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

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October 25, 2023

Defendants in U.S. trans equality cases now standardly argue that it is not conceptually possible for discriminatory legislation targeting transgender people to violate constitutional guarantees of gender equality, because such legislation equally applies to all transgender persons regardless of gender.[1] In fact, many have gone further to argue that anti-trans legislation cannot even be said to target transgender people specifically, as the discrimination can be easily redescribed as applying to only persons diagnosed with gender dysphoria, only persons seeking gender-affirming care, or only some other facially neutral category of persons—but not trans persons as such.[2]

Increasingly, courts are finding this *neutral application* defense persuasive. Allowing the first state law prohibiting gender-affirming care for trans youth to go into effect, the U.S. Court of Appeals for the Sixth Circuit found the law likely consistent with constitutional requirements of gender equality on the grounds that it denies gender-affirming care "to all minors, regardless of their biological birth with male or female sex organs."[3] The court later elaborated:

1. See, e.g., Opening Brief for Defendants-Appellants at 31–36, K.C. v. Individual Members of the Medical Licensing Board, No. 23-2366 (7th Cir. Aug. 21, 2023); Brief of Defendants-Appellants at 31–32, L.W. v. Skrmetti, No. 23-5600 (6th Cir. July 24, 2023); Brief of Appellants at 27–28, Fain v. Crouch, No. 22-1927 (4th Cir. Oct. 31, 2022); Brief of Appellants at 21–29, Kadel v. Folwell, No. 22-1721 (4th Cir. Aug. 31, 2022); Opening Brief of State Defendants at 47, Eknes-Tucker v. Governor of the State of Alabama, 80 F.4th 1205 (11th Cir. 2023) (No. 22-11707); Brief of Defendants-Appellants at 38–39, Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (No. 21-2875).

2. See, e.g., Opening Brief for Defendants-Appellants in *K.C.*, n. 1 above, at 40; Appellees' Response Brief and Cross-Appellant's Opening Brief at 21, B.P.J. v. West Virginia State Board of Education, No. 23-1078 (4th Cir. Apr. 26, 2023); Brief of Appellants in *Fain*, n. 1 above, at 28–29; Brief of Appellants in *Kadel*, n. 1 above, at 32–37; Opening Brief of State Defendants in *Eknes-Tucker*, n. 1 above, at 45–50; Brief of Defendants-Appellants in *Brandt*, n. 1 above, at 8. See also the cases curated in Katie R. Eyer, "Transgender Equality and Geduldig 2.0," *Arizona State Law Journal*, forthcoming, n. 5.

3. L.W. v. Skrmetti (*L.W. I*), 73 F.4th 408, 419 (6th Cir. 2023).

> Such an across-the-board regulation lacks any of the hallmarks of sex discrimination. It does not prefer one sex over the other. It does not include one sex and exclude the other. It does not bestow benefits or burdens based on sex. And it does not apply one rule for males and another for females.[4]

The denial of a form of medical care that is life-saving to so many transgender people precisely because of our distinctive relations with gender, so analyzed, becomes formally and substantively gender-neutral; it is merely differential treatment, to quote one defendant, "based on medical diagnosis, not sex or gender identity,"[5] or according to another, "on the basis of age and medical procedure," not "either sex or transgender status."[6] Embracing a version of the neutral application defense applied to transgender status, the Court of Appeals for the D.C. Circuit dismissed the notion that the Trump administration's trans military ban—a policy that disqualified from the U.S. military trans persons diagnosed with gender dysphoria, having transitioned, or seeking to transition—could even be said to discriminate against trans people to begin with, seeing as "not all transgender persons seek to transition to their preferred gender [sic] or have gender dysphoria."[7]

It doesn't help, then, that there is no good response to the neutral application defense currently on offer. Even the most sympathetic courts and advocates, for example, have resorted to strategies that further essentialize gender and pathologize trans people. In a leading case challenging insurance exclusions of gender-affirming care coverage, a federal district court in North Carolina tried to get around the neutral application defense by construing gender-affirming care as "*treatments* that lead or are connected to *sex* changes or modifications,"[8] doubling

4. L.W. v. Skrmetti (*L.W. II*), Nos. 23-5600, 23-5609, slip op. at 24–25 (6th Cir. Sept. 28, 2023) (in-text citations omitted). A similar argument, which I discuss below, was made in *Adams v. School Board of St. Johns County*, 57 F.4th 791, 808–9 (11th Cir. 2022) (en banc) (holding that a trans-exclusionary school bathroom policy does not discriminate against trans students based on transgender status).

5. Memorandum in Opposition to Plaintiff's Cross-Motion for Summary Judgment and Reply in Further Support of Defendants' Motion for Summary Judgment at 19, Hammons v. University of Maryland Medical System Corp., No. 20-cv-2088 (D. Md. Aug. 15, 2022).

6. Brief of Defendants-Appellants in *Brandt*, n. 1 above, at 22.

7. Doe 2 v. Shanahan, 755 F. App'x. 19, 24 (D.C. Cir. 2019).

8. Kadel v. Folwell, 620 F. Supp. 3d 339, 379 (M.D.N.C. 2022) (emphasis in original), *appeal docketed*, No. 22-1721 (4th Cir. July 8, 2022), *reh'g en banc granted sua sponte*,

down on the regrettable trope that to be trans is to be born in a wrong body awaiting medical correction.[9] Another leading strategy approaches gender-affirming care as treatments meant specifically and exclusively for trans people. As one court claimed, "a person cannot suffer from gender dysphoria without identifying as transgender,"[10] the fact that cisgender people routinely seek and access medical care for gender-dysphoric reasons apparently notwithstanding.[11]

Courts and advocates have struggled to no avail with the neutral application defense, I worry, because the assumption that transgender discrimination requires differential treatment *across* the sexes as we know them is perfectly consistent with, if not directly implied by, the conception of gender equality that has come to dominate U.S. law. In what follows, I examine this failure of the dominant conception in order to argue for a trans feminist alternative. The diagnosis is that an adequate response to the neutral application defense is foreclosed by the social metaphysics and political philosophy implicit in the dominant conception, and is therefore unavailable within the framework of mainstream gender equality law. To overcome the limitations of the dominant conception, I argue that the law should turn to conceptual and analytical resources made possible by trans feminist philosophy.

In so doing, this essay develops and defends the first trans feminist response to the neutral application defense. From a trans feminist standpoint, gender equality has to do not so much with sex and transgender status reduced to purported biological differences as with their social meaning—that is, gender. On my view, discrimination against, say, persons diagnosed with gender dysphoria is *ipso facto* discrimination based on both sex and transgender status, not because gender dysphoria as a medical diagnosis is somehow unique to trans people, but because persons diagnosed with gender dysphoria are systematically disadvantaged

No. 22-1721 (4th Cir. Apr. 12, 2023).

9. On the "trapped in the wrong body" theory, see, e.g., Robin Dembroff, "Moving beyond Mismatch," *American Journal of Bioethics* 19, no. 2 (2019): 60–63; Chase Strangio, "Can Reproductive Trans Bodies Exist?," *City University of New York Law Review* 19, no. 2 (2016): 223–45; Talia Mae Bettcher, "Trapped in the Wrong Theory: Rethinking Trans Oppression and Resistance," *Signs* 39, no. 2 (2014): 383–406.

10. Fain v. Crouch, 618 F. Supp. 3d 313, 325 (S.D. W. Va 2022), *appeal docketed*, No. 22-1927 (4th Cir. Sept. 6, 2022), *reh'g en banc granted sua sponte*, No. 22-1927 (4th Cir. Apr. 12, 2023).

11. See, e.g., Theodore E. Schall and Jacob D. Moses, "Gender-Affirming Care for Cisgender People," *Hastings Center Report* 53, no. 3 (2023): 15–24.

by the social meaning of our bodies being interpreted as trans—that is, extending Sally Haslanger's now-classic approach, because persons diagnosed with gender dysphoria make up a special kind of *gender category* for critical feminist analytical purposes.[12] And I suggest that we can avoid the apparent trans-exclusionary implications of Haslanger's published view by distinguishing gender categories from genders (proper): gender categories, while useful for critical feminist analytical purposes, need not be central to the construction of our authentic selves in the same way genders (such as *women* and *men*) are.[13]

I begin by unpacking the challenge posed by the neutral application defense to the dominant conception of gender equality (§ 1). I then consider and reject five responses to the neutral application defense that are available under the dominant conception (§ 2). Finally, I introduce the trans feminist alternative I defend and show that it cleanly bypasses the neutral application defense (§ 3). Throughout my discussion, my broader methodological aim is to illustrate the unique space for philosophical engagement with substantive law that trans feminist philosophy opens up.

1. The Neutral Application Problem

Equality, according to the prevailing view in U.S. law, is all about eliminating differential treatment *unjustified* by real underlying differences. Thus, when men but not women were automatically included in jury pools, the state treated women differently from men on the basis of a purported sex difference. But according to the Supreme Court that

12. Cf. Sally Haslanger, *Resisting Reality: Social Construction and Social Critique* (New York: Oxford University Press, 2012), esp. chaps. 6–8, 13, 16. Cf. also Catharine A. MacKinnon, "Exploring Transgender Law and Politics," *Signs*, forthcoming; "A Feminist Defense of Transgender Sex Equality Rights," *Yale Journal of Law and Feminism* 34, no. 2 (2023): 88–96.

13. Cf. Elizabeth Barnes, "Gender and Gender Terms," *Noûs* 54, no. 3 (2020): 704–30; Katharine Jenkins, "Amelioration and Inclusion: Gender Identity and the Concept of *Woman*," *Ethics* 126, no. 2 (2016): 394–421; Stephanie Julia Kapusta, "Misgendering and Its Moral Contestability," *Hypatia* 31, no. 3 (2016): 502–19; Jennifer McKitrick, "A Dispositional Account of Gender," *Philosophical Studies* 172, no. 10 (2015): 2575–89. Cf. also Sally Haslanger, "Going On, Not in the Same Way," in *Conceptual Engineering and Conceptual Ethics*, ed. Alexis Burgess, Herman Cappelen, and David Plunkett (Oxford: Oxford University Press, 2020), 230–60; Katharine Jenkins, "Toward an Account of Gender Identity," *Ergo* 5, no. 27 (2018): pp. 738–39; Mari Mikkola, *The Wrong of Injustice: Dehumanization and Its Role in Feminist Philosophy* (New York: Oxford University Press, 2016), chap. 5.

decided the case in 1961, such differential treatment was "reasonable," "rational," and hence not at all "constitutionally impermissible." The state's decision to exempt a woman from jury service because of her gender, the Court reasoned, constituted a special perk of sorts that appropriately compensated the woman for "her own special responsibilities," not in civic participation, but "as the center of home and family life."[14] Conceived this way, equality does not protect against substantive disadvantages; it demands merely instrumental rationality. Where differential treatment accurately reflects a real underlying difference, there is no arbitrariness that could give rise to a violation of equality, as the Court now understands it.[15]

While in the subsequent decades the Court eventually came to reject the premise that a woman's place is in the home, it managed to do so only by doubling down on its conception of equality. The Court has since recognized that "archaic"[16] or "overbroad generalizations about the different talents, capacities, or preferences of males and females" fail to provide the kind of "exceedingly persuasive justification" needed for gender-based differential treatment by the state.[17] A major caveat, however, is that the Court has also refused to characterize as archaic or overbroad those generalizations that it deems genuinely reflective of the "inherent differences between men and women."[18] For example, in upholding differential U.S. citizenship requirements based on the gender of a child's unmarried citizen parent, the Court declared it "a matter of *biological inevitability*," not an archaic or overbroad generalization, that "the opportunity for a meaningful relationship between [mother] and child inheres in the very event of birth"—a relationship that the five-men majority judged to be so fundamentally different from what the parent-child bond may mean to the father, who apparently does not even have to "be present at the birth,"[19] that both of their

14. Hoyt v. Florida, 368 U.S. 57, 61–62 (1961), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

15. Notably, this is a conception of equality rejected by the Warren Court's treatment of racial discrimination, which I will come back to in the last section in order to tease out an alternative.

16. Mississippi University for Women v. Hogan, 458 U.S. 718, 725 (1982).

17. United States v. Virginia, 518 U.S. 515, 531–33 (1996).

18. *Id.* at 533 (cleaned up). Except these inherent differences cannot be used "for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.*

19. Nguyen v. Immigration and Naturalization Services, 533 U.S. 53, 65–66 (2001)

women colleagues then on the Court found themselves in dissent. But tellingly, even the dissent conceded that the mother is "by nature" and the father "by choice present at birth," contesting instead the fit between that difference and the differential treatment it purports to justify.[20] It turns out that despite all the significant progress in its gender equality jurisprudence, the Court's understanding of gender equality itself has remained strikingly the same: real differences in the underlying reproductive biology, where they are understood to actually obtain, still justify real differences in the resulting social treatment.

The Court's now-notorious conception of equality in terms of discrimination in terms of differential treatment—which, following Catharine MacKinnon, I call the *differences conception*—is underinclusive in two interrelated ways.[21] To start with, differential treatment, where justified by real underlying differences, is perfectly consistent with the requirements of equality, as we have seen in the citizenship and jury cases. Curiously, moreover, where the justification works just a bit too well, differential treatment may be explained *away* altogether. For example, in its recent decision revoking abortion as a federal constitutional right, the Court in *Dobbs v. Jackson Women's Health Organization* homed in on the notion that "abortion is a medical procedure that only one sex can undergo." If there were no pregnant men that pregnant women could be treated differently from, the Court thought, then it's not even conceptually possible for abortion bans to raise any special worries about gender inequality. A substantive gender inequality in life, on the *Dobbs* Court's analysis, simply becomes an inherent sex difference beyond the reach of law.[22]

The way I see it, it is precisely these ways in which the differences conception is underinclusive that give rise to the neutral application defense, which we can accordingly recognize in its two forms. The first one,

(my emphasis). But cf. Sessions v. Morales-Santana, 582 U.S. 47, 64–66 (2017) (distinguishing *Nguyen*).

20. Id. at 86 (O'Connor, J., dissenting).

21. See Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987), chap. 2; *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven, CT: Yale University Press, 1979), chaps. 5–6. The differences conception is also overinclusive, most famously, of cases alleging reverse discrimination. See especially Students for Fair Admissions v. President and Fellows of Harvard College, 143 S. Ct. 2141 (2023).

22. Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2245–46 (2022) (dictum).

which we can think of as *equal application*, attempts to justify differential treatment by appeal to an alternative, facially neutral underlying difference that is claimed to be shared by all. Most notoriously, the Virginia government once argued that its prohibition of interracial marriage could not be said to discriminate on the basis of race, because it applied to everybody marrying interracially without regard to race.[23] While this specific version of the equal application defense was rejected by the unanimous Court in *Loving v. Virginia* (1969), structurally identical arguments have been offered by more recent justices in defense of discrimination based on sexual orientation. Declining to join the majority in striking down a Texas law criminalizing same-sex intimacy, Justice Scalia wrote: "Men and women, heterosexuals and homosexuals, are *all* subject to its prohibition of deviate sexual intercourse with someone of the same sex."[24] In an attempt to distinguish *Loving*, Justice Alito recently argued in an employment discrimination case:

> Discrimination because of sexual orientation is different. It cannot be regarded as a form of sex discrimination on the ground that applies in race cases since discrimination because of sexual orientation is not historically tied to a project that aims to subjugate *either* men *or* women.[25]

The thought guiding all three arguments is the same: the equal application defense concedes differential treatment in order to resist the characterization that the differential treatment is on a non-neutral basis. Discrimination against interracial and same-sex couples, so analyzed, is merely differential treatment based on interracial and same-sex marriage status, not the kind of "invidious" discrimination based on race or sex prohibited by law.

In transgender discrimination cases, the neutral basis for differential treatment is often cloaked in the language of "biological sex."[26] Consider the Eleventh Circuit's holding that a trans-exclusionary school bathroom policy does not discriminate against trans students on the basis

23. Loving v. Virginia, 388 U.S. 1, 7–8 (1967).

24. Lawrence v. Texas, 539 U.S. 558, 599–600 (2003) (Scalia, J., dissenting) (my emphasis).

25. Bostock v. Clayton County, 140 S. Ct. 1731, 1765 (2020) (Alito, J., dissenting) (my emphasis).

26. For a helpful critique of the notion of "biological sex," see Katrina Karkazis, "The Misuses of 'Biological Sex,'" *The Lancet* 394, no. 10212 (2019): 1898–99.

of transgender status. Thankfully, unlike pregnancy, the need to access bathrooms is not assumed to be unique to any specific gender, making it at least conceivable that trans students of various genders could be treated differently from their similarly situated cis peers. But then the equal application defense goes, a policy requiring any student to use bathrooms that align with their "biological sex" applies to trans and cis students all the same, and therefore cannot be said to treat trans students any differently.[27] Indeed, the Eleventh Circuit seemed to go so far as to suggest that "the biological differences between the sexes" would *demand*, not just permit, the effective denial of bathroom access to trans students. The "sex-specific privacy interests" in "using the bathroom away from the opposite sex and shielding one's body from the opposite sex," the court claimed, "justify a sex-specific policy," and cannot be alternatively realized by individual stalls or apparently even additional single-user bathrooms.[28] In a true separate-but-equal, differences in bathroom biology justify differences in bathroom treatment.

The second form of the neutral application defense, which I term *unique application*, aims to explain away differential treatment altogether by appeal to an alternative, facially neutral underlying difference that is claimed to be unique but not universal to a specific category of persons. This style of reasoning is characteristic of the Court's treatment of pregnancy discrimination and reproductive freedom. Earlier I introduced the *Dobbs* Court's argument that abortion bans are consistent with constitutional requirements of gender equality because "abortion is a medical procedure that only one sex can undergo."[29] Three decades earlier, the Court upheld organized attempts to physically obstruct and blockade the entrance to abortion clinics, explicitly rejecting the counterargument that "since voluntary abortion is an activity engaged in only by women, to disfavor it is *ipso facto* to discriminate invidiously against women as a class."[30] Both cases relied on a 1979 decision *Geduldig v. Aiello*, in which the Court relied on the unique application defense to hold that pregnancy discrimination is not in itself a form of sex discrimination: whereas sex discrimination is the differential treatment

27. Adams v. School Board of St. Johns County, 57 F.4th 791, 809–10 (11th Cir. 2022) (en banc).

28. *Id.* at 806.

29. Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2245–46 (2022) (dictum).

30. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 271 (1993).

of women relative to men, pregnancy discrimination is the differential treatment of "pregnant women"—which, according to the Court, "is exclusively female"—relative to "nonpregnant persons"—which "includes members of both sexes." On the unique application logic, pregnancy discrimination cannot, even as a conceptual matter, constitute differential treatment based on sex if it applies to only but not all women.[31]

In one of the first cases applying the unique application defense to transgender equality, a federal magistrate judge in Arizona argued that the state's denial of gender-affirming surgery coverage to its public school teachers and other public employees merely "discriminates against persons seeking gender transition surgery," not "against transgender people in general." The analysis is as remarkable as it is consistent with the differences conception: first, on the assumption that "all persons seeking gender transition surgery are transgender," trans persons seeking gender-affirming surgery could not be treated any differently from similarly situated cis persons, because no such cis persons exist; then, on the assumption that "not all transgender persons seek gender transition surgery," the specifically and explicitly carved-out exclusion of gender-affirming surgery is not inherently discriminatory against trans persons as such. "It is therefore unclear," the magistrate judge concluded, "whether the [state] intentionally tried to burden transgender individuals."[32]

Even more disturbing versions of the unique application defense are regularly invoked in cases of discrimination against trans women and girls; given how transmisogyny works, this is hardly surprising. Recently, a U.S. district court in Illinois dismissed an incarcerated trans woman's claim that, by subjecting her to some 27 years of horrific sexual and physical abuse in men's facilities, the federal government discriminated against her on the basis of transgender status. The abuse, the court reasoned, was not "due to her gender identity," only "due to the denials in being housed in a women's prison," forgetting for a moment that the federal government assigns incarcerated trans women to men's facilities

31. Geduldig v. Aiello, 417 U. S. 484, 496 n. 20 (1974).

32. Report and Recommendation at 5–6, Toomey v. Arizona, No. 19-cv-35 (D. Ariz. Nov. 30, 2020). Sidestepping the magistrate judge's argument, the district court nevertheless denied preliminary relief in important part because it was not convinced "that 'extreme or very serious damage will result' if the injunctive relief sought does not issue." No. 19-cv-35, slip op. at 10 (D. Ariz. Feb. 26, 2021).

by default precisely because they are trans, not cis, women.[33] Not to be outdone, the West Virginia government defended its new law prohibiting trans girls from participating in girls' sports with two unique application arguments passing as equal application:

> Although the Act affects biologically male athletes identifying as female [sic], it treats them no differently from other biologically male athletes. For example, a law that favors veterans is not sex-based discrimination even if veterans are 98% male. Nor is the regulation of a medical procedure that affects only one sex. [citing *Dobbs*] The same logic holds here. Because the Act applies equally to all biological males [sic], a lack of identity exists between its sex-based classification and transgender persons.[34]

Clearly, that trans girls are treated the same as cis *boys* shows rather than disapproves that they are treated differently from cis *girls*, which is the point. The equal application defenses have to be read as unique application defenses in order to make even superficial sense: First, trans girls are apparently so unique that they are not even comparable to cis girls; it follows that it is not differential treatment of trans girls relative to cis girls to prohibit trans girls, but not cis girls, from participating in girls' sports. Second, the law applies to trans girls specifically, rather than all trans students, and therefore cannot be said to discriminate against trans students as a class either.

Although the equal application and unique application defenses have been treated separately as problems, they have not been thought of as two sides of the same coin in the way exposed here.[35] Taken to their logical conclusions, the two forms of the neutral application defense foreclose every conceivable way in which a claim of transgender discrimination may be raised under the dominant conceptual frame-

33. Iglesias v. Federal Bureau of Prisons, No. 19-cv-415, slip op. at 56 (S.D. Ill. Dec. 27, 2021). I discuss Ms. Iglesias's case in my "Putting Gender Back into Transgender Equality: On *Iglesias v. Federal Bureau of Prisons*," APA Blog, September 21, 2023, https://blog.apaonline.org/2023/09/21/putting-gender-back-intotransgender-equality-on-iglesias-v-federal-bureau-of-prisons.

34. Appellees' Response Brief and Cross-Appellant's Opening Brief in *B.P.J.*, n. 2 above, at 21 (cleaned up).

35. The closest attempt at systematically treating something like the neutral application problem is probably MacKinnon's now-classic analysis of sameness and difference in *Feminism Unmodified*, chap. 2.

work of U.S. gender equality law. If the discrimination targets trans people of a specific gender—nearly always, trans women and girls—the unique application defense is available; if it sweeps broader, the equal application defense is. If the discrimination can be redescribed as differential treatment based on a medical diagnosis, treatment, or some other *prima facie* neutral characteristic thought to be unique to trans people, the unique application defense is again available; if not, the equal application defense is.

Employing the two forms of the neutral application defense in tandem, the Eleventh Circuit's most recent analysis of a gender-affirming care ban for trans youth first applied the equal application reasoning to find no discrimination based on sex, as "the law . . . equally restricts the use of puberty blockers and cross-sex hormone treatment for minors of both sexes."[36] Next, the court applied the unique application reasoning to find no discrimination based on "transgender status, separate from sex": just like abortion, "the regulation of a course of treatment that, by the nature of things, only transgender individuals would want to undergo" cannot treat trans youth any differently from their similarly situated cis peers, because no such cis peers exist. As a treat, the court then applied the same unique application reasoning once more to find no discrimination based on "gender nonconformity" either, considered as separate from both sex and transgender status. All told, "the law simply reflects biological differences between males and females, not stereotypes associated with either sex," and is simply too instrumentally rational to violate constitutional guarantees of gender equality, or so the court determined.[37]

The analysis developed so far suggests that the neutral application defense becomes an analytical problem because and only because courts and advocates alike follow the differences conception in understanding sex discrimination and gender equality. But if you are like me, you are probably already shouting out all the ways that even proponents of the differences conception can—and, as I discuss below, sympathetic courts and advocates that must work with if not around the differences conception have tried to—respond to the neutral application defense. I survey five such strategies in the following section. I argue that, de-

36. Eknes-Tucker v. Governor of the State of Alabama, No. 22-11707, slip op. at 49 (11th Cir. Aug. 21, 2023).

37. *Id.*, slip op. at 45–46.

spite their initial appeal, none of the strategies are ultimately successful. If I'm right that neutral application poses a difficult challenge to the differences conception but not to the trans feminist alternative I want to propose, then that should give us very good reason to turn to trans feminist philosophy for an adequate response to the neutral application defense, if not to regard the trans feminist alternative, or something close to it, as in fact the default view of sex discrimination and gender equality.

2. In Search of Discrimination

I take it that the cases of transgender discrimination I have focused on—the prohibition of gender-affirming care, the mistreatment of incarcerated trans women, the denial of school accommodations, and the trans military ban—all directly violate the requirements of gender equality in general and transgender equality in particular. In the terms of the differences conception, this is to say that these cases of transgender discrimination constitute discrimination on the basis of both sex and transgender status under what's known in U.S. law as the "disparate treatment" (in contrast to "disparate impact") theory. The prohibition of gender-affirming care, for example, does not merely disproportionately affect transgender persons in the same way the gendered division of labor disproportionately affects women,[38] or in the same way gendered dress codes disproportionately affect those who are trans or gender-nonconforming, carry a pregnancy, or practice certain religions.[39] Rather, gender-affirming care bans directly target trans persons for discriminatory treatment precisely because of our sex and transgender status.[40]

How might those working under the differences conception respond to the neutral application defense? I'm going to consider five strategies that either have been pursued by sympathetic courts and advocates or may be available under the differences conception. I will assess these strategies according to what I hope are three uncontroversial criteria

38. Gina Schouten, "Discrimination and Gender," in *The Routledge Handbook of the Ethics of Discrimination*, ed. Kasper Lippert-Rasmussen (New York: Routledge, 2018), pp. 191–92.

39. Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (New York: Oxford University Press, 2020), p. 44.

40. More on the distinction between disparate treatment and disparate impact, see, e.g., Moreau, pp. 13–18.

for success—empirical, extensional, and explanatory adequacy. An empirically adequate response must not characterize trans persons, gender dysphoria, gender-affirming care, and so on in ways that fail to respect trans people's lived gender realities. An extensional adequate response must count paradigmatic cases of transgender discrimination, such as the examples we have been considering here, as discrimination based on both sex and transgender status. Finally, an explanatorily adequate response must provide plausible and principled reasons for why these paradigmatic cases of transgender discrimination are indeed based on sex and transgender status despite the neutral application defense's argument to the contrary. If a response is not empirically and extensionally adequate, it can't be explanatorily adequate either.

2.1. The Definitional Response

A popular response to the neutral application defense is that transgender discrimination is not neutral on sex and transgender status because it is impossible to write a trans discriminatory statute entirely in *prima facie* sex- and gender-neutral terms. Let's call this the *definitional response*.

The state-of-the-art formulation of the definitional response is offered by Judge Loretta Biggs in an opinion invalidating the categorical exclusion of gender-affirming care under North Carolina's public employee health insurance plan. According to Judge Biggs,

> In *Geduldig*, the Supreme Court held that a state health program that denied coverage for pregnancy did not discriminate based on sex. . . . But the same cannot be said here. The Plan does not merely exclude one "objectively identifiable physical condition with unique characteristics" from coverage; rather, it excludes *treatments* that lead or are connected to *sex* changes or modifications. Pregnancy can be explained without reference to sex, gender, or transgender status. The same cannot be said of the exclusion at issue here.[41]

To drive the point home, Judge Biggs cited several dictionary definitions of 'pregnancy' along the lines of "having a developing embryo or fetus

41. Kadel v. Folwell, 620 F. Supp. 3d 339, 378–79 (M.D.N.C. 2022) (emphasis in original), *appeal docketed*, No. 22-1721 (4th Cir. July 8, 2022), *reh'g en banc granted sua sponte*, No. 22-1721 (4th Cir. Apr. 12, 2023).

in the body, after union of an oocyte and spermatozoon."[42] By contrast, Judge Biggs observed, the North Carolina health insurance plan's exclusion of gender-affirming care expressly uses the term 'sex changes or modifications' to pick out the target of the exclusion—in so doing, the exclusion of gender-affirming care "facially discriminates based on sex and transgender status."[43]

The definitional response realizes that there is a direct connection between gender-affirming care and sex, gender, and transgender status, but I worry that it spells the connection out in all the wrong ways. First of all, it's not clear why the terms to which the target of the exclusion *can* be explained without reference should have the metaphysical significance that the definitional response seems to presume they do. On the one hand, there is good reason that the Supreme Court's argument in *Geduldig* "has been almost universally reviled"[44] by "commentators across the ideological spectrum":[45] pregnancy discrimination is still a form of sex discrimination even if the physical state of being pregnant can be explained in *prima facie* sex- and gender-neutral terms. On the other hand, it also seems possible to redescribe many, though arguably not all, forms of transgender discrimination in *prima facie* sex- and gender-neutral ways. If a law denying disability insurance to those "having a developing embryo or fetus in the body, after union of an oocyte and spermatozoon," is *prima facie* sex- and gender-neutral, then so is, one would assume, a law that generally prohibits the administration of "any drug to delay or stop normal puberty," the performance of "any sterilizing surgery," or the removal of "any healthy or non-diseased body part or tissue."[46] But none of this sounds right. The definitional

42. *Id.* at 379 n. 7.

43. *Id.* at 379. See also K.C. v. Individual Members of the Medical Licensing Board of Indiana, No. 23-cv-595, slip op. at 18 (S.D. Ind. June 16, 2023), *appeal docketed*, No. 23-2366 (7th Cir. July 12, 2023).

44. David Fontana and Naomi Schoenbaum, "Unsexing Pregnancy," *Columbia Law Review* 119, no. 2 (2019): p. 331 n. 130.

45. Mary Ziegler, "Fresh Fallout From the Supreme Court's *Dobbs* Ruling Just Hit Trans People," *Slate*, July 19, 2023, https://slate.com/news-and-politics/2023/07/supreme-court-dobbs-ruling-trans-backlash.html. "Even the principal scholarly defense of *Geduldig* admits that the Court was wrong in refusing to recognize that the [pregnancy] classification was sex-based." Sylvia A. Law, "Rethinking Sex and the Constitution," *University of Pennsylvania Law Review* 132, no. 5 (1984): pp. 983–84.

46. These are, verbatim, some of the language standardly used to write bans on gender-affirming care for trans youth, though these bans do explicitly limit their own scope to care provided for "the purpose of attempting to alter the appearance of, or to validate a minor's perception of, the minor's sex, if that appearance or perception

response lets the neutral application defense off the hook too easily the moment it concedes away pregnancy discrimination; it is neither extensionally nor explanatorily adequate.

More subtly, the definitional response finds sex, gender, and transgender status in gender-affirming care only by essentializing gender and pathologizing trans people. Judge Biggs follows the North Carolina health insurance plan in conceptualizing gender-affirming care as "*treatments* that lead or are connected to *sex* changes or modifications" (her emphasis).[47] Likewise, in recent opinions, other courts have understood gender-affirming care as "sex-transition treatments for [those] experiencing gender dysphoria,"[48] as "care related to transsexualism and gender dysphoria,"[49] as "treatment for transgender and gender dysphoric individuals,"[50] or simply as "treatment for gender dysphoria,"[51] where the term 'gender dysphoria' picks out the "serious but treatable medical condition" codified in the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5).[52] Even though DSM-5's adoption of the term 'gender dysphoria' as a replacement for the diagnostic categories of "gender identity disorder" and "transsexualism" that appeared in its earlier editions represented a significant achievement, gender dysphoria as a diagnosis is still thoroughly pathologizing and essentializing in substance[53] and in practice[54] if not in name, and has

is inconsistent with the minor's sex." See, e.g., Ky. Rev. Stat. § 311.372, *preliminarily enjoined by* Doe v. Thornbury, No. 23-cv-230 (W.D. Ky. June 28, 2023), *rev'd sub nom.* L.W. v. Skrmetti, Nos. 23-5600, 23-5609 (6th Cir. Sept. 28, 2023); Ala. Code § 26-26-4, *preliminarily enjoined in part by* Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131 (M.D. Ala. 2022), *rev'd sub nom.* Eknes-Tucker v. Governor of the State of Alabama, 80 F.4th 1205 (11th Cir. 2023).

47. *Kadel*, 620 F. Supp. 3d at 379.

48. *L.W. II*, slip op. at 3.

49. Toomey v. Arizona, No. 19-cv-35, slip op. at 2 (D. Ariz. Feb. 26, 2021).

50. Edmo v. Corizon, Inc., 935 F.3d 757, 769 (9th Cir. 2019).

51. *Id.* at 767.

52. *Id.* at 769. For clinicians practicing outside of the United States, the eleventh version of the World Health Organization's *International Statistical Classification of Diseases and Related Health Problems* (ICD-11) includes a comparable diagnosis of "gender incongruence," which was similarly introduced to supersede "gender identity order."

53. See, e.g., Zowie Davy and Michael Toze, "What Is Gender Dysphoria? A Critical Systematic Narrative Review," *Transgender Health* 3, no. 1 (2018): pp. 164–65.

54. See, e.g., Florence Ashley, "Gatekeeping Hormone Replacement Therapy for Transgender Patients Is Dehumanising," *Journal of Medical Ethics* 45, no. 7 (2019): 480–82; Sarah L. Schulz, "The Informed Consent Model of Transgender Care: An Alternative to the Diagnosis of Gender Dysphoria," *Journal of Humanistic Psychology* 58, no. 1 (2017): 72–92.

been rightfully criticized as such. At the heart of all of these definitions of gender-affirming care is still the age-old myth that trans people are "trapped in the wrong body," miserable and pathetic until the marvels of modern medical technologies come to the rescue.[55] On the trapped-in-the-wrong-body view, to be trans is to suffer from the "mismatch" between mind and body, and gender liberation on the personal level ultimately requires the dissolution of transgender status on the bodily level.

2.2. *The Level-of-Generality Response*

But there may be a way to avoid the pathologization and essentialization implicit in the definition response. Consider a two-fold strategy inspired by Florence Ashley's recent defense of gender-affirming care access. First, we do not have to think of gender dysphoria as a diagnostic category in DSM-5; instead, we can speak of the first-personal experiences of being gender dysphoric. Second, we should recognize other sufficient grounds for access to gender-affirming care such as the pursuit of gender euphoria and the desire to creatively transfigure one's body in gendered ways.[56] Gender-affirming care, so construed, consists of medical care provided not only in order to mitigate gender dysphoric experiences, but also for purposes of pursuing gender euphoria and creative transfiguration. Arguably, gender-affirming care in this expansive sense is not uniquely accessed by trans persons. For example, gender-affirming estrogen is regularly prescribed to cisgender women and girls, and gender-affirming chest reduction surgery is available to cisgender men and boys with enlarged chest tissues almost as a matter of course. Raising the *level of generality* in this way connects gender-affirming care to sex, gender, and transgender status and in so doing sidesteps the unique application defense.

This all sounds promising until one remembers the equal application defense on the other side of the coin. Recall the Eleventh Circuit's analysis of the trans-exclusionary school bathroom policy. There, bathroom access was cast at a high level of generality. Since nobody is allowed

55. See, e.g., Strangio, "Reproductive Trans Bodies," pp. 225–26; Talia Mae Bettcher, "Trans Women and the Meaning of 'Woman,'" in *The Philosophy of Sex: Contemporary Readings*, 6th ed., ed. Nicholas Power, Raja Halwani, and Alan Soble (New York: Rowman & Littlefield, 2013), pp. 233–34.

56. Ashley, "Gatekeeping," p. 481.

to enter bathrooms thought to be inconsistent with their "biological sex," the policy treats transgender students exactly the same as their cisgender peers. The equal application defense could likewise say that the current gender-affirming care bans—which apply only to transgender people—prohibit everybody from accessing gender-affirming care in a way thought to be inconsistent with their "biological sex," regardless of transgender status. Indeed, this is what defendants have argued in the ongoing wave of discriminatory legislation targeting transgender youth. The Alabama government, for example, suggested that its gender-affirming care ban for transgender youth applies to gender-affirming care provided to both transgender and cisgender youth "for the purpose of attempting to alter the appearance of or affirm the minor's perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor's sex." On Alabama's analysis, the ban merely involves the differential treatment of youth seeking gender-affirming care for gender-transitioning purposes relative to "all other minors,"[57] not transgender youth relative to cisgender youth. "Because the two categories created by the Act both include transgender and non-transgender minors," the equal application defense goes, "the Act does not discriminate based on transgender status."[58]

To address the equal application defense, we need to lower the level of generality such that the discrimination does not come out as equally applicable across the board. Even though the school bathroom policy forbids all students from using bathrooms thought to be inconsistent with their "biological sex," only trans students are prohibited from doing so *in a way that demeans their authentic sense of self.* Similarly, even though the gender-affirming care ban outlaws gender-affirming care for any youth who wish to access it for gender-transitioning purposes, only trans youth are denied the care *in a way that demeans their authentic sense of self.*

Following this strategy, Judge Liles Burke rejected Alabama's argument that its gender-affirming care ban equally applies to both transgender and cisgender youth. The ban is indeed based on transgender status, Judge Burke wrote, because "minors who seek transitioning medications" as a category

57. Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 75, Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131 (M.D. Ala. 2022) (No. 22-cv-184).

58. *Id.* at 77.

> consists entirely of transgender minors. The Act categorically prohibits transgender minors from taking transitioning medications due to their gender nonconformity. In this way, the Act places a special burden on transgender minors because their gender identity does not match their birth sex.[59]

By lowering the level of generality, Judge Burke got around the equal application defense without having to sacrifice empirical adequacy. By "transitioning medications," Judge Burke had in mind puberty blockers and gender-affirming hormones taken for gender-transitioning purposes specifically *by those who sex assignment at birth does not align with whom they authentically are.*[60]

I have already objected to the pathologization and essentialization implicit in responses like Judge Burke's. Here, for the sake of argument, I will assume that the problems can be fixed with something along the lines of the Ashley-style strategy envisioned above. Still, it's difficult to see how doubling down on the uniqueness of the relevant medical care to transgender youth would not be vulnerable to the unique application defense. If the care is truly unique to transgender youth, then no cisgender youth can access it, making it impossible for transgender youth to be treated differently from their similarly situated cisgender peers, as no such similarly situated cisgender peers exist. No differential treatment, no discrimination on the differences conception.

It turns out that the level-of-generality response is caught in the middle of two irreconcilable demands. On one hand, a level of generality high enough for comparability is needed to counter the unique application defense, which then invites the equal application defense. On the other hand, a level of generality low enough to avoid uniqueness is needed to counter the equal application defense, which then invites the unique application defense. It's not obvious what sweet middle level there may be. Nor is it obvious on what plausible and principled basis the appropriate level of generality could be settled, even if such a middle level may be found.

59. Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1147 (M.D. Ala. 2022), *rev'd sub nom.* Eknes-Tucker v. Governor of the State of Alabama, 80 F.4th 1205 (11th Cir. 2023).

60. *Id.* at 1139.

2.3. Two Counterfactual Responses

Perhaps not so quick, urges the counterfactual theorist. Judge Burke's response leaves us in a place where there are no similarly situated cisgender peers that transgender youth can be treated differently from. But it seems significant enough that transgender youth *would* be treated differently from these similarly situated cisgender peers if they were to simply exist.

John Gardner proposes a strategy like this in response to what he calls "Robinson Crusoe discrimination," a case where, by stipulation, Crusoe "encounters Friday" but "refuses to collaborate with him because he is black." Gardner tells us,

> To know whether Crusoe treats Friday "differently" when he refuses to collaborate with him, we need to ask how Crusoe would treat other imaginary candidates for collaboration, imaginary candidates who are not black but are otherwise (so far as possible) just like Friday. Why do we care to construct these imaginary candidates? Because if Crusoe would treat these imaginary non-black candidates differently, we deduce, Crusoe is refusing to work with Friday for the reason that Friday is black. Actually, it is misleading to call that a deduction. It is more like a restatement.[61]

Call this the *counterfactual comparator response*. The strategy is tempting, and I'm willing to grant that it gets a lot of cases right, at least as far as extensional adequacy is concerned. In our case, though, I confess I don't know what it would mean to imagine cisgender youth whose sex assignment at birth does not align with whom they authentically are, who therefore seek but are denied access to "transitioning medications" that are, by stipulation, unique to transgender youth. Counterfactuals are analytically powerful, but they are also notoriously tricky; here, they just seem to run out altogether.

Luckily, the problem can be avoided by another way of constructing the relevant counterfactual. Instead of counterfactual comparators, the *but-for analysis* popularized by the U.S. Supreme Court's much-celebrated opinion in *Bostock v. Clayton County* turns to counterfactual compara-

61. John Gardner, "Discrimination: The Good, the Bad, and the Wrongful," *Proceedings of the Aristotelian Society* 118, no. 1 (2018): pp. 57–58.

tees.[62] On this analysis, discrimination against trans people is discrimination on the basis of sex, because, holding everything else fixed, we would not receive the differential treatment if our sex assignment at birth were different. Likewise, discrimination against trans people is also discrimination on the basis of transgender status because, again holding everything else fixed, we would not receive the differential treatment if we were not transgender.[63]

If that sounds too good to be true, it is because it is. The but-for analysis has long been faulted for its extensional and explanatory inadequacy in cases of intersectional discrimination against Black women,[64] and a structurally analogous problem arises in cases of intersectional discrimination against trans women. With extraordinarily rare exceptions, incarcerated trans women are assigned to men's facilities,[65] where, according to data from a recent study, 69.4% of them are sexual assaulted and 80.3% physically assaulted.[66] Although the but-for analysis can get the result that the failure to place incarcerated trans women in women's facilities is discrimination based on sex assignment at birth, it can't say that the discrimination is also based on their transgender status. This is because incarcerated trans women would still be assigned to men's facilities if they were cisgender persons assigned male at birth. As the equal application defense would put it, the policy applies exactly the same to everyone assigned male at birth, regardless of transgender status.

62. Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

63. Note that, in so doing, the but-for analysis effectively sets up a cis-centric standard: transgender discrimination is legally cognizable in so far as, only as far as, we can be considered the same as a cisgender person who is exactly like us but for our sex assignment at birth or transgender status. I think this is a serious problem, but I'm not going to pursue it here. For useful discussions, see, e.g., MacKinnon, *Feminism Unmodified*, pp. 63–64.

64. Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum* 1989, no. 1 (1989): 139–67.

65. "Out of 4,890 transgender state prisoners tracked in 45 states and Washington, D.C., NBC News was able to confirm only 15 cases in which a prisoner was housed according to their lived gender." Kate Sosin, "Trans, Imprisoned—and Trapped," *NBC News*, February 26, 2020, https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436.

66. Valerie Jenness, Lori Sexton, and Jennifer Sumner, "Sexual Victimization against Transgender Women in Prison: Consent and Coercion in Context," *Criminology* 57, no. 4 (2019): p. 617. I'm using the data for what the article calls "sexual victimization," which includes both sexual acts that the trans women "would rather not do" and those done "against their will" (the article uses the term 'sexual assault' to refer exclusively to the latter).

Moreover, the but-for analysis seems doomed to failure in dealing with discrimination against nonbinary persons. On one hand, nonbinary persons are nonbinary no matter which sex was imposed onto us at birth, foreclosing the variation in treatment that a but-for analysis of discrimination against nonbinary persons as sex-based has to turn on. This gives rise to an equal application defense that the but-for analysis has no response to: discrimination against nonbinary persons applies equally to all nonbinary persons regardless of sex. On the other hand, it sounds awfully like an oxymoron to speak of cisgender nonbinary persons assigned either male or female at birth, whom the but-for analysis would ask us to imagine in order to determine whether discrimination against nonbinary persons is based on transgender status. This gives rise to a unique application defense that the but-for analysis has no response to either: discrimination against nonbinary persons is not discrimination on the basis of transgender status because only but not all transgender persons are nonbinary.

2.4. The Sex-Stereotyping Response

Is there really no better way to capture the intuition that both sex and transgender status are indeed part and parcel of paradigmatic cases of trans discrimination? The last strategy I want to consider, the *sex-stereotyping response*, builds on the Supreme Court's holding that it is sex discrimination to deny partnership promotion to a cis woman manager on the ground that she is not feminine enough. The Court explained,

> In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.[67]

On this approach, gender equality is primarily about combating inaccurate sex stereotypes.[68] For sex stereotypes to be inaccurate in the relevant way, two things must be true at once: First, inaccurate sex stereotypes, in order to count as stereotypes to begin with, must in some way fail to be justified by real underlying sex differences. The underlying sex differences themselves, on the other hand, are never stereotypic.[69]

67. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

68. See, e.g., Fontana and Schoenbaum, "Unsexing Pregnancy," p. 310: "The hallmark of sex-equality law is the aggressive policing of laws that classify individuals on the basis of sex and that are grounded in mere sex stereotypes."

69. See, e.g., Fontana and Schoenbaum, pp. 358–62.

Second, inaccurate sex stereotypes must in some way fail to describe the individuals in question. As a result, the sex-stereotyping approach has little, if anything, to say about people who do confirm to the sex stereotypes that are thought to be appropriate for their sex assignment at birth—or, pretty much everybody.[70]

The leading case applying the sex-stereotyping approach to transgender discrimination analyzed the employment discrimination against a trans woman as discrimination "against men [sic] because they *do* wear dresses and makeup, or otherwise act femininely."[71] Here, the masculine gender norms that the trans woman was expected but failed to comply with constitute inaccurate sex stereotypes within the sex-stereotyping approach. Nothing in reproductive biology can dictate pants- or dress-wearing, and the trans woman was exceptional to masculine gender norms. On a sex-stereotyping analysis, the discrimination that the trans woman received was based on gender understood as inaccurate sex stereotypes because "*his* [sic] failure to conform to" those masculine gender norms defied "how a man should look and behave."[72]

Perhaps finding it ironic to characterize trans women as effeminate *men* in an effort to combat transgender discrimination, courts now for the most part avoid misgendering trans plaintiffs with the wrong pronouns and gender terms "as a courtesy."[73] A more implicit problem, however, is that the sex-stereotyping approach itself requires a metaphysical if not linguistic form of misgendering. Note that the sex-stereotyping approach is premised on the idea that the gender norms applicable to trans people are those operative under dominant cultural spaces and social structures. This spells trouble for both empirical and explanatory adequacy. Here, empirical adequacy requires the recognition that many trans women do not think of ourselves as gender-nonconforming even though our bodies would not be seen as consistent with our authentic sense of self by the dominant cisheterosexual world, because the gender norms available to us from our own cultures and communities regard

70. Cf. MacKinnon, "Defense," p. 93.

71. Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004). But see *L.W. II*, slip op. at 32 ("*Smith* tells us nothing about whether a state may regulate medical treatments for minors facing gender dysphoria.").

72. *Smith*, 378 F.3d 566 at 572 (my emphasis).

73. A major exception is *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020), which expressly denied a trans woman's request that the court address her using her chosen pronouns.

bodies like ours as unproblematically if not paradigmatically female.[74] In fact, even when we do conform to gender norms that would be coded as feminine in the dominant world, many trans women still do not think of ourselves as gender-nonconforming because it is the dominant norms of *masculinity* that are inconsistent with our authentic sense of self.[75] These empirical inadequacies create an explanatory inadequacy. From the sex-stereotyping approach's point of view, it's as if trans women really are just "biological males" courageous enough to subvert the dominant norms of masculinity imposed onto us from birth, as if it really is our frivolous pursuit of "dresses and makeup" that's at the bottom of our discrimination.

Considered as a response to the neutral application defense, the sex-stereotyping approach is also not extensionally adequate. That the sex-stereotyping approach covers only inaccurate stereotypes is demanded by its commitment to the differences conception. It's helpful to recall here that the motivating case for the sex-stereotyping approach was a cis woman manager denied promotion to partnership because of her noncompliance with dominant norms of femininity. In a world where to be feminine is to be, by dominant social definition, weak, passive, dependent, immature, unserious, emotional, and submissive,[76] one wonders of what, if any, use the sex-stereotyping approach is to cis women denied promotions precisely because of their femininity. The situation does not get any better for trans women. To be sure, the sex-stereotyping approach can address, at least extensionally, cases of discrimination against trans women because we are regarded as too feminine for our imposed sex. But that is just one side of the multifaceted oppression that trans women find ourselves in. Trans women, as trans *women*, are also subject to discrimination because we are deemed not feminine *enough* for our lived sex. Under these conditions, trans women's compliance with dominant norms of femininity is not an inaccurate stereotype; it is

74. Bettcher, "Meaning," p. 240. See also Rowan Bell, "Being Your Best Self: Authenticity, Morality, and Gender Norms," *Hypatia*, forthcoming; E. M. Hernandez and Archie Crowley, "How to Do Things with Gendered Words," in *The Oxford Handbook of Applied Philosophy of Language* (forthcoming); C. Jacob Hale, "Leatherdyke Boys and Their Daddies: How to Have Sex without Women or Men," *Social Text* 15, nos. 3–4 (1997): 223–36.

75. For some excellent discussions, see Jenkins, "Amelioration and Inclusion," pp. 411–13.

76. See Julia Serano, *Sexed Up: How Society Sexualizes Us, and How We Can Fight Back* (New York: Seal, 2022), chap. 2.

a lived reality, a survival strategy, an inescapable fact of life in an unjust world.[77] Here again, the sex-stereotyping approach protects only the exceptional—trans women who are privileged enough that their material survival, personal safety, medical care, and social relations do not depend on their compliance with dominant norms of femininity.[78] Feminine trans and cis women denied promotions are not treated differently from similarly situated men, according to the neutral application defense, because masculine men, who are not denied promotions, are not similarly situated as feminine women, whereas effeminate men, who are similarly situated as feminine women, are likewise denied promotions.

3. A Trans Feminist Alternative

But there was a time when the Court saw through alleged differences as evidence for, rather than justification of, substantive inequality. Most tellingly, the unanimous Court that decided *Brown v. Board of Education* never even bothered to entertain alleged racial differences as a possible basis for justifying school segregation. The way I read *Brown*, relevant to discrimination in law is not so much any purported difference *per se* as its unequal social significance. For the *Brown* Court, that unequal social significance was reflected most strikingly in the ways in which the segregation of Black students from their white peers "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[79] To ask whether there might be enough of a racial difference to justify school segregation is already to misconceive the problem that racial discrimination *is* in the first place.

Cast in this light, the Court's willingness to take alleged sex differences at face value and cite them as justification for upholding sex discrimination represents a consequential retreat from the conception of equality envisioned by *Brown*.[80] One key explanation for why the differences conception has no good response to the neutral application defense is that it is oblivious to the self-fulfilling prophecy through which inequality shapes the social world in its mold. Under conditions of inequality, members of disadvantaged groups *are* different, precisely

77. Bell, "Being Your Best Self."
78. MacKinnon, *Sexual Harassment*, p. 126.
79. Brown v. Board of Education, 347 U.S. 483, 494 (1954).
80. See MacKinnon, *Sexual Harassment*, pp. 139–40.

because of that inequality. In a society where girls are discouraged from obtaining an education because they are girls, most often they will not grow up to possess the same qualifications as men, to have the same work experience and job skills as men, to enjoy the same luxury of not having to take on the same family and caregiving responsibilities as men, and worst of all, to imagine a life where they may flourish as a full person without being dependent on men. But on a differences analysis, the more pervasive and profound gender inequality is in social reality, the more rational and reasonable differential treatment based on gender seems to become in legal analysis—if not explained away entirely as a brute difference in biological destiny.[81]

I follow MacKinnon in locating *Brown*'s insight in its realization that discrimination in law must be analytically accountable to inequality in life; regrettably, this is a methodological commitment that the Court, partial to the differences conception, now rejects. *Brown* recognized that even though school segregation treats Black students as differently as it treats white students, it *means* something qualitatively different to be Black under the social conditions enforced by such segregation: the discrimination consists in the substantive disadvantages justified and enabled by that inequality of social meaning, not in the equally differential treatment considered as such. As I interpret the alternative that MacKinnon argues we can recover from *Brown*—which she refers to as the "inequality" or "dominance" conception—sex discrimination likewise occurs not because and when some persons are treated differently from their similarly situated counterparts on the basis of sex construed as a biological difference, but because and when they are systematically (i.e., nonaccidentally) disadvantaged by the social meaning of that purported biology—that is, *gender*.[82] Under this alternative view, the automatic exemption of women from jury service constitutes a violation of gender equality because—not in spite—of the social meaning of women's bodies as encapsulated in the reality that "woman [sic] is still regarded as the center of home and family life," a meaning that the law transformed into a substantive disadvantage.[83]

A very useful way to theorize social meaning in law is Haslanger's

81. MacKinnon, pp. 108–9.
82. See MacKinnon, *Feminism Unmodified*, esp. chap. 2; *Sexual Harassment*, esp. chaps. 5–6.
83. *Pace* Hoyt v. Florida, 368 U.S. 57, 62 (1961).

suggestion that gender categories can be a powerful tool for analyzing gender in its social meaning. The account of gender categories I defend amends Haslanger's original formulation in important places in response to now well-known critiques:

> *Gender categories*: A category is gendered (for critical feminist analytical purposes) if its members are socially positioned as subordinate or privileged along some dimension (economic, political, legal, social, etc.), and the category is "marked" as a target for this treatment by observed or imagined, or would-be-observed or would-be-imagined, bodily features presumed (taken, suspected, expected, etc.) to be evidence of a certain (present, previous, or future) body socially interpreted as sexed one way or another.[84]

On the combined MacKinnon-Haslanger approach I favor, to be discriminated against on the basis of sex is to be systematically disadvantaged by the social meaning of one's body being interpreted as sexed one way or another, which is in turn to be a member of a subordinate gender category for critical feminist analytical purposes. This way, an analysis of discrimination becomes an empirical, situated inquiry into substantive disadvantages and their social structural explanation, rather than a formalistic, detached assessment of the match between differential treatment and the underlying differences that purport to justify it, as is the case with the differences conception.

The best interpretation of the MacKinnon-Haslanger approach should acknowledge that the gender categories useful for critical feminist analytical purposes need not be limited to the genders *that we know of*. Haslanger herself envisions "the possibility of non-hierarchical genders" that may finally escape "the binary opposition between man and woman."[85] More recently, Elizabeth Barnes considers the categories of "gender outlier" and "gender confounder" as plausible extensions of a Haslanger-style social position account of gender.[86] In my own attempt to formulate a trans feminist response to the Court's treatment

84. Cf. Haslanger, "Gender and Race," in *Resisting Reality*, pp. 39, 44. The critiques I have in mind include: Jenkins, "Amelioration and Inclusion"; Kapusta, "Misgendering"; McKitrick, "Dispositional Account." See also Haslanger, "Going On."

85. Haslanger, "Gender and Race," p. 244.

86. Barnes, "Gender and Gender Terms," pp. 716–17.

of pregnancy discrimination, I suggest that it is important to pick out the category of persons systematically disadvantaged by the social meaning of their bodies being interpreted as pregnant; for purposes of a critical feminist analysis of pregnancy discrimination as a form of sex discrimination, then, *pregnant persons* constitutes a gender category.[87]

In so doing, we need not claim any necessary connection between usefulness for critical feminist analytical purposes and significance for the construction of authentic selves. What I'm interested in here are the gendered analytical categories that serve explanatory roles in critical feminist theory; such analytical categories may or may not function additionally as the kind of building blocks that can make up part of who we authentically are.[88] To be clear on the difference between gender as analytical categories in critical feminist theory and gender as components of our authentic selves, I've found it helpful to draw a distinction between what I call *gender categories* and *genders* (proper), though alternative terminology might also be suitable (say, *genders* and *Genders*). On my view, all genders (such as *women*) are also gender categories, but some gender categories (such as *pregnant persons*) do not constitute genders. Having this distinction helps us to retain the valuable analytical power of the MacKinnon-Haslanger approach while sidestepping difficult worries about wrongful exclusion, marginalization, and inclusion, which arise in relation to genders, not gender categories.

As early as the 1970s, MacKinnon already saw the need to recognize the sexual harassment of trans people in the workplace as a form of sex discrimination within a critical feminist analysis of gender inequality in employment. Her proposal, however, was to lump trans people into the category *women*: "Transsexuals and transvestites," she wrote, "would probably be considered legally female for this purpose."[89] Although MacKinnon's proposal has the space for analyzing the discrimination faced by trans women because we are women, it lacks the conceptual resources needed to capture the discrimination directed at trans people because we are trans or the transmisogynistic discrimination that targets trans women specifically because we are trans women. But we can fix

87. I defend this account in my "Pregnant Persons as a Gender Category: A Trans Feminist Analysis of Pregnancy Discrimination" (in progress). Cf. Haslanger, "Future Genders? Future Races?," in *Resisting Reality*, p. 259.

88. For an account of identity construction particularly friendly to this proposal, see Bell, "Being Your Best Self."

89. MacKinnon, *Sexual Harassment*, p. 183 n.

these problems once we realize that there are many more gendered analytical categories available to critical feminist theory than *women*, *men*, and even *nonbinary persons* and *genderqueer persons*.

Instead of routing all forms of transgender discrimination through the category of women, we can recognize discrimination against trans persons as based on sex and transgender status directly and immediately. Note that the interpretation of bodies as trans represents a family of ways in which bodies may be interpreted socially as sexed: within dominant cultural spaces and social structures, these would include the interpretation of bodies as trans male or female, as inconsistently male or female, as insufficiently male or female, as clockably male or female, as gender-disorderedly male or female, as (gender-?)exotically male or female, as unexpectedly or confusingly male or female, as problematically, upsettingly, or disgustingly male or female, and the like.[90] To bring this to bear on the neutral application defense, consider the trans military ban introduced earlier. On the view I'm proposing, discrimination based on—as the Trump administration characterized the ban—"a medical diagnosis (gender dysphoria) and a related medical treatment (gender transition)" is *ipso facto* discrimination based on both sex and transgender status.[91] Such a ban violates the requirements of gender equality in general and transgender equality in particular because it reflects the unequal social meaning of trans bodies and turns it into a substantive disadvantage—that is, because *persons diagnosed with gender dysphoria* and *persons seeking gender-affirming care* are subordinate gender categories for critical feminist analytical purposes.[92]

We have just cleanly and straightforwardly bypassed both forms of the unique application defense. The equal application defense would claim that a trans military ban is not discrimination based on sex because it equally applies to all persons diagnosed with gender dysphoria or seeking gender-affirming care, regardless of sex. But equal application is not a defense to substantive disadvantages. An equally applicable

90. On my view, it's possible to interpret bodies as sexed according to an explicitly trans-centric conception of sex, rather than what is operative under dominant cultural spaces and social structures. In fact, this is what happens everyday within trans communities. I try to spell these out in my "On Our Own Terms: Trans Women Crafting the Meaning of 'Woman'\hspace{0.75pt)" (in progress).

91. *Pace* Appellants' Reply Brief at 2, Karnoski v. Trump, 926 F.3d 1180 (9th Cir. 2019) (No. 18-35347).

92. For a contrasting strategy, see MacKinnon, "Transgender Law" and "Defense."

trans military ban discriminates against persons with gender dysphoria and persons seeking gender-affirming care based on sex—properly understood, based on the social meaning of sex—because the ban systematically disadvantages them on the basis of the social meaning of their bodies being interpreted as gender-disordered in the relevant ways. As for the unique application defense, the argument that a trans military ban is not discrimination based on transgender status because it applies to only but not all transgender persons fails because the interpretation of bodies as gender-disordered is among the many ways in which bodies are read socially as trans. Discrimination against persons diagnosed with gender dysphoria and persons seeking gender-affirming care is *ipso facto* discrimination based on transgender status—again, properly understood, based on the social meaning of transgender status—because it reflects the social meaning of bodies being interpreted as trans.

To emphasize, as gender categories for purposes of analyzing transgender discrimination, *persons diagnosed with gender dysphoria* and *persons seeking gender-affirming care* pick out those who are systematically disadvantaged by the social meaning of their bodies being interpreted as gender-disordered in the relevant ways, who may or may not have in fact been diagnosed with gender dysphoria or in fact seek gender-affirming care. If a person in fact diagnosed with gender dysphoria or in fact seeking gender-affirming care is for some unlikely reason not systematically disadvantaged on that basis, they are not included in the relevant category; but if a person who has not been diagnosed with gender dysphoria or who does not seek gender-affirming care is in fact systematically disadvantaged because they are read socially as a person diagnosed with gender dysphoria or a person seeking gender-affirming care, then they are included in the relevant category. Like Haslanger, I believe that these are the right results for a critical feminist analysis of transgender discrimination.[93] The same goes for other gender categories socially marked as trans in their own ways.

Now, what about intersectional discrimination against not just any person diagnosed with gender dysphoria or seeking gender-affirming care, but, let's say, specifically trans women diagnosed with gender dysphoria or seeking gender-affirming care? On my account, gender categories, as analytical categories in critical feminist theory, need not be

93. See Haslanger, "Gender and Race," pp. 239–40.

mutually exclusive. There is no internal inconsistency is saying that trans women are systematically disadvantaged by the social meaning of our bodies being interpreted not just separately as trans female and as gender-disordered in the relevant ways, but specifically as trans female gender-disordered in the relevant ways. Being read socially as a trans woman does not prevent one from being read socially as a person—often, specifically as a trans woman—diagnosed with gender dysphoria or seeking gender-affirming care; indeed, given the social reality that trans women know because we have to live it, it would be a *reductio* of the analysis if these categories had to be mutually exclusive.

Since much of the analytical power of my account is made possible by its pluralism about gender categories, one might wonder if it'd be possible for proponents of the differences conception to respond to the neutral application defenses by being similarly pluralistic about gender categories. The answer is no, and it's useful to see why not. Think about a gender-affirming care ban. The equal application defense claims that the ban applies to everyone without regard to "biological sex." Here, pluralism about gender categories does not make the differences conception any less beholden to purported sex differences. The unique application defense then suggests that the ban does not treat trans persons differently because only but not all trans persons are diagnosed with gender dysphoria or seek gender-affirming care. Pluralism about gender categories does not itself create any similarly situated persons from whom persons diagnosed with gender dysphoria or persons seeking gender-affirming care may be treated differently, leaving the unique application defense in full force. These extensional inadequacies, I suspect, reflect a failure of the differences conception itself, not just its denial of pluralism about gender categories.