship. Most notably is the Law of Return, 5710-1950, which establishes the right of every individual with Jewish ancestors to
come to Israel as an “Oleh” and receive Israeli citizenship. This law is in stark contrast with the absence of any other formal immigration policy
in Israel, expect for limited possibility for family reunification, from which Palestinians are excluded all together by the Citizenship and Entry
into Israel Law (Temporary Order) 2003-5763 that denies the right for family reunification for Israelis who’s partners are citizens or residents of
different states and territories, including Gaza, the west bank as well as Iran, Afghanistan, Lebanon, Libya, Sudan, Syria, Iraq, Pakistan and
Yemen. The legal reasoning for privileging Jews is connected to the notion that in order to be able to exercise the Jewish right for self-
determination there must be a Jewish majority in Israel (Ruth Gavison, “Shishim Shana Le’Chock Ha’Shevu’: Historia, Ideologia, Hatzdaka”
(Sixty Years to the Law Of Return: History, Ideology and Justifications”) (The Metzilah Center for Zionist, Jewish, Liberal and Humanist
Thought, 2009) at 29. http://www.metzilah.org.il/webfiles/fck/file/shvut%20final.pdf), and that the right for Jewish self-determination includes
the right from protection from its enemies, and justifies different treatment to those who are associated with those enemies (See article 27 to
Justice Nao\r opinion in HCJ 466907, as well as article 31 to Justice Meltzer opinion In the same case. This was in which the HCl ruled (five to
four) that the Citizenship and Entry into Israel Law (Temporary Order) 2003-5763, is proportionate and therefore should stand). As noted before,
the Jewish right for self-determination is based on notions of a racial/ethnic homogenous Jewish collective.
475 Harbon, supra note 408 at 456.
476 Ibid.
477 Harbon, supra note 408.
are understood as European Jews, the Mizrahi should be understood Arab-Jews. In this sense, the Mizrahi right claim might expose not only the falseness of the separation into disparate categories of Jews and Arabs, but might also facilitate an intrasectional look at the falseness of the categories themselves, to expose the heterogeneous nature of the Jewish and the Arab collectives.  

7 Mizrahi Rights Claims

Before I move on to describing Mizrahi legal struggles for inclusion, I should note that as far as the legal system is concerned, as well as mainstream discourse, Mizrahi discrimination does not exist in present times. The almost complete denial of the Mizrahi discrimination is evident in the fact that there are no monumental verdicts dealing with such discrimination, as opposed to cases dealing with the rights for equality of gays or Palestinians citizens of Israel.  

Mizrahim are also absent from legal and scholarly debate. The fact that Mizrahi is still fighting for recognition as an identity category and separated group is a central element in the denial of their discrimination and lack of acknowledgment received for that discrimination by society and the legal system.  

Yet, discrimination against Mizrahim might expose the role of presentation in racial/ethnic discrimination because Mizrahim are making their claim from an “in-between” position of Israeli law.

478 The Mizrahi claim might also question the common (somewhat outdated) Israeli claim that Arabs are one collective and therefore Palestinians have no unique affiliation to Israeli/Palestine, yet this argument is beyond the scope of this thesis.  
479 Bitton, supra note 410 at 332.  
481 Bitton notes “the recognition of the existence of a clear, continuing ethnic disparity has not ended the denial of the discrimination against Mizrahim in Israel.” (Yifat Bitton, “The Dream and Its Construction: Mizrachi-Arab Cooperation to Combat Discrimination1”, online: <http://www.levantine-journal.org/NetisUtils/srvutil_getPDF.aspx/1NJUTJHs%204.1_Dock_Bitton%20.pdf>).
Yifat Bitton critically reads Mizrahi rights claims in Israel from the 1970’s to current times. She shows how the court consistently fails to recognize the existence of Mizrahim as a separate category being discriminated against. This argument is traced through four different legal periods, differentiated by the legal tactic that was applied in them. I will focus only on the fourth period, in which an anti-discrimination law was enacted, in accordance with the focus on ADL throughout my thesis. The fourth period starts with the enactment of the *Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 2000* (PDPS law), a classical ADL law that was enacted to counter certain types of Mizrahi discrimination. Paradoxically this law does not include ethnicity or Mizrahiness as a protected category.

Bitton notes, Mizrahi discrimination, as opposed to discrimination of Palestinian citizens of Israel, is almost always de-facto. The law is an active participant in the promotion of the social exclusion by stressing the uniformity of Jewish society in Israel and denying the existence of Mizrahi as a unique category of experience. Yet, Mizrahi as an identity category and political-cultural movement is evident in everyday life in Israel, and the cases of Mizrahi people being discriminated against for being Mizrahi, whether they identify as such or not, abound. Keeping this hybrid reality in mind, we now turn to discuss *the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 2000* (PDPS).

---

483 *Ibid* at 345–353.
484 *Ibid* at 336.
485 *Ibid* at 335.
I will first introduce the law, then I will look at the ways in which rights claims and the court have understood and used the law. Following that analysis, I will draw similarities between the Mizrahi anti-discrimination rights claim and the trans right claim, pointing out the role performance plays in all these cases. Thereafter, I will consider the possibilities of reading the PDPS law from a queer perspective, to suggest that the analytical juxtaposition of trans and Mizrahi can tell us something about the law’s investment in stability and the potentially disruptive power of in-between identities to that stability.

The background for the enactment of PDPS was a widespread phenomena of refusing young Mizrahi men entry to nightclubs and bars in the 1990’s, much like in the case I opened with.486 This phenomenon received great attention in the mass media,487 perhaps because it provided a way to discuss Mizrahi exclusion at the time, outside of its historical-systematical aspects. These incidents are understood as acts that are contrary to the unified Jewish identity (because one is not considered an equal member) and not as undermining that ideal (as would a discussion on what how does act relate to the structure of Jewish society). Perhaps this explains why the public discussion of the phenomenon was quickly picked up by members of the Knesset (the Israeli Parliament), who used the media attention to promote a liberal law to counter the phenomena.488 Reading the law in the context of the public debate that prompted its enactment, which regarded those private acts of exclusion as harming the unity of the Jewish collective, might suggest why this law does not name Mizrahim or ethnicity as protected categories. The law is not aimed at questioning the unity of the Jewish collective; on the contrary, it should protect the

---

487 Ibid.
purported unity. However, as in other ADL, the performative element is ever present, in the illusion
of unity, as in the illusion of coherence.

8 Legislative History and the Absence of the Mizrahi Category

PDPS law is based on a proposition made by the Association for Civil Rights in Israel (ACRI).\footnote{Draft Bill for Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law 2000, HH 2871 (Isr.).} It was initiated by MK Ben-Menahem, an Iraqi Jew from India, and a member of the ruling party at the time, Ha’Avoda. The bill was present to the Knesset as a government bill in May 2000.\footnote{Meaning, the minister in charge of the subject submitted it to the Knesset, and it had a simpler legislative procedure. It also meant the bill was considered to have majority in its favor (because the government has a majority in the Knesset, although in practice it can vary).} After the usual procedure of three readings\footnote{“Bills are advanced in a number of stages, called readings. Every reading of a bill is adopted or rejected by a vote of the Knesset members present in the Plenum at the time. Between each reading there are debates within the Knesset committees, and they prepare the bill for the next stage of legislation. After passing the third reading, the bill is published in the Official Gazette and becomes a law of the State of Israel.” (from the Knesset website: “Legislation”, online: <http://www.knesset.gov.il/description/eng/eng_work_mel2.htm>).} of the law, which were accompanied by debates within the Knesset’s Constitution, Law and Justice Committee, the law was passed in December 2000 and was signed and published that same month. The explanatory notes of the bill\footnote{Draft Bill PDPS, supra note 484. According to section 75(a) to Knesset Rules of Procedure (which is not a law but does bind the Knesset members) a bill shall include “words of explanation”. These “words of explanation” usually set forth the purpose of the law, the background for its enactment and further explain each of its sections.} open with the following statement: “one of the most difficult problems in the social arena is the discrimination in delivery of service and products and entry to public places. In denying one entry to a public place or refusing to provide one a service or a product just because one is a member of a certain group, and especially a group that has history of discrimination against it, one’s human dignity is severely harmed. Recently it has been known that in places of entertainment, for example, the entrance of persons with \textbf{Mizrahi/oriental appearance was denied.}” (Emphasis added)\footnote{Draft Bill, Supra note 485.}.
The parliamentary debates about the law further emphasize that it is aimed at Mizrahim. In the parliamentary debates, the minister of justice, Yossi Beilin, who introduced the law to the Knesset, specifically referred to cases where people with “Mizrahi appearance” were refused entry to entertainment venues, and stressed the need to expand anti-discrimination prohibition to apply to private service providers. The initiator of the law, MK Ben-Menahem directly referred to Mizrahim and told the story of Mizrahi officers from an elite combat unit of the IDF who were refused entry to a Kibbutz nightclub because they were Mizrahi. This comment makes very clear the inclusionary nature of the law, where these same young men who are on the front lines protecting Israeli Jewish hegemony against its enemies (the Arabs) are excluded from Israeli society once they take off their uniforms.

Article 1 of the law declares that its purpose is to promote equality and to prevent discrimination in entry into public places and distribution of services and products. Article 2(A) defines “public place” as any place which is intended for the use of the public, including a tourist attraction, hotel, hostel, guest house, park, restaurant, coffee shop, banquet hall used for entertainment and cultural events, museum, library, nightclub, sport facility, swimming pool, shopping mall, shop, garage and any place offering public transit. The law defines public service as transportation, communications, energy, education, culture, entertainment, tourism and financial services, intended for public use. It is clear from this detailed list that the law is meant to

494 Minutes of plenum no. 107 of the 15th Knesset (22.5.2000) http://82.166.33.81/Tql//mark01/h0003811.html#TQL (Isr.)
495 Ibid.
apply to almost any private actor providing services for the general public. Accordingly, article 2(B) defines “public” as non-specific public.

Yet, the law itself does not name Mizrahi specifically, or ethnicity more broadly, as protected classes. Instead section 3(A) of the law names the following protected classes: race, religion or religious sect, nationality, country of origin, sex, sexual orientation, political views, age, personal status or parenthood. In the context of this thesis, it is notable that the law prohibits discrimination on the basis of sex and sexual orientation. Despite searching in the Knesset and committee hearings for a discussion on the protected classes that would address the lack of an ethnicity category, I found none. In all Knesset committee meetings dedicated to the subject, the question of the protected class of ethnicity was entirely absent.496

It is striking that law does not name any protected category that can directly apply to those young Mizrahi men the law was enacted for, it does not include the protected class of Mizrahi or ethnicity. Religion and nationality are not relevant categories because Mizrahim are as Jewish and Israelis. Country of origin is not relevant because the mass immigration to Israel from the Arab and Muslim world stopped by the 1970’s and today’s young Mizrahim are second, third and even fourth generation Israeli born. Bitton argues that race is also not a relevant category because under

496 Interestingly in regard to the protected classes, besides an entertaining comment about how to make sure that lesbians can have separatist spaces, the legislators were largely occupied with the effects its prohibition to discriminate on the basis of sex would have on the Jewish Orthodox community’s practice of gender based segregation in public spaces and events. To answer this problem, in spite of some feminist opposition represented by the Association for Civil Rights in Israel, Article 3(D)(3) was added. The article notes that the specific existence of separated space or services for men and women is allowed as long as it justified, taking into account the nature of the event or service, its vitality, the existence of a reasonable alternative to it, and the needs of the public that might be affected by the separation. Compared to the lack of protected class that applies directly to Mizrahim, it is striking how this article is carefully suited for a very specific social group. Also interesting is that this article reflects back on the protected class of sex and reaffirms that it refers to “men” and “women” in the heteronormative sense of these categories. I wonder, for example, what would happen if a trans man who had been refused entry to an orthodox gender segregated event would claim he was discriminated on the basis of his sex.
the Israeli law’s understanding, all Jewish people share a race.\textsuperscript{497} I disagree with Bitton because in the case of Yitzhak,\textsuperscript{498} and in other cases as well, the court did refer to race, as I will further elaborate.

Moreover, the absence of an explicit “protected category” is not so striking in the context of the enactment of the law, a public debate about a very narrow and not so materially harmful act of exclusion, refusing entrance to night clubs. As I have argued, focusing on such a minor effect of social stratification can be understood as an attempt to address Mizrahi exclusion without questioning the unity of the Jewish collective. Yet, as with trans persons, I argue that the absence of a category is not significant insofar as what is actually revealed in court through the use of PDPS, is the performance of race/ethnicity. Parenthetically, even though this have not been tried, I believe that courts would be susceptible for claims of discrimination of trans persons using the sex category of PDPS.

As I will elaborate further, it seems that like in the case of gender variance, there might not be a need to create a separate protected class but that there exists a possibility to reread the law with a focus on performativity. In this context all other “unusable” applicable categories of the law, religion, nationality and country of origin also have a strong element of performance, because

\textsuperscript{497} Bitton, supra note 477 at 348. This is easily evident because when the HCJ refers to racial discrimination, it refers to discrimination of Arabs vs. Jews See H.C. 6698/95, Aadel Ka’adan v. Israel Lands Administration, 54(1) P.D. 258 (Isr.) in this landmark HCJ judgment about the principle of equality, the HCJ describes discrimination suffered by Palestinian (Israeli citizens) couple who was rejected from a settlement because they are Arabs as race discrimination, referring among other to Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) as well as the International Convention on the Elimination of All forms of Racial Discrimination (1965). Recently a public debate about the exclusion of Ethiopian Jews have sprung to life, ignited by the bashing of young Ethiopian man by a policemen. What come of this social movement remains to be seen, but it would no doubt would change the notions of racism within Israel. However, and although Ethiopian Jews have already used the PDPS, the Israeli law does not refer to them directly as a group suffering from distinct discrimination but, much like Mizrahim, as part of the Jewish collective to be protected. For example the court dealt with cases of discrimination in school placement, while the plaintiff described it as “Racial discrimination on the basis of ethnicity”, the HCJ simply referred to discrimination in general (see HCJ 7426/08 Tabeka Advocacy for Equality and Justice for Ethiopian Israelis v. Minister of Education, paragraphs 14-16 (August 31, 2010) Nevo Legal Database (by subscription) (Isr.).

\textsuperscript{498} Ramot Menashe v Mizrahi, supra note 396.
from the perpetrator’s point of view, as in the case of the nightclub’s bouncer, these factors are only understood through presentation.

Still, young Mizrahi men being discriminated against for being Mizrahi was exactly what the court had to deal with when applying the law. Bitton’s ten year analysis of the law shows that 79% of claims made using the law were of Mizrahi, 100% of them men. How, then, did the courts apply the law? Besides elaborate legal acrobatics, such as in depth discussion whether the protected classes listed in the law are a closed or open list, again and again, much like in the case of Yitzhak, the court talked directly about performance, without recognizing the subversive and substantive implication of such analysis.

9 Yitzhak Mizrahi

Going back to Yitzhak’s case, which is highly cited verdicts in respect to PDPS, we can see the first major use of “skin color” as a form of protected class, when the court concludes that he was discriminated against on the basis of his “race and skin color”. I argue that in Yitzhak’s case what the court is actually doing is connecting racial/ethnic performativity to discrimination. The court’s willingness to use race to protect Mizrahim strengthen my hypothesis that in the case of Mizrahim and Palestinian citizens of Israel, race/ethnicity are interchangeable insofar as they are constituted by the same set of signifiers on the public body.

499 Bitton, supra note 477 at 488.
500 Ibid at 493–8.
501 Ibid at 193.
9.1 Summary of the Facts, Arguments and Proceedings

A short reminder, Yitzhak was asked to wait on the side while his other friends were granted entry. Yitzhak claimed that while he was standing in line waiting to be let in, he noticed a pattern by which dark skin men were refused entry, even if they were active combatants.\textsuperscript{502} Yitzhak filed a lawsuit against the Kibbutz that owned the nightclub and the persons who run the nightclub in the Magistrates Court of Haifa. Yitzhak argued that the nightclub had discriminated against him, and systematically discriminated against “dark skin” men in contravention of the PDPS and the court.\textsuperscript{503} The defendants rejected Yitzhak’s claims and argued that the nightclub is a “member’s only” club, where entry is determined by a list that the defendants keep.\textsuperscript{504} They did not submit this list to the court, claiming they needed to protect the privacy of their members.\textsuperscript{505} They also claimed that on the night Yitzhak asked to enter, they were holding an “invite only event”, and that Yitzhak was only turned away because he was not on the invite list or on the members list.\textsuperscript{506} The defendants brought different evidence in an attempt to undermine Yitzhak’s version of the story, including, a testimony of a dark skin person who was allowed entrance.\textsuperscript{507}

The Magistrates court sided with Yitzhak, finding his version of the events to be more reliable.\textsuperscript{508} The court claimed that the defendants did not prove they had an invite list,\textsuperscript{509} and found that the bouncer did not corroborate any names with any list but reached his decision based on how

\begin{itemize}
\item \textsuperscript{502} \textit{Ramot Menashe v Mizrahi}, supra note 396, para 8.
\item \textsuperscript{503} \textit{Ibid}, para 2.
\item \textsuperscript{504} \textit{Ibid}, para 9.
\item \textsuperscript{505} \textit{Ibid}.
\item \textsuperscript{506} \textit{Ibid}.
\item \textsuperscript{507} \textit{Ibid}, para 11.
\item \textsuperscript{508} \textit{Ibid}, para 17
\item \textsuperscript{509} \textit{Ibid}, para 19.
\end{itemize}
people looked to him.\textsuperscript{510} Yitzhak won the case and the Kibbutz appealed to the district court of Haifa. In the appeal, the Kibbutz claimed that the Magistrates court was wrong in its factual findings and legal conclusions. The Kibbutz claimed that section 3 of the PDPS does not include a protected category of “skin color”, thus Yitzhak does not belong to a protected group.\textsuperscript{511} Alternatively, they also claimed that they had proven that they grant entry to other “dark skin” persons and therefore Yitzhak’s claim that he was rejected on that basis does not stand.\textsuperscript{512} The district court rejected both claims and rules in Yitzhak’s favor, finding that he was discriminated against because of skin color.\textsuperscript{513}

9.2 Reasoning and Analysis

Unknowingly, the court applied an intrasectional analysis. The court focused on the external markings of Yitzhak, the color of his skin, which in the eyes of the perpetrator made him look like a potential trouble-maker. The perpetrator only saw Yitzhak’s performance of race/ethnicity. However the court cannot reach this analysis, of how performance constitutes the alleged “truth”. As I am inquiring into the role performance played in this scene, I am highly interested in the court’s analysis of what happened and what it means in terms of the protection of equality, that is, what is the court actually prohibiting?

The verdict is remarkably focused on the perpetrator’s point of view, in the most literal sense, asking what the bouncer saw and whether this image is what moved his decision to not grant

\textsuperscript{510} Ibid, para 15.
\textsuperscript{511} Ibid, para 12.
\textsuperscript{512} Ibid.
\textsuperscript{513} Ibid, para 25-6.
entry to Yitzhak. The bouncer saw Yitzhak and his friend’s skin color, which was not okay “in his eyes.” 514 Subsequently, the club owner allegedly “didn’t like the look of them”. 515 The bouncer and the club owner did not see “with their eyes” that Yitzhak was an “active combatant”, a virtue that was supposed to grant him the privilege of entering hegemony, or at least prove him a member of the allegedly homogenous Jewish society. The bouncer and club owner did not see the “biological truth” 516 behind Yitzhak’s skin color that should have proved his belonging in the club, for they did grant access to his lighter skin cousin.

The court finds that it was clear that the bouncer made his decision based on his eye sight, as he perceived of the color of Yitzhak’s skin, a conclusion strengthened by the fact that the Yitzhak’s cousin, who has lighter skin was granted entry. 517 The court states that:

“the color of one’s skin can never be consider as statistic warrant in regard to grating entry to a nightclub, and cannot even provide a shred of evidence to predict one’s behavior inside the nightclub… such discrimination severely hurts one’s dignity. One has no control over his sex or skin color or ability…. Moreover, we should avoid, as much as possible, sorting people according to irrelevant external features that might provide an “easy” external basis for comparison but are rooted in unfounded 518 stereotypes and prevent the application of equality and hurt human dignity.” 519

514 Ibid., para 10.
515 Ibid., para 7.
516 I am not sure what the truth that hides behind Yitzhak’s skin color is, for the biology of race is questionable, as is the biology of ethnicity or religion. This all ties back to the question of the all-encompassing Jewish identity, which will be discussed further.
517 Ramot Menashe v Mizrahi, supra note 400, para 16.
518 In passing, could one potentially argue that s/he made a decision based on “founded” stereotypes? Can there be such thing?
519 Ramot Menashe v Mizrahi, supra note 400, para 22.
As the above citation shows, the court ruled that the club was wrong for considering ones skin color as a statistical warrant, deciding that external features are irrelevant and that making a decision based on them causes harm to equality. i.e., the court finds that one’s presentation (his skin color) is not evidence of inner truth, it cannot be used to draw conclusion about who someone “really” is or how he would behave. In this reasoning the court exposes that the prohibition to discriminate under PDPS has much to do with performance, however the court does not go further into questioning this relation.

The court does claim that presentation is not evidence of inner truth, but it does not reject the fantasy of inner truth. Instead it concludes that there is another “truth” to Yitzhak, which is not evident from his performance, that he is an active combatant, which positions him as an equal member of the nation. The court says that the bouncer was wrong to consider Yitzhak as other when in fact he belongs. In this reasoning, the court fails to account for the social system concealed in performativity, the ways in which alleged inherent difference (such as skin color) reflect ones characteristics and abilities. Even through the court rules that it is illegal to use external features as the basis for comparison, in focusing solely on Yitzhak’s skin color, the court misunderstands the central role of coherence and the way it is achieved.

As I discussed before, racial/ethnic and gender/sex performativity work through correlation. By focusing on one feature, the verdict still heeds to the social mechanism of attaching value based on coherence and proximity. As I argued previously, Yitzhak was considered dangerous not because he was mistaken for a Palestinian, he was considered dangerous because he failed to posit himself in proximity to (Ashkenazi) hegemony and because his presentation situated him in proximity to another race/ethnicity (Arabness) that correlates to danger. I argue that his cousin was granted entry not because he was thought to be Ashkenazi, but because his
presentation marked him in close enough proximity to Ashkenazi-ness and that proximity marked him as fit for inclusion. The parties and the court might have found it easier to talk about his “skin color”, but I doubt if it was his skin color was the sole cause or rather, his entire performance.

10 Eran Tzadok and Ehud Kataabi

In the case of Tzadok and Kataabi vs. Shlosh Ltd,\textsuperscript{520} citing Leonard Cohen’s song “Everybody knows,” the court concluded that everybody knows that people with darker skin are more likely to be exposed to racial discrimination, thus discrimination on the basis of skin color is per-se racial discrimination\textsuperscript{521} as well as discrimination on the basis of country of origin.\textsuperscript{522} Nonetheless, the court’s narrow understanding of what it is “that everybody knows” make me wonder whether relying solely on “skin color” as a marker for Mizrahiness, without accounting for the correlation process taking place (which posits Mizrahi as dangerous), continues to conceal the realities of the discrimination. Furthermore, I argue that discrimination against Mizrahim does not effect only dark skin individuals, for ethnic/racial performance is not only about ones skin.

10.1 Facts Argument and Findings

This case united two lawsuits, one made by Mr. Eran Tzadok and another made by Mr. Ehud Kaatabi, regarding the same incident in which the two were refused entry to the “Dona Martin” nightclub in Tel-Aviv. The two asked to enter the nightclub with another woman friend of theirs. The two had dark complexions, and were both of Yemenite family origins.\textsuperscript{523} According to the

\textsuperscript{520} CC (TLV) 43168/05 Tzadok Eran v Shevah Shlosh Company LTD (Sep. 26, 2009), Nevo Legal Database (by subscription) (Isr.)
\textsuperscript{521} Ibid, para 22. The claim that discrimination on the basis of “Mizrahi appearances” is racial discrimination was also adopted by the court in later cases (See: CA (CT) 39345-07-12 Key Yazmot Omanot Habiluy ve Hapnay LTD v Sharon Shraga (Nov. 9, 2013) Nevo Legal Database (by subscription) (Isr.))
\textsuperscript{522} Ibid, para 61. The court did not specify why discrimination on the basis of the color of your skin is discrimination on the basis of your country of origin, but implies that your country of origin affects your skin color.
\textsuperscript{523} Ibid, para 2.
plaintiffs, they were refused entrance by the bouncer, while their woman friend was allowed entrance.\textsuperscript{524} They also claimed that the bouncer told them the event that night was an invite only event, yet, while they were waiting they noticed that other persons with lighter complexion were entering the club without being asked for invitations. The two audio recorded the event and warned the bouncer that they would file a lawsuit if they were not allowed to enter, but to no avail.\textsuperscript{525} After only four days on 16.8.2005, Mr. Tzadok filed his lawsuit to the Magistrates Court in Tel-Aviv and a year later it was joined by Mr. Kaatabi’s lawsuit.\textsuperscript{526}

The defendant, on the other hand, had no concrete version of the events. The defendant argued abstractly that the two were refused entry either because their names were not on the invite list or that alternatively they were refused entry due to fear of problematic behavior, because they behaved in an aggressive manner toward the bouncer.\textsuperscript{527} However, the defendant did not bring evidence to support its claims. The defendant brought testimonies of personnel who were not present at the incident, and did not ask the bounder to testify.\textsuperscript{528} The defendant also brought a person of “dark skin” to testify that he is a regular client of the club.\textsuperscript{529} The defense focused on arguing that the plaintiffs acted without bona fide, out of lucre and out of desire for publicity (as the two were also lawyers themselves). The defendant claimed that the plaintiff’s goal was not to enter the nightclub, but to be refused entry in order to formulate a cause for action.\textsuperscript{530}

In September 2009, the court ruled in favor of the plaintiffs, finding their evidence and testimony to be reliable, and found that the defendant did not contradict their version of the
The court found that the bouncer applied the pre-condition of entry to the club by invitation very selectively, focusing on men with darker skin. The court ruled that discrimination based on skin color is discrimination based on race, and ordered the defendant to pay the plaintiffs compensation in the sum of 60,000 NIS.

10.2 Reasoning and Analysis

The court’s reasoning relies on performativity, although not explicitly. The court finds that skin color is so close to the category of race and country of origin that it reads its existence into the law, thus implying that one’s racial/ethnic performance charges those categories with meaning. It attributes to skin color the complete affect of performance. The court understands the discrimination event as follows: the bouncer saw the plaintiffs and something in their presentation “outed” them as incoherent with local norms that constitute citizenship or at least the norms that constitute membership in the club which are in proxy to the general social norms. However, the court limits its own analysis when it ties back incoherence with “biological differences”, as something that is allegedly objective but mal used, without questioning the mechanisms that charge these differences with racialized meaning.

The court found that whether or not the defendant did so with intention, its practice discriminated on the basis of skin color. The court found that this discrimination is based on biological difference, which correlates to differentiation between races. The court continued to
find that discrimination on basis of skin color is sociologically and psychologically the same as racial discrimination.\textsuperscript{537} Therefore, the court found that even though discrimination on the basis of skin color occurs within the Jewish society, it should be regarded as racial discrimination, including with respect to the PDPS prohibition to discriminate on the basis of race or country of origin.\textsuperscript{538} Moreover, the court found that “the close link between the color of one’s skin and the categories race and country of origin, forces to interpretation the law’s prohibition to discriminate as applying to discrimination on the basis of skin color.”\textsuperscript{539}

The court found that persons who have darker skin suffer more severely from discrimination than people of the same communities with lighter skin. The court stated that: “specifically in light of the common nationality factor [origins from the same counties, I.K] of these e’dot [Referring in Israel to specific Jewish ethnic groups, I.K] one cannot ignore the role that skin color plays in this phenomena”.\textsuperscript{540} The court also added that even though skin color is an allegedly objective factor, it is a characterization that lies in the eyes of the beholder and changes in respect to the beholder’s social consciousness.\textsuperscript{541} I argue that in this reasoning, the court is implying that even if the law does not say so, what “everybody knows” is that persons who are discriminated on the basis of their race/ethnicity are actually discriminated against for their racial/ethnic performance.

It seems that the court does comprehend the discriminatory act from a performative point of view. Considering how one’s performance might signify some sort of threat, the court asks whether the same behavior by someone with light skin would inspire the same subjective

\begin{footnotes}
\item[537] Ibid.
\item[538] Ibid.
\item[539] Ibid, para 24.
\item[540] Ibid, para 32.
\item[541] Ibid, para 33.
\end{footnotes}
impression and operative conclusion.\textsuperscript{542} The court finds that the fact that the defendant’s dark skinned witness was allowed entry to the club does not suggest that it did not discriminate. Rather, it means that the witness proved that he himself does not pose any threat. This does not imply that such proof is also required by a light skin person as a pre-condition for entry. The court found that the selective demand for invitation shows that certain persons had to prove their lack of threat, while others did not. The court finds this to be racial profiling and asserts that it is an ineffective tool for detecting threats.\textsuperscript{543}

The court’s framing of differences in subjective impressions and operative conclusions based on one’s appearance is highly significant, and might go as far as shifting the basis of compression and focusing on racial/ethnic coherence, that is, whether the plaintiff was treated differently than someone whose racial/ethnic performance coheres with socially accepted norms. However, albeit this kind of comparison between the plaintiffs and other guests who were allowed entry motivates the courts findings of discrimination, the court never goes that far. Instead, the court clings to skin color only to very delicately detach it from other performative signifiers, using it as if it does reflect some biological truth but not one that deserves a different social value.

The narrow legal application of what “everybody knows” reinforces my suspicion that in reality, Mizrahi discrimination does not only occur to “dark skin” individuals. The court does recognize that the discrimination that occurs within Jewish society is racial discrimination, suggesting that it is not ethnically homogenous. Yet, the court’s attachment to only one signifier of racial/ethnic performance seems to serve the idea that “all Israel are brothers”,\textsuperscript{544} which is

\textsuperscript{542} \textit{Ibid}, para 42.
\textsuperscript{543} \textit{Ibid}, para 46.
\textsuperscript{544} Taken from Midrash Tanhum (one group of homiletic stories as taught by Chazal- the rabbinical Jewish sages of the post-Temple era). It is an expression widely used in Israel to point to solidarity within Jewish society, and to its common ancestry.
noticeable in the repeated reference to the plaintiff’s military service, rather than questioning of the ethnic/racial social hierarchies in Israel. On this point I agree completely with Bitton that focusing on skin color is a detour from addressing the issues at hand, but only insofar as it not considered as one amongst many signifiers of performativity. I suggest that the category of “ethnicity” or “Mizrahi” are not “missing” from the law, but rather, that there is no need for a category of “ethnicity” or Mizrahi in order to be able to bring attention to racial/ethnic coherence. As Tzadok and Kaatabi’s verdict shows, racial/ethnic performance is interlocked with PDPS. More than there is a need to add protected categories, there is a need to shift the basis of comparison, focusing on the entire performative spectrum that constitutes racial/ethnic coherence.

11 David Liran

The case of Liran vs. Ramat David\(^{545}\) discusses racial/ethnic performance that goes beyond one’s skin color. The plaintiff asked to enter a nightclub at Kibbutz Ramat David but was refused entry, supposedly because his attire and hair style made him look “dangerous”. At the same time, two of his friends were granted entry, yet refused to enter without him. Mr. Liran tried to switch clothes with his friends in hopes of being granted entry, but was still refused entry. Mr. Liran and his friends left the scene and subsequently Mr. Liran filed a lawsuit arguing he was discriminated against in violation of PDPS.

\(^{545}\) CC (Afu.) 353-08-07 David Liran v Kibbutz Ramat David (and others) (Jan. 5, 2009), (by subscription) (Isr.)
11.1 Facts and Findings

In May 2007 Mr. Liran and a few friends went to the “Vertigo” nightclub at Kibbutz Ramat David.\textsuperscript{546} The court describes Mr. Liran as “a young man in his 20’s who has completed his military service.”\textsuperscript{547} Upon arriving at the club Mr. Liran’s friends were allowed entry while he was refused. When his friends inquired as to why he was refused entry, he was told to change his “flashy” shirt, to flatten the spikes in his hair and to take off his wristwatch.\textsuperscript{548} Mr. Liran and his friends then went back to the parking lot where one of the friends flattened Mr. Liran’s hair, another exchanged shirts with him and the third took his wristwatch. The group tried again to enter. Again, the plaintiff was refused entry and his friends were granted entry, even while wearing the plaintiff’s “dangerous” attire. Mr. Liran left the entrance in disgrace, and within a few minutes his friends joined him.\textsuperscript{549}

On August 2007 Mr. Liran filed a lawsuit against the Kibbutz, the company who operated the nightclub and the manager of the nightclub in the magistrate court in Afula. Mr. Liran argued that the “Vertigo” has a policy of racial profiling which amounts to discrimination prohibited by PDPS.\textsuperscript{550} He argued that the incident was perceived by him and his friend as discrimination relating to his skin color, in their words, because he was “black”.\textsuperscript{551}

The defendant claimed that Vertigo’s policy is to grant entry to all guests, and that entrance is only denied if the club is full or when there is a threat that the guest might be dangerous to other

\textsuperscript{546} Ibid, para 4.
\textsuperscript{547} Ibid, para 2.
\textsuperscript{548} Ibid, para 20.
\textsuperscript{549} Ibid, para 4.
\textsuperscript{550} Ibid, para 6.
\textsuperscript{551} Ibid.
guests.\textsuperscript{552} They claimed that Ms. Liran was refused entry because he smelled of alcohol and acted drunk. They claimed that Mr. Liran changed his shirt only to disguise the smell of alcohol.\textsuperscript{553} Moreover, the defendant argued that Mr. Liran did not name a protected category of the PDPS, and that his lawsuits relates to “skin color”, which is not a protected category.\textsuperscript{554}

The court found Mr. Liran’s version of the events to be more accurate, finding that he was not drunk.\textsuperscript{555} The court concluded that Mr. Liran was discriminated against on “personal background”\textsuperscript{556} and stated that there is no doubt that Mr. Liran was a member of a group whose characteristics are protected under PDPS, referring to the protected category of country of origin.\textsuperscript{557}

\textbf{11.2 Reasoning and Analysis}

The evidence in this case seems to suggest that racial/ethnic performance is about more than one’s skin color. While the court refers to Liran’s “dark skin” to conclude he was discriminated against on the basis of “country of origin”,\textsuperscript{558} in this case the color of skin is a part of an ensemble of performance signifiers. Yet, the court rests its decision on the fact that it finds that Mr. Liran has a “Mizrahi appearance” and that he is “dark skinned”.\textsuperscript{559} It states “it is hard not to notice the plaintiff’s dark appearance compared with his friends, who testified in this court, with whom he arrived at the club.”\textsuperscript{560} It seems that the court itself is affected by Mr. Liran’s racial/ethnic

\begin{thebibliography}{9}
\bibitem{552} Ibid, para 7.
\bibitem{553} Ibid.
\bibitem{554} Ibid.
\bibitem{555} Ibid, para 15.
\bibitem{556} Ibid.
\bibitem{557} Ibid, para 21.
\bibitem{558} This is unclear because Liran was born in Israel but it seems that the court understand country of origins as ancestry.
\bibitem{559} David Liran v Kibbutz Ramat David (and others), Supra note 545, para 21.
\bibitem{560} Ibid.
\end{thebibliography}
performance. However, the court insists that it was only skin color that was a factor in the discriminatory decision.

This reasoning is striking because it was Mr. Liran’s flashy shirt, gel spiked hair and golden wristwatch made him look “dangerous” to the bouncer. i.e., in this case it is clear that it was Mr. Liran’s complete racial/ethnic performance which effected the discriminatory act. Remember that, according the Ehlers, performativity is what constitutes race as biological, and that race is marked on the public body by performativity. Only when one achieves coherent racial/ethnic performance, by aligning the public markers and the internal markers to the relevant social norms, one can “pass” as a member of a specific group. In the case of Mr. Liran, it was not only his dark skin that marked him as “dangerous”, it was the correlation of his skin, his attire and his hairstyle.

Hence I argue that the case of Mr. Liran suggests that racial/ethnic performance cannot be reduced to one factor. Can the court be certain that Mr. Liran would not have been granted entrance if he would have initially tried to enter the club with the attire and hair style he adopted in his second attempt? I argue that it was the correlation between Mr. Liran’s performative markers that charged his skin color with racial meaning and not vice versa. Mr. Liran “achieved” “Mizrahi-ness” the moment a set of external markers aligned so that the bouncer could read these external markers are as evidence of a correlating set of characteristics and abilities.

The court ruled in favor of Liran, claiming he received different treatment in spite the fact that he was equal,\(^{561}\) reinforcing the notion of a homogenized Jewish society. However it is clear

\(^{561}\) Which raises the question of using a “separate but equal” argument would stand here.
that Liran failed to pass as Ashkenazi, as a non-Arab Jew, because his set of external markers did not correlate into coherences. Not only did his “skin color” fail to position him in close enough proximity to Ashkenazi-ness, his attire and hair style, as well as his skin color, positioned him in proximity to Arabness, thus he failed to signify himself as part of the hegemonic regime. This is much like trans people are discriminated against when they fail to constitute their gender as coherent, to pass. Instead of talking about his Mizrahi identity and its connection to ethnic/racial performativity, the court used the vague term “origins” and referred to his “dark skin”.

12 Lessons Learned so far from PDPS

The court’s inability to recognize the performative nature of the discrimination prohibited under PDPS is to a great extent the result of their inability to account for the heterogeneous ethnicity of Jewish society in Israel. It is a failure to comprehend the proximity of the Arab and Mizrahi racial/ethnic performance, which is plausible considering that such connection questions the most fundamental differentiation in Israeli law, the differentiation that constitutes Israeli law itself. The Mizrahim racial/ethnic performance marks their incoherence with the norms of the proper Israeli citizen. Yet, the cases reviewed have shown that performance is evident when trying to account for the exclusion of Mizrahim, for their exclusion itself is rooted in their “in-between” position. In that, they face similar challenges to those faced by trans persons who use ADL. Resonating the position of trans persons, the Mizrahi incoherence not only marks their own private exclusion, but reveals the discursive nature of the two dichotomous categories from which they deviate. Hence, as I have suggested in chapter one with respect to gender variant ADL claims, I suggest that making PDPS claims that expose the performative nature of the discriminatory act can potently promote a discussion about the social structure of (mal) distribution of resources and opportunities.
As I have shown with PDPS, by focusing on one element of racial/ethnic presentation, the courts conceal the social mechanism in action, the mechanism that forms the racial/ethnic hierarchal order of Israeli society. This hierarchy contrasts European Jews to Arabs, creating the otherness of Mizrahim. The courts themselves seem to use skin color to point to Mizrahi as a distinct category, referring to “Mizrahi appearance” at times, connecting between skin color and racism, or skin color and country of origin, or skin color and e’da\(^{562}\). Discussing skin color without accounting for the meanings that are attached to it, the courts keep denying the discursive nature of race/ethnicity, and continue to replicate the performance of a homogenized Jewish race/ethnicity in Israel.

All though it seems the tribunals are making efforts to counter Mizrahi discrimination, it is obvious to me that the lack of discussion of the social mechanism that cast Mizrahi as other, as less of a subject deserving access to social resources and opportunities, hinder the court’s ability to actually intervene and change the realities of Mizrahi lives in Israel. For instance in recent months there have been reports on new techniques of discrimination at nightclubs and parties, where people are now asked to share their Facebook profile with the organizers in order to be included in a closed guest list.\(^{563}\) Moreover, much like in respect to other communities who have been included in ADL,\(^ {564}\) the job market realities and cultural disparities between Mizrahim and Ashkenazim have not decreased after the enactment of the law. As in chapter one, I suggest that it is the lack of coherence that should be the starting point, leaving the tribunal free to search for and discover the social norms the perpetrator’s had in mind. Yet, in the case of Mizrahim under Israeli

---

562 Referring in Israel to specific ethnic group, such as Yemenite Jews, Moroccan Jews, Polish Jews etc.
564 Spade, supra note 12, chap 4.
law, this might be even more of a hypothetical fantasy, because Mizrahiness puts so much at stake for the state.

The court’s limited ability to comprehend Mizrahi exclusion calls for an intrasectional reading. The inability of the juridical system to recognize Mizrahi discrimination’s inextricable link to racial/ethnic performance in a broader sense is evidence of its structural difficulties to recognize the epistemological ideological basis that marks Mizrahi as other. An intrasectional look inside the court’s deliberations finds racial/ethnic presentation at its core, inhabiting the space between the recognizable Jew and the recognizable Arab. The court, serving the nation’s ideological paradigm of seeing Jewish identity as all-encompassing national/religious/ethnic, affectively tries to erase the impact of having a non-hegemonic ethnic performance, by emptying these performances of social meaning. Yet, the court’s focus on the process by which the outer gaze makes exclusionary judgments based on presentation, uncovers the mechanism of correlating the categories and of attaching specific social value to specific configurations of racial/ethnic coherence and incoherence. It further allows us to question the pre-discursive ‘truth’ of those separate components.

The Mizrahi is discriminated against when he is not “Jewish” enough to pass, insofar that passing is achievable by specific correlation nationality/religion/ethnicity. In similar fashion the transwoman is not “woman” enough to pass, when her lack of coherence between sex/gender/sexuality is exposed. When the transwoman and the Mizrahi man are discriminated against they are punished for revealing the discursive nature of the correlations. Because both categories of identity are situated “in-between” the coherent subjects, they teach us about how

565 Similarly, Ehler makes a mark on the double edged use of scientific claim for lack of biological difference between races to conceal social stratification attracted to different racial presentations.
coherence constitutes the subject. The Mizrahim force a more complex reading of race/ethnicity than a simple black/white analysis. Trans persons demand a more complex reading of gender than man/women hetero/homo analysis. Both exist in the excess of the legal dichotomies that construct legal categories. The juxtaposition of Mizrahi and trans reveals that race/ethnicity, like gender/sex, are not as stable as seems, and that it is the demand for coherence which constitute them as stable and dichotomous.

Mizrahi and trans discrimination are not the same, but their in-between-ness presents similar challenges to the law, which can be better understood though formulation of performativity in ADL. Both trans persons and Mizrahim are seeking protection from the same system that actively creates and upholds the dichotomous boundaries that cast them as others. The courts themselves play this dual role when they try to protect Mizrahim by drawing attention to one element of racial/ethnic presentation while avoiding the whole system of racial/ethnic performativity. Thus, they continue to constitute coherence as a stable tactic of mal distribution, while at the same time actively changing and controlling its meaning. Considering the role coherence plays in formulating the citizen as a readable subject to the court as well as the perpetrator a creative use of ADL is needed. Theorizing the relative nature of legal coherence as it is evident with “in-between” positions of trans and Mizrahi might be a good place to start. We cannot settle for inclusion of a new or better protected class as we cannot settle for recognition of one performative element as the core of discrimination. Instead, we must strive to demystify ADL and expose its performative function. Yet, this is not a task the law would voluntarily undertake, given its dual role in protecting and upholding of binaries. Rather, it is for us, critical legal scholars and practitioners, to “take advantage” of this opportunity to strategically advance a broader discussion.
Conclusion

The starting point of this thesis was my own experience as a trans activist and lawyer, where I encountered people’s requests to use ADL to fight their exclusion. The trans people who came to me were often not privileged at all, situated in the intersections of multiple discriminations. They wanted material justice; they wanted, for once, to make the perpetrators pay. At the same time, significant part of the innovative western trans political discourse, pointing out the connection between trans inclusionary politics and neo-liberalism, seemed to suggest that by providing trans people the tools of ADL, I would actually be causing harm to the greater goal of countering the structural mal distribution of resources and opportunities. While these claims have merit in the realms of political theory, I am also invested in listening to the voices of members of the trans community, to formulate a legal strategy for ADL that might do a little bit more justice with trans people.

What I quickly learn is that the history of trans claims in courts around the world resolves around question of how to define legal protection: who is that we protect? It is ever clear to the law that trans people are not exactly what the law means when it talks about sex discrimination, they are not the legal “men” or “women”, insofar as those categories reflect a pre-legal coherence between one’s birth assigned sex, gender and sexuality. From that legal perspective, trans people are situated “in-between” the legal “man” and “woman”. I set out to look at ADL and found that between its closed systems of mutually exclusive categories exists a universe of “in-between-ness”.

In order to understand this universe, I used the concept of intersectionality, only I have turned inwards to look inside the protected classes themselves and not only at their relation to one another. Because the gender variant ADL claims exist in-between the legally protected categories,
they allowed me to take an intrasectional look inside the relevant protected classes, revealing the false premise of the dichotomy and more than that, revealing the space in between the mutually exclusive categories, to hold gender performativity. Looking at legal cases from Canada and Israel I was able to see how tribunals and courts struggle to read gender variant claims into the narrow framing of ADL legal analysis. While holding on to the link between medical and legal recognition, court and tribunal are still inclined to essentialize the phenomena of gender variance, to understand it as deriving from a pre-social, pre-legal inherent truth about what someone “really is”.

Against the ever-evolving discourse of legal essentialism, I argued, following Butler, that as much as gender is subjectively true, nobody’s gender objectively exists. Rather, it is a performance that constitutes the “truth” it is supposed to reflect. This performance is charged with social value by means of population control and intersubjective discipline, which moves us to self-discipline. Consequently, I have claimed, that if sex/gender is performative, than the legal prohibition to discriminate refers also to performativity. Accounting for the performative components of ADL would mean that the basis of compression would shift; instead of asking if X was treated differently than Y, we would ask whether a person whose performance marks her/his sex/gender/sexuality as incoherent was treated differently than someone who adheres to socially accepted norms of sex/gender/sexuality. It is my hope that such a shift will allow ADL claims to move from focusing only on recognition, to a broader debate that critically accounts for the systematic harm to trans and non-trans person, created by the use of sex/gender/sexuality as categories of (mal) distribution.

Trying to expose these legal mechanisms of (mal) distribution, I found another group who is situated “in-between” dichotomous legal categories, the Mizrahim. As Jews who originally
emigrated from Arab countries, they exist in excess of two distinct categories of Israeli law, the homogenous Jewish collective and non-Jews, i.e. Arabs. Using the conceptual framework of I developed for gender variance performance and ADL, I tried to better understand the ADL claims of Mizrahim and their relation to inclusionary politics. I located the role of performativity in my review of PDPS cases, and offered explanations for the court’s inability to fully address the performative elements, despite their great potential in promoting structural debate. Juxtaposing trans and Mizrahi, I found that what the in-between space embodies is the “other” of the language of law, the affective ideologies that the law refuses. These ideologies are what I am intrigued by.

The continuous trauma of otherness566 is where Mizrahi and transgender imagined communities and demands for inclusion come from.567 These imagined communities successfully provide a collective narrative to people who have been excluded from the hegemonic narrative. But blinded by trauma, they fail to escape the political desire for a unified narrative that leaves space for incoherence, for multiplicity of possibilities of being and doing.568 In order to become Mizrahi or transgender, one must set aside those queer connections that shape human experience. In order to cohere as transgender or Mizrahi one is required to affectively deny their own in-between spaces. While it is easy to critique this desire for “normalcy”, it is important to note that we are in a constant process of trying to reconcile difference within ourselves.569 Yet, our need “to

567 This recognition, paradoxically, is about been not visible, not exceeding the borders of “normal” presentation. Mizrahi and transgender political identities are constituted in relation to the coherent social body. When thinking of the internal desire and external need for normality one must consider the affect of being coherent, that elusive ability to take up us much of the public space as you desire and still remain invisible, something people who cohere with hegemonic citizenship enjoy constantly. It is about passing but in a broader sense, it is the desire to expand the borders of hegemony to include your specific differentiating feature (your gender or ethnic presentation). The identitarian attachment to ideas of “inclusion” is the desire for external approval that you deserve to be you, the freedom that comes with not been constantly policed by outside gazes, direct and indirect violence.
569 Gozlan, supra note 217 at 334/3268.
make sense” points to an inner tension, the tension created by a closed system of mutually exclusive and stable categories of being and practicing.570

Looking from a gender variant perspective at trans right claims, and applying my formulation of those claims to Mizrahi claims, the existence of parallel narrative became evident. From reading decisions, I learned how the law, courts and tribunals expect a specific narrative of trans identities and practices, as well as of Mizrahi experiences, and demand the plaintiffs cohere to certain versions of subjectivity they deem as reflecting “truth”, while others are deemed as “fake”. From other the legal documents and arguments that appear in the decisions I read, I learned how litigants, speaking in the name of their clients, had another narrative to describing the events, often one that tries to translate complex realities into the “language of the law”, inevitably flattening them. For indeed ADL and other inclusionary instruments tend to “simplify” the heterogeneous nature of human experience, especially those at the margins of the “norm”. Yet, there exists another narrative, one that I could not find in the legal text, one that occasionally flickered in a citation of a testimony: the narrative of the plaintiffs themselves. I suspect that this narrative is more complex than those of the law or of a advocates, and that it could tell us something significant about how the law actually impacts lives. Today, as trans intelligibility is growing globally and with it the use of ADL, the trans political movement and the emerging field of trans studies stand at a pivotal moment. This moment demands that we turn our ear to the multiplicity of trans narratives, creating an ethnography of legal change that would enable us to formulate viable intersectional and intrasectional strategies.

570 Ibid at 334–336.
Bibliography

Canadian Human Rights Act, RSC 1985, c H-6

Charter of Human Rights and Freedoms, CQLR c C-12

Human Rights Code, RSBC 1996, c 210

Human Rights Code, RSO 1990, c H.19

Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 2000 (Isr.)

Employment (Equal Opportunities) Law, 5748- 1988 (Isr.)

Draft Bill for Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law 2000, HH 2871 (Isr.)

Minutes of plenum no. 107 of the 15th Knesset (22.5.2000)
http://82.166.33.81/Tql//mark01/h0003811.html#TQL (Isr.)

Kavanagh v Canada (Attorney General), [2001] 8496 CanLII (CHRT) (available on http://canlii.ca/t/1g946).

Vancouver Rape Relief Society v Nixon et al, 2003 BCSC 1936 (available on http://canlii.ca/t/1g4c8).

Vancouver Rape Relief Society v Nixon, 2005 BCCA 601 (available on http://canlii.ca/t/1m50v).

XY v Ontario (Government and Consumer Services), 2012 HRTO 726 (available on http://canlii.ca/t/fqxvb).

Dawson v Vancouver Police Board (No 2), 2015 BCHRT 54 (available on http://canlii.ca/t/ggzx4).

Labor Dispute L.D (TLV) 10-11-57199 Plonit v. the Respondent (Settled outside of Court)(Isr.)

CA 5833/12 Plonit v the State of Israel (September 12, 2013), Nevo Legal Database (by subscription) (Isr.)

Labor Dispute LD (TLV) 791-06-13 Marina Meshel v CET (May 13, 2014), Nevo Legal Database (by subscription) (Isr.)


Foucault, Michel et al. *The Foucault effect: Studies in governmentality* (University of Chicago...


Grant, Jaime M et al. *Injustice at every turn: a report of the National Transgender Discrimination Survey* (National Center for Transgender Equality, 2011).


Koyama, Emi. *Whose Feminism is it Anyway?*. (Emi Koyama, 2000).


Segev, Idan. *LE DESENCHANTEMENT DU GENRE, UN REGARD CRITIQUE SUR LA CLINIQUE DU TRANSEXUALISME* (Work for Masters Degree Psychonalitic, Paris Diderot University,).


Cohen-Eliya, Moshe. “Hahirut ve Hashivyoon BeRe’ee Ha’Hok Le’Esor Aflaya Be’Motzarim ve Shirutim [Equality and Librety in light of the Prohibition of Discrimination in Products, Services


Georgi, Anat. “BaKetzev Hanohehi, YiKach Le’Mizrahim 99 Shana Le’Hagia Le’Shivyon Muhlat [In the current ratio it would take Mizrahim 99 Years to reach complete equality]”, TheMarker (25.3.22013), online: <http://www.themarker.com/news/1.1976460>.


Meganzi, Aviel. “‘Lo Esrod Kele’, Transgender Lifney Maasar [I will not Survive Prison-Transgender Pre Incarceration]”, Ynet (17 September 2013), online: <http://www.ynet.co.il/articles/0,7340,L-4430773,00.html>.


Valentine, David. “‘I went to bed with my own kind once’: the erasure of desire in the name of identity” (2003) 23:2 Lang Commun 123.


Spade, Dean. For Those Considering Law School (2010).


“Marriage Equality Symposium | Perspectives in Gender and Geography in the Marriage Debate - YouTube”, online: <https://www.youtube.com/watch?v=TpKa2opkWUc>.

“‘Roller Girl’ Angela Dawson wins $15K damages from Vancouver police”, online: <http://www.cbc.ca/1.3009637>.

L.D (TLV) 10-11-57199 Plonit v. the Respondent (Isr.).

Copyrights Acknowledgments

Figure 3: Roller Girl (Angela Dawson) directing the traffic in downtown Vancouver (John Lehmann/The Globe and Mail)