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Article

*27 Perpetuating the Cycle of Abuse: Feminist (Mis)use of the Public/Private Dichotomy in the Case of Nixon v. Rape Relief

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Abstract

This article addresses the human rights case between Kimberly Nixon, a transsexual woman, and Vancouver Rape Relief and Women's Shelter (Rape Relief), a women-only collective, by critically analyzing the legal arguments and justifications put forth by Rape Relief and its counsel. Nixon was denied the opportunity to volunteer at Rape Relief on the basis that she was allegedly not born a woman and was not treated as one her entire life. By engaging in a discursive analysis of Rape Relief's oral arguments, Rape Relief's co-counsel Christine Boyle's academic arguments, and the judicial decisions related to the human rights complaint, I argue that Rape Relief exploited the governing assumptions of the public/private divide in its attempt to justify its exclusionary policy against transsexual women volunteers. As my title suggests, Rape Relief's use of the public/private dichotomy could be understood as perpetuating a cycle of abuse: it appropriated and perpetuated a legal principle that has consistently been used to the disadvantage of all women in society. Ultimately, I posit that Rape Relief's arguments worked against the interests of both transsexual and non-transsexual women.

*28 *OPENING REMARKS*

The enshrined common law maxim, "a man's home is his castle", [FN1] has long stood for the principle of man's freedom and autonomy in private spaces. Though he must conform to legal codes and rules in public areas, man becomes the supreme ruler when nestled in his home. I use the words "man", "he", and "his" purposefully here, not as gender-neutral terms, but rather to foreshadow the feminist engagement with this legal principle. In this regard, feminist legal scholarship has argued that the notion of a man's home-cumcastle perpetuates a public/private dichotomy where men enjoy freedom and women suffer servitude in spaces designated as "private."

Tracing the public/private divide back to Aristotle, [FN2] feminists have argued that this ordering of society allowed "private" sites to become havens of legal impunity. For example, in the quintessential private space--the hallowed home-- "man" (and here man operates metonymically for husband and father) can control, abuse, rape and exploit his wife and children without ***29** significant legal intervention, or with a mitigated punishment. [FN3] By analyzing family, criminal, employment, administrative and virtually every other

aspect of law, feminists demonstrated that the carving off of certain spaces as "private" has often worked to the disadvantage of women and children. Harms and inequalities in these so-called private spaces were rendered invisible, irrelevant or inevitable. On this view, feminists posited that the separation of the public and the private in law was not an empirical observation of a natural division, but rather an ideological operation serving the status quo of patriarchy.

This article examines how the public/private divide was exploited to support the status quo, not of patriarchy, but of feminism, in the human rights case between Kimberly Nixon and Vancouver Rape Relief and Women's Shelter ("Rape Relief"). [FN4] This high-profile case involved Kimberly Nixon, a transsexual woman [FN5] who filed a human rights complaint against Rape Relief, ***30** an all-woman collective that rejected Nixon as a potential peer counsellor. Rape Relief's refusal of Nixon was based on the claim that she was not born a woman, and therefore, had not been assigned the "historically subordinate status assigned to women", nor treated exclusively as a girl and woman. Based on this, Nixon did not qualify as a peer in Rape Relief's regard. A subsidiary justification offered by Rape Relief was that Nixon's appearance might cause discomfort to the clients who seek counselling and services from their organization.

The crux of my argument is that Rape Relief relied on a regressive understanding of law's proper role in regulating harmful behaviour, by capitalizing on the hegemonic concept of the public/private divide, in order to escape legal accountability for its members' discriminatory conduct. Further, Rape Relief's position on the contestability of Nixon's womanness, which was accepted by the appellate courts, relied on the larger implication of the public/private divide by re-entrenching that what matters for the law happens in the public sphere, and what does not matter for the law happens in the private and personal sphere. By framing the case as one centering on the autonomy interests of Rape Relief and the privacy interests of their clients, Rape Relief portrayed itself as the proverbial castle, with the women who run the organization as the ruling "queens." What will hopefully become evident throughout this paper is the irony of a purportedly feminist organization dichotomizing the public and the private spheres in order to discount the experiences and identities of one of the most marginalized subcategories of women: transsexual women.

As is obvious from the previous paragraph, I take it as a given that Kimberly Nixon is a woman. The purpose of this paper is not to advocate this viewpoint. Whether one subscribes to this position or not, I believe we need to be suspicious of the ways that Rape Relief exploited the governing assumptions of the public/private dichotomy in order to justify its behaviour. The arguments put forth by Rape Relief can be seen as highly problematic from a feminist perspective, even accepting its right to define who qualifies as a "woman" for the purposes of their volunteer program. As my title implies, I believe that Rape Relief's arguments could be understood as perpetuating a cycle of abuse: by deploying the public/private dichotomy as a cloaking and ***31** sanitizing measure, Rape Relief perpetuated the legitimacy of a legal principle that has consistently been used to the disadvantage of all women in society.

This article is in conversation with two previous articles written by counsel on both sides of the case. In "Real Women:

Kimberly Nixon v. Vancouver Rape Relief", barbara findlay, counsel for Nixon, argued that the dispute "[i]s a textbook case of the human rights principle that an individual must not be stereotyped by membership in a particular social group but must be assessed individually in relation to the service or employment being offered." [FN6] My analysis builds on this argument, but explicitly uses the insights of feminist legal theory to deconstruct the underlying assumptions in Rape Relief's legal justifications.

In "The Anti-discrimination Norm in Human Rights and Charter Law: Nixon v. Vancouver Rape Relief", Christine Boyle, co-counsel for Rape Relief, used this human rights case to illustrate her argument that the meaning of discrimination in human rights legislation should be consistent with the meaning of discrimination at the constitutional level. [FN7] Boyle argued that such an approach would incorporate a substantive equality analysis, governed by *R* v. *Law*, [FN8] and that such an analysis would lead to the conclusion that Nixon did not suffer discrimination because her dignity was not objectively impacted. [FN9] My analysis takes issue with this conclusion. Even given that Boyle is correct that human rights legislation should be interpreted consistently with the constitutional approach as articulated in *Law*--an approach overturned by the British Columbia Court of Appeal in the final *Nixon* appeal--I will argue that her contextual analysis actually serves to decontexualize the vulnerability and disadvantaged position of transsexual women in mainstream and feminist spaces.

***32** The body of this article proceeds in two parts. The first part provides a background of the material facts of the case and its adjudicative progression. In the second part, I demonstrate how Rape Relief relied on the public/private divide to claim that Nixon's complaint was unjustified and should be dismissed. I explore five dimensions of the public/private dichotomy in play during the litigation of the human rights complaint. First, I examine Rape Relief's restrictive interpretation of the term "sex" as a prohibited ground of discrimination. Second, I critique their assertion that volunteering should not be considered an employment. Third, I deconstruct their rhetorical manipulation of their clients' privacy interests. Fourth, I turn to the reasoning of Justice Edwards of the British Columbia Supreme Court to examine how his concurrence with Rape Relief's position was built upon the problematic assumptions of the public/private dichotomy. Fifth, I deconstruct how the portrayal of Nixon's private identification as a girl and woman as materially irrelevant, is premised on a privileging of the public sphere over the private sphere, as the space that demands judicial notice.

Ultimately, this paper takes issue with the hegemonic conception of the public/private dichotomy perpetuated by Rape Relief, and how this worked against the interests of both non-transsexual women as well as transsexual and transgendered women.

PART I: BACKGROUND FACTS AND CASE HISTORY [FN10]

In August of 1995, Nixon responded to an advertisement from Rape Relief calling for volunteers who wished to be trained as peer counsellors for victims of male violence. Nixon herself had suffered male violence in multiple forms, including relationship violence, sexual assault, and street harassment. She had previously

received counselling from Battered Women's Support Services (BWSS), an all-woman collective designed to assist women who have experienced violence and sexual assault. From this empowering experience, Nixon was inspired to give back to other women the kind of positive support she had received. Because BWSS had a policy against former clients volunteering immediately after having received counselling from them, Nixon turned to Rape Relief as an ideal venue to support women who, like her, had suffered from male violence.

***33** Rape Relief has a pre-screening process for their training program, the goal of which is to ensure that potential volunteers adhere to the group's listed political beliefs, which are:

> 1.) Violence is never a woman's fault; [FN11]
>
> 2.) Women have the right to choose to have an abortion;
>
> 3.) Women have the right to choose who their sexual partners are; and
>
> 4.) Volunteers agree to work on an on-going basis on their existing prejudices, including racism.

At this pre-screening interview, Nixon accepted these four principles and was invited to begin her training at the next scheduled session, beginning the following week. At the first training session, Cormier, a facilitator for the workshop, visually identified Nixon as someone who may not belong. During a break, Cormier asked Nixon about her sex status. [FN12] When Nixon confirmed she was a transsexual woman, Cormier asked her to leave.

In response to this exclusion, Nixon filed a human rights complaint alleging that Rape Relief had discriminated against her by refusing her employment and by denying her a service on the basis of sex. [FN13] On judicial review, Rape Relief questioned the British Columbia Human Rights Tribunal decision to hear the case on the basis that the Tribunal lacked jurisdiction, primarily relying on the argument that freedom from discrimination on the basis of "sex" under the *Code* does not protect against discrimination based on transsexualism. [FN14] Rape Relief's challenge was unsuccessful and the complaint proceeded with a full evidentiary hearing in front of the Human Rights Tribunal in 2001. Tribunal member Heather MacNaughton found that Rape ***34** Relief breached the *Code* by discriminating against Nixon on the basis of sex, and held no statutory defences applied to its' members' conduct.

Rape Relief applied for judicial review of the Tribunal's decision. Justice Edwards of the British Columbia Supreme Court agreed that the Tribunal had erred and quashed the decision on the basis of two findings. First, he concluded that Rape Relief's refusal of transsexual women was allowed based on s. 41 of the *Code*, dubbed the "groups' rights exemption." This section provides a defence to a *prima facie* case of discrimination for a non-profit organization provided: its primary purpose is the promotion of an identifiable group of persons, characterized by sex (among other grounds); and the organization is granting a preference to members of that identifiable group of persons. Although he held this finding was dispositive of the case, Justice Edwards nevertheless applied the *Law* framework to the facts of the case. Using a mixed subjective-objective test, he concluded that Nixon did not satisfy the legal test for discrimination because she had failed to show an objective impact on her human dignity.

Though Nixon's appeal of this decision was unsuccessful, she was vindicated to a degree by the Court of Appeal's reasoning. Justice Saunders held that the *Law* framework was not applicable to the test for discrimination in the present case. Through this reasoning, it was established that Rape Relief had committed an act of *prima facie* discrimination. However, Justice Saunders agreed with Justice Edwards that Rape Relief's conduct was legally justified by the groups' rights exemption pursuant to s. 41 of the *Code*.

PART II: WORKING THE PUBLIC/PRIVATE DIVIDE TO ERASE THE HARMS OF GENDER ESSENTIALISM

A. Taking the Sex out of Transsexualism

As discussed above, Rape Relief first challenged Nixon's complaint by an application for judicial review, contesting the jurisdiction of the Human Rights Tribunal to hear the case. Rape Relief argued it was not the legislature's intention to "alter the ground "sex" to encompass transsexualism or "gender identity"". [FN15] Rape Relief submitted that sex discrimination refers exclusively to conduct that disadvantages a person based on their status as a ***35** man or a woman, or based on associations to a person's maleness or femaleness. It relied on earlier case law holding that the ground "sex" in human rights legislation did not include discrimination based on sexual orientation. Finally, Rape Relief argued that three previous decisions of the Tribunal, finding sex did include transsexualism, were wrongly decided. [FN16]

Had Rape Relief been successful in their argument to restrict the meaning of "sex" to address male and female inequality exclusively, transsexuals and transgendered people would have faced serious barriers to access human rights protection in *any* kind of employment, service or housing relationship, not just women-only spaces. In consequence, transgendered and transsexual individuals would either have been completely excluded from protection from discrimination, or they would have been forced to self-construct as suffering from a disability. [FN17] Leaving transgendered and transsexual people with no protection would clearly be contrary to their human rights, as studies have shown that transgendered and transsexual people are acutely vulnerable to discrimination in all areas of life. [FN18] Though some transsexual persons have argued that discrimination has occurred on the basis of "disability" as well as "sex", other claimants object to what they perceive to be the medicalisation of their sex status. [FN19] In addition, this ground may not be available to transgendered claimants who have chosen not to undergo sex reassignment surgery. Though Rape Relief's main focus of concern regards women who were assigned the female sex at birth, I believe that as a feminist and justice seeking equality group, it betrayed its own principles. Rape Relief chose to pursue arguments that potentially had ***36** devastating repercussions on transgendered people, a group, which Rape Relief itself did not contest, is a minority group, is marginalized and is disadvantaged in Canadian society.

Beyond their harmful effects for transgendered people, Rape Relief's arguments further entrenched the public/private divide. In attempting to

ground "sex" in a (bio)logical [FN20] discourse of female and male, Rape Relief needed to sever the connections of sexuality and gender from the category of sex. The logic of a public/private dichotomy lurks behind this reasoning and has the effect of rendering the private identifications of one's gender and/or one's sexual desires to be legally irrelevant. On Rape Relief's analysis, what counts for law is the public assignment and recognition of coherent sexed subjects without the gender imperatives that attach to one's sex.

This erasure of the gender components of sex is reflected in the rhetoric used by Rape Relief. According to the decision, Rape Relief submitted that "the issue is not what the term "sex" might mean in the abstract, or in some other legislative or semantic context, but rather what it means in the context of the legal concept of sex discrimination." [FN21] In this argument, the use of the terms "abstract" and "semantic" work to dematerialize the issues of gender, implying that gender has less corporeality than sex, and that it primarily exists in the world of language and ideas, and not in the concrete world of "male" and "female". This concrete world is construed by Rape Relief as a "male dominated society" in which "sex discrimination" in law is meant to deal solely with issues of inequality between men and women. The inequality between transsexual women and non-transsexual women becomes an irrelevant issue within this binary thinking. Gender expression and identity are rendered epiphenomenal private choices and not public issues of inequality.

Discrimination based on sexual orientation is also deemed by Rape Relief to be outside of the scope of "sex." Relying on case law that predated the inclusion of sexual orientation as its own ground in human rights ***37** legislation, Rape Relief sought to demonstrate that these cases gave a restrictive meaning to "sex" that did not include sexual preference. By presenting these cases as part of their legal strategy to delimit "sex", Rape Relief further underscored the category of sex as something that is ontologically fixed, and not something that is policed through the regulation of sex roles. And yet, as Catharine MacKinnon argues, "[s]ame-sex discrimination is sex discrimination ... sex roles are socially enacted in part through sexual expression and sexual identity." [FN22] By citing jurisprudence that denies the imbrications' of sexuality with sex, Rape Relief tacitly approved of the ways sexuality is coded as private within legal reasoning, and therefore outside of law's scrutiny. [FN23]

B. Disavowing the Dignity Issues in Volunteering

Rape Relief's second argument, concerning the nature of volunteering, also attempted to exploit the governing assumptions of the public/private divide. Rape Relief argued before the Tribunal that volunteering does not constitute "employment" under the *Code*, and that the Tribunal therefore lacked jurisdiction with regards to the complaint. In support of this proposition, Rape Relief submitted that performing paid work provides dignity in a way that volunteering does not, and that the denial of the opportunity to engage in paid work therefore harms dignity in a way that denial of the opportunity to volunteer does not. Rape Relief further argued that volunteering does not raise the same concerns regarding the power imbalance as are involved in paid relationships.

Rape Relief's strategy of bracketing volunteer work as work that does not implicate legally relevant dignity contributes to the patriarchal undervaluation of women's unpaid or underpaid work. [FN24] Although men and ***38** women tend to volunteer about the same amount of time, there is a stark gender gap regarding the kinds of volunteer activities they perform and the significance it holds in their lives. According to a government sponsored research brief, men are more likely to occupy prestigious positions in the volunteer sector, such as serving on boards of directors, and women are more likely to be delivering hands-on services, such as care giving. [FN25] As such, men tend to have more supervisory roles, while women will have less power and less control over their volunteer work. Male volunteers are also more likely than women to have paid employment alongside their volunteer activity. [FN26] Women, who are systemically excluded from waged work, will often turn to volunteering to obtain skills and gain valuable experience in order to increase their chances of acquiring paid work. [FN27] For women, volunteering is also noted as a means to feel connected to the community and gain self-confidence. [FN28]

Had Rape Relief been successful in its bid to legally immunize volunteering from discrimination law, women--who have less power in their ***39** volunteer jobs and who rely on such work to upgrade skills, to connect with their community and to improve their self-esteem--would have been disproportionately affected. The non-profit volunteer-driven organization would become overdetermined as a private sphere that can escape accountability for harmful treatment because money is not exchanged.

Rape Relief's view that the dignity of work is inextricably tied to the value of money was reflected in its final argument that volunteering does not implicate the same power imbalance as paid work, presumably because being denied such work does not directly affect one's financial status. Yet, feminists have argued that the domestic sphere, where women continue to perform most of the unpaid work, involves stark power imbalances between parties that need to be addressed in law and economic policy. [FN29] In other words, feminists have argued that the fact that labour is unpaid, whether in the community or at home, should not indicate that such work is performed under fair or equal conditions.

In sum, Rape Relief's attempt to preclude Nixon's complaint by distinguishing volunteer work from paid work, premised on purported differential dignity and power issues, recalled the problematic ways the state has traditionally ignored the harms and inequality that occur when unremunerated work is performed, most often by women, in spaces designated as private.

C. Using the 'Best Interests of the Clients' Rhetoric to Justify Discrimination

Rape Relief argued before the Tribunal that even if *prima facie* discrimination was established, it was still not liable for a breach of the law because it was a *bona fide* occupational requirement that volunteers have lived their whole lives as girls and women. A substantial part of this alleged justification rested on the purported privacy and dignity interests of their clients. In its' evidence, Rape Relief called on Edith Swain, a former client of the organization. Swain testified that she would not have confided her story to someone she believed was a man or had grown up as a man.

***40** In its' oral argument to the Tribunal, Rape Relief cited Supreme Court of Canada jurisprudence protecting the privacy of sexual assault victim records. Rape Relief then sought to draw an analogy between the privacy interests of those victims and the privacy interests of its clients. Rape Relief submitted:

> Women who have suffered male violence should be entitled to maintain the privacy of their stories and *to choose* to whom they tell their stories. Women like Ms. Swain cannot be honestly reassured that a transgendered person has lived as a woman. [FN30] [emphasis added]

Using Swain's discomfort as evidence, Rape Relief suggested that to accept a transgendered or transsexual woman as a volunteer would violate the right to privacy for victims of sexual assault.

The nexus, however, between a sexual assault victim's privacy interests and a transsexual woman counsellor is not elaborated upon. The mere fact that Swain would have felt uncomfortable with Nixon as a counsellor does not establish an invasion of privacy, and instead shows little more than the fact that Swain prefers certain types of women as counsellors over others. Interestingly, Rape Relief does not allow other types of stated client preferences to govern the choice of counsellor. For example, imagine a woman from a socially conservative background who requests a different counsellor because she is not comfortable disclosing sexual abuse to a woman who appears to be a lesbian. Rape Relief's policy is to refuse such requests, despite evidence from its own expert witness, Dr. Pacey, who testified under cross-examination that in her view, "the sexual orientation of a peer counselor could be an issue for a victim of sexual assault because the issues following a sexual assault sometimes differ for heterosexual and lesbian women." [FN31]

It is therefore clear that despite Rape Relief's claim that a woman's right to privacy entitles her "to choose" to whom she will confide with regards to her history of sexual abuse, the organization does not attempt to accommodate all such client requests, even if this may disturb or upset the client. Apparently, "privacy" interests are not at stake when a client suffers discomfort in the presence of a lesbian woman. Nixon, on the other hand, ***41** because of her transsexualism, is constructed as an invasive presence that would violate the privacy of clients who are not comfortable with transsexual women.

This perspective reflects a version of the public/private dichotomy, specifically the one that genders the public as male and the private as female. [FN32] Part of Rape Relief's semantic strategy was to emphasize Nixon's sex-designation at birth by continually referring to Nixon as a "male-to-female transsexual" and never as a transsexual woman. Counsel for Rape Relief sought to discursively bind Nixon to that temporal place of "maleness" in order to overdetermine her as "public" within a patriarchal framework. Thus, Rape Relief capitalizes on the underlying gendered nature of the public-man/private-woman dichotomy to couch an argument about client discomfort within the terms of a right to privacy. [FN33] The inconsistency in analysis--that discomfort with a transsexual counsellor violates one's right to privacy, while discomfort with a lesbian counsellor does not--is never addressed by Rape Relief.

Boyle maintained this strategy of using a client's discomfort with transsexualism in

her academic article, arguing that a substantive approach to discrimination would take into consideration third party interests. [FN34] As part of her evidence, she cites a European Court of Human Rights decision, *X, Y, and Z v. United Kingdom*, which upheld a British law prohibiting a transsexual man from registering as the father of his partner's child, conceived through artificial insemination. [FN35] Boyle quotes the court, which stated, ""it is not clear that it [registration] would necessarily be to the advantage of the children" and "might have undesirable or unforeseen ramifications for the children in Z's ***42** position."" [FN36] Thus, Boyle borrowed rhetoric from the "best interest of the child" doctrine to forward the notion of the "best interest of the client".

Yet, feminists and other critical scholars have argued that the notion of "best interest of the child" is indeterminate and often manipulated by judges to justify their own prejudices or stereotypes. [FN37] For example, William Eskridge has argued that despite the fact that judges have replaced discourses of immorality with the discourse of best interests of the child, gay men and lesbians are still often disadvantaged because of homophobic conceptions of the capacities of gay and lesbian parents and assumptions regarding what a "healthy" and "normal" childhood should entail. [FN38]

***43** Along the same lines, the majority decision-makers in *X, Y, and Z* cite no evidence in support of their suspicion that registration of the transsexual parent as father might "not be to the advantage" of the child, nor ever elaborate on their assertion that "undesirable or unforeseen ramifications" might flow from the registration. [FN39] Instead, the majority simply assumes that the mere fact of transsexuality is enough to justify the British government's decision to treat transsexual men differently from non-transsexual men where children are involved. In contrast to this perspective, the dissenting opinion of Judge Gotchev found that the best interest of the child standard would be best served by treating transsexual parents equally to non-transsexual parents; by drawing baseless distinctions between these groups, the British law violated the right of respect for one's private and family life. [FN40]

***44** The same indeterminacy that plagues the "best interest of the child" analysis exists with respect to Rape Relief's arguments concerning the "best interest of the client". Based on evidence of merely one former client, who was already aware of Nixon's status as a transsexual, Boyle homogenizes and reifies Rape Relief's client base to support its anti-transsexual stance. She sets up false distinctions that inherently portray the use of transsexual women counsellors as being contrary to the best interests of sexual assault victims.

For example, Boyle argues, "[o]ne way of stating the issue is how to be attentive to the human rights of both [sic] transgendered persons, raped and beaten women seeking help from women-only space, and women with the life experience of being treated as women who want to combat male violence." [FN41] By framing the issue in this manner, Boyle suggests that the interests of transgendered women are necessarily in contradistinction to "raped and beaten" women and non-transgendered women. Yet, transgendered women could very well be the "raped and beaten" women that Boyle and Rape Relief seek to protect. Indeed, Nixon herself was a "raped and beaten" woman who sought services in a women-only space and Rape Relief members testified that the organization had, on at least two occasions, assisted transsexual or transgendered

women. [FN42] Boyle's framework disavows the intersectional oppression that occurs when transsexual or transgendered women suffer sexual abuse. These victims of male violence get erased and their possible interests are occluded from Rape Relief's analysis.

Further, even with non-transsexual women victims of male violence, Rape Relief and Boyle presented only inconclusive opinion evidence to support their argument that it was in the best interest of their clients not to have a transsexual woman counsellor. In this regard, expert witness Dr. Pacey hypothesized that a transsexual woman would not be appropriate as a peer counsellor. However, Dr. Pacey also testified that she had no experience with transgendered people in women's shelters or in peer counselling situations, either as members or as facilitators. [FN43] Under cross-examination, she further conceded that a transgendered woman may be an effective counsellor. [FN44] Edith ***45** Swain's evidence was similarly speculative, as she had never encountered a transsexual woman herself when seeking services and instead testified about how she would have felt had this situation occurred. By contrast, Nixon adduced uncontroverted evidence that she had been a successful counsellor at two women's shelters, BWSS and Peggy's Place. [FN45] Based on this evidence, it appears that the human rights and interests of Rape Relief's clients would have been best served by the organization enrolling Nixon into the volunteer training program, since she had already proven herself to be an effective counsellor for victims of male violence. In rushing to label Nixon as a volunteer who is contrary to its clients' best interests, Rape Relief ignored the direct evidence of her past accomplishments as a counsellor.

Boyle's “best interests of the client” framework also sets up an inherent antagonism between transsexual women and non-transsexual women--even though both groups of women may have as their goal the eradication of male violence. Indeed, many women-only organizations that advocate for the end of violence against women include both transsexual women and non-transsexual women. [FN46] Rather, the conflict of interest lies between transsexual women who seek inclusion, and non-transsexual women who seek to exclude transsexual women. Casting non-transsexual women's interests in the altruistic “best interests of the client” rhetoric obscures their self-interested desires of exclusion. Much like a parent who seeks exclusive custody of a child over her gay ex-spouse using the “best interest of the child” rhetoric to justify her own homophobia, Rape Relief sought to exclude Nixon partly using a “best (privacy) interest of the client” rhetoric to justify its own stereotypes and assumptions concerning the capacities of transsexual women.

D. Diminishing the Significance of Private Discrimination

If the Tribunal determined that Rape relief veritably denied a form of employment (volunteering) to Nixon because of discrimination on a ***46** prohibited ground (sex), Rape Relief's next legal strategy was to challenge the *prima facie* case of discrimination using a substantive analysis based on the Supreme Court jurisprudence in *Law*. In her article, Boyle credits the British Columbia Supreme Court for adopting this position. In this section, I consider how Rape Relief's use of the governing assumptions of the public/private dichotomy were operationalized by Justice Edwards of the

British Columbia Supreme Court in his finding that Nixon did not suffer discrimination based on the *Law* analytical framework.

Throughout his reasoning, Justice Edwards continually demeans Nixon's perceptions and feelings of discrimination by dismissing her conflict with Rape Relief as a private affair that should not attract the scrutiny of the law. He characterizes Rape Relief as a "small relatively obscure self-defining private organization." [FN47] He later refers to Rape Relief's policy of excluding transsexual women volunteers as one coming "from a backwater, not from the mainstream of the economic, social and cultural life of the province." [FN48]

Justice Edwards' use of diminutive descriptors is meant to downplay the impact of the exclusion, ignoring the context of what a publicly funded women's shelter might mean to a woman who, like Nixon, has been a victim of sexual violence. He assumes that the "public" and the "private" are discrete spheres that have objective and unified significance to all citizens. This way of mitigating "private" harm is also reminiscent of earlier legislation and case law that had dismissed violations like sexual harassment as private sexual behaviour that should not be regulated by state actors. [FN49] Yet, this approach ignores both the power imbalance in the private sphere and the extent to which such "private" harms impact one's sense of dignity and safety.

Justice Edwards also discursively privatizes Rape Relief when he refers to the organization as a "club-like sisterhood," [FN50] implying the ***47** organization is as intimate as a family. In Canadian legal culture, this kinship trope imports with it the presumption that a veil of privacy should protect the integrity of the organization. Yet, as feminist research has shown, when the courts have refused to examine the harms inflicted within the domestic sphere, they tacitly overlooked the harms experienced by women and children who were associated with the home. [FN51] In addition, feminists have shown that the ideological boundary between public and private obscures the ways that the private is "permeated by government." [FN52] In this instance, Justice Edwards attempts to neutralize Rape Relief's exclusion of transsexual women by ignoring the public aspects of the case. Rape Relief received government funds and advertises publicly for new volunteers. By casting Rape Relief within familial terms, Justice Edwards evacuates the public nature of their services. In this framework, Nixon is supposed to understand Rape Relief as a family of sisters to which she has no relation, not as a community organization that has excluded her because of societal treatment that was beyond her control.

Another example of Justice Edwards exploiting the public/private divide occurs when he blames Nixon for publicizing her grievance. He states, "[i]t attracted publicity and took on political significance outside the private relationship between Rape Relief and Ms. Nixon, only because Ms. Nixon chose to initiate a complaint under the *Code*." [FN53] In this assessment, Nixon's relationship with Rape Relief is represented as private, even though she was interacting with a community organization publicly advertising for positions that were legally defined as "employment" within the framework of the *Code*. Justice Edwards constructs the interaction as if it were between two acquaintances with equal power and resources.

Further, he implies that if Nixon had just kept her mouth shut and suffered the pain of exclusion in silence, her dignity would not

have been so injured. Or put yet another way, she has only herself to blame for the pain she is suffering. This strategy of blaming the victim is reminiscent of historical case law that has condemned women for airing their dirty laundry in public; that is, complaining about abuses that happened in the context of relationships ***48** coded as private. [FN54] Implicit in this is the belief that it is the public knowledge of such exclusion that matters, not the private experience of suffering and exclusion. This perspective is in direct opposition to the feminist notion that women must break the silence of their oppression in order to heal and effect change from socio-legal institutions that foster and buttress these hegemonic relations.

In Justice Edwards' concluding remarks, he demeans Nixon's subjective experience of harm by implying her problem is a private issue of self-esteem, and not one of discrimination worthy of a legal recognition or remedy. In referring to Nixon's decision to cease being a volunteer at BWSS he states:

> Groucho Marx once famously observed on resigning from a club, that he did not want to be a member of any club that would accept someone like him as a member. The club's acceptance and his resignation were matters of self-esteem, that is, his subjective sense of dignity and self-worth, just as Ms. Nixon's departure from BWSS was for her. [FN55]

Here, Justice Edwards implies that Nixon left BWSS because they accepted her, but wanted to volunteer at Rape Relief because they did not.

In this analysis of Nixon's motivations and self-esteem, Justice Edwards ignores the context of Nixon's participation at both Rape Relief and BWSS. Nixon had testified that her desire to volunteer at Rape Relief was based on her own experiences as a victim of male violence, who had received support and counselling. She had wished to "give something back" to the women's community. In contrast to this evidence, Justice Edwards claims that the real attraction of working at Rape Relief for Nixon lay in the political victory it would signify to her: it would "vindicate her womanhood." [FN56] He thus erases both Nixon's history of victimization and her stated intentions.

When Nixon was expelled from Rape Relief after her status as transsexual was discovered, she eventually returned to BWSS to volunteer. ***49** After training there and volunteering for approximately three months, she chose to leave that organization because of some hostility she encountered from a few other members. The Tribunal established that there was controversy at BWSS over Nixon's participation, but that she would be welcomed back if she chose. Justice Edwards' interpretation of Nixon's experiences at both women's shelters was that Nixon's "self-exclusion" from BWSS should objectively have the same dignity impact as Rape Relief's transsexual exclusion. His analysis of Nixon characterizes her feelings of injury at Rape Relief's anti-transsexual policy as being irrational, unwarranted and based upon the desire to be included only because she was excluded. He thus conflates the decision to leave a controversial environment with the experience of being ejected from an environment. He further ignores the fact that, in her complaint against Rape Relief, Nixon was not seeking to be reinstated as a volunteer trainee after encountering its' hostility and exclusionary practices. Rather, she wanted compensation for the injury that she had suffered and recognition that Rape

Relief's categorical policy against transsexual women as counsellors had contravened her human rights. Thus, the invocation of the comedic personality, Groucho Marx, [FN57] served to delegitimize Nixon's human rights complaint, evacuating the rationality out of her decisions and ignoring the public nature of a women's community organization *officially* excluding transsexual women.

E. Transsexual Bodies that Do Not Matter

As was stated earlier, the Court of Appeal invalidated Justice Edwards' reasoning with regards to the applicability of the *Law* framework and found that Nixon had established a *prima facie* case of discrimination. [FN58] The Court of Appeal did find, however, that the exemption provision in s.41 of the *Code* was a valid defence for Rape Relief. It is not my purpose in this section to mount an argument against this finding, but instead to highlight how the hegemony of the public/private divide was utilized in the Court's reasoning.

Justice Saunders, who wrote the main decision for the Court of Appeal, based her interpretation of s. 41 on the Supreme Court of Canada's ***50** reasoning in *Caldwell et al. v. Stuart et. al*. [FN59] In that case, the Court held that a Catholic school could legitimately refuse to rehire a Catholic teacher who had married a divorced man, contrary to the organization's own interpretation of church dogma. Relying on this reasoning, Justice Saunders determined that she need only inquire if Rape Relief's exclusionary practice was rationally connected to its work and done in good faith.

In the course of analyzing Rape Relief's arguments about *bona fide* occupational requirements, Tribunal member MacNaughton found that Rape Relief met both of these conditions; nevertheless the requirement that a volunteer counsellor must have been treated as female her whole life could not stand because it was not reasonably necessary. [FN60] Taking these findings, Justice Saunders concluded that for the purposes of a s. 41 exemption, so long as a rational connection and good faith were established, Rape Relief "... was entitled to exercise an internal preference in the group served, to prefer to train women who had never been treated as anything but female." [FN61] This assessment echoed Rape Relief's unwavering contention that Nixon did not fit their definition of "woman" because she did not have the life-long experience of having been treated exclusively as a girl and a woman.

This perspective imposes on Nixon a gender identity constituted by the public sphere, depoliticizing her personal experiences as a girl and a woman who has struggled against a patriarchal system that imposes and polices a rigid sex/gender binary. By accepting Rape Relief's assertion--that volunteers must have been treated by others as female for their entire lives--as rational and in good faith, Justice Saunders places paramount importance on how other people defined and treated Nixon. It should be recalled that in *Caldwell*, the appellant, Caldwell, was treated differently because it was perceived that she had contravened Catholic doctrine by marrying a divorced man in a civil ceremony. This was something she *did*. Nixon did not *do* anything to contravene Rape Relief's beliefs, and in fact had concurred with their list of stated political beliefs in her pre-interview with the organization. She was excluded simply because of the way others perceived

and reacted to her, i.e. what *other* people did. This difference was immaterial in the eyes of the law, which found that the public sphere holds the trump card. It did not ***51** matter that Nixon had, her whole life, understood and treated herself as female. Ultimately, by rendering the public the final arbiter of Nixon's femaleness, the Court of Appeal reinscribed the public/private dichotomy by making Nixon's conviction from childhood that she was female irrelevant; something that does not matter.

When I say that the law accepted Rape Relief's contention that Nixon's self-identification as female does not matter, I want to exploit the overlapping double-meaning of "matter" as both physicality and as a subject of importance by recalling Judith Butler's useful reformulation of the materiality of the body in her book, *Bodies That Matter*. [FN62] Butler argues that the matter of bodies, and particularly the sex of the body, comes about through an effect of power, of coercive regulatory systems and of violent reiterative processes that materialize the sexed subject into intelligibility, as someone who matters in society. Rape Relief insists that Nixon's childhood, because she was iterated and reiterated as a boy, has thus now irrevocably made her into something other than a woman.

The rejection of Nixon from Rape Relief's "club-like sisterhood" continues this violent reiterative process by arguing that the truth of Kimberly Nixon lies in the gaze of others. Her own truth--that of a girl who was (mis)taken for a boy, who had to remain fearfully vigilant about hiding her true sex (knowing that publicly expressing herself would mean confronting violent opposition) and who sought assistance in order for her body to conform to her visceral sex identity--this truth does not matter. Nixon's ordeals--experiences of patriarchal oppression, including domestic violence, sexual assault and street harassment-- these ordeals did not matter. By accepting Rape Relief's standards of womanhood for their volunteer program as rational and in good faith, Justice Saunders dematerializes both Ms. Nixon's own experiential truth and her life-long subordination under a patriarchal system. Once again, what matters for the law happens in public, what does not matter, happens in private.

****52 CONCLUDING REMARKS***

This paper has disclosed how the law and Rape Relief relied upon the governing principles of the public/private dichotomy in order to minimize, trivialize and neutralize the discriminatory nature of Rape Relief's policy against transsexual women volunteers. The fact that Rape Relief is a non-profit, equality-seeking feminist organization should not absolve or justify their complicity in naturalizing this divide. It is not only ironic, but also tragic, that a feminist organization exploited the public/private divide as part of its legal strategy to defend its policy, since this *man*-made divide has historically obscured the harms that women suffer in "private" spaces.

This is reflected in Rape Relief's arguments concerning the restrictive meaning of sex and the significance of volunteering that worked against the interests of all women. Indeed, arguments seeking to interpret the ground "sex" in a restrictive way have historically been used in attempts to deny legal recourse to women who suffered sexual harassment, who were victims of stalking, who suffered discrimination on the basis of pregnancy,

who refused to conform to stereotypes of femininity in the workplace, and who came out as lesbian or bisexual. Positioning volunteer work outside the scope of human rights protections would have left many women vulnerable to discrimination and harassment in an area that can be crucial to their livelihood, self-esteem, sense of community and future prospects. On a symbolic level, evacuating the dignity interests and disavowing the power imbalances present in many volunteer relationships would have continued the patriarchal tradition of devaluing the work that women do in spaces designated as "private".

Although Rape Relief failed in its attempt to restrict the scope of the "sex" and "employment" categories, its appropriation of the language of "privacy" rights found some support in the reviewing courts. Meanwhile, Nixon's struggle to be recognized and respected as the woman she has always known herself to be was construed as private business that did not ultimately matter to Rape Relief or for the proceeding. Thus, marginalized women like Kimberly Nixon, who suffer from the intersectional oppression of being female and transsexual, find themselves further isolated from the women's community and from social services. Ultimately, the case proceeded in a manner that further marginalized transgendered and transsexual people and furthered the inequality between non-transsexual women and transsexual women, while ignoring the history of prejudice and stigmatization continually ***53** faced by transsexual women in both public and private spaces and in both mainstream and feminist circles. [FN63]

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[FN1]. Semayne's Case (1604), 5 Co. Rep. 91, 77 E.R. 194.

[FN2]. M. Thornton, "The Cartography of Public and Private" in M. Thornton, ed., *Public and Private: Feminist Legal Debates* (Oxford: Oxford University Press, 1995) at 3.

[FN3]. See C.A. MacKinnon, *Towards a Feminist Theory of the State* (Cambridge, MA: Harvard U.P., 1989) at 194 ("... the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited domestic labor"). See also A. L. Allen, "Coercing Privacy" (1999) 40 Wm and Mary L. Rev. 723 at 749 [A.L. Allen]: ("[f]eminists charge that privacy justifies exclusive monopolies over social resources as well as societal indifference to the violence and poverty that characterize the "private" lives of many women and children"). See also S. Boyd, "Challenging the Public/Private Divide: An Overview" in S. Boyd ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) at 10 [S. Boyd] ("[o]ne example of this [public/private] division is the state's failure to deal with men's violence against women in the 'private' sphere of

family relations"). See more generally R. B. Siegel, ""The Rule of Love": Wife Beating as Prerogative and Privacy" (1996) 105 Yale L.J. 2117.

[FN4]. The complaint against Vancouver Rape Relief instigated four judicial proceedings that I consider: *Vancouver Rape Relief Society v. British Columbia (Human Rights Commission)* (2000), 23 Admin L.R. (3d) 91 [*Vancouver Rape Relief*], *Nixon v. Vancouver Rape Relief* Society 2001 BCHRT 1, (2002), B.C.H.R.T.D. 1 [*Nixon* Human Rights Tribunal], *Vancouver Rape Relief Society v. Nixon* (2003), 22 B.C.L.R. (4th) 254 (S.C) [*Nixon* B.C. Supreme Court], and *Vancouver Rape Relief v. Nixon* 2005 BCCA 601, [2006] 4 W.W.R. 213 [*Nixon* B.C. Court of Appeal]. Also, it should be noted that being feminist does not mean being transphobic, see K. Scott-Dixon ed., *Trans/forming Feminisms: Transfeminist Voices Speak Out* (Toronto: Sumach Press, 2006). Instead, I locate Rape Relief's feminist position in the gender essentialist school of feminism.

[FN5]. Both of the terms, transsexual and transgendered are used in this article. For the purposes of this article, transsexual encompasses individuals who have undergone some form of medical sex reassignment procedures or have intention to do so. Transgendered refers to a broad range of people who defy their birth sex assignment, thus could include transsexual persons. I generally refer to Kimberly Nixon as a transsexual woman, as this is how her lawyer identified her.

[FN6]. b. findlay, "Real Women: Kimberly Nixon v. Vancouver Rape Relief" (2003) 36 U.B.C.L. Rev. 57 at para. 2.

[FN7]. C. Boyle, "The Anti-discrimination Norm in Human Rights and Charter Law: Nixon v. Vancouver Rape Relief" (2004) 37 U.B.C. L. Rev. 31-72 [C. Boyle].

[FN8]. [1999] 1 S.C.R. 487, 170 D.L.R. (4th) 1 [*Law*].

[FN9]. It is not my purpose here to engage in the debate regarding the appropriate analysis to determine discrimination in human rights cases. Rather, this is a discursive analysis of Rape Relief's position with a focus on its problematic reliance on the public/private dichotomy.

[FN10]. The material facts outlined in this section are drawn from *Nixon* Human Rights Tribunal, *supra* note 4, and were not in dispute.

[FN11]. For an astute critique of this political belief see V. Namaste, *Sex Change, Social Change Reflections on Identity, Institutions and Imperialism* (New York: Women's Press, 2005) at 68 (Namaste points out that such a belief erases the reality of women's violence in same-sex partner abuse and in child abuse). And indeed, Rape Relief refuses to offer counselling to women who have suffered violence from their female partners.

[FN12]. The parties did contest the exact words that were exchanged during this conversation.

[FN13]. Nixon initially filed her complaint under the *Human Rights Act*, S.B.C. 1995, c. 22, ss. 3 (services) 8 (employment). In 1997, the legislation was replaced by the *British Columbia Human Rights Code*, R.S.B.C. 1996, c. 22, ss. 8, 13. [hereinafter, the *Code*]. No substantive changes were made, but the sections were renumbered ss. 8 (services) and 13 (employment).

[FN14]. In the alternative, Rape Relief

submitted that the Tribunal lost jurisdiction due to the delay in processing the complaint.

[FN15]. *Vancouver Rape* Relief, *supra* note 4 at para. 38.

[FN16]. *Sheridan v. Sanctuary Investments Ltd.* (1999), 33 C.H.R.R. D/467 (B.C.H.R.T.); *Mamela v. Vancouver Lesbian Connection* (1999), 36 C.H.R.R. D/318 (B.C.H.R.T.); *Ferris v. O.T.E.U., Local 15* (1999) 36 C.H.R.R. D/329 (B.C.H.R.T.).

[FN17]. The ground of sexual orientation or perceived sexual orientation has also historically been used to protect transgendered and transsexual people from discrimination. See barbara findlay, "Real Women: Kimberly Nixon v. Vancouver Rape Relief" *supra* note 6 at para. 28. But, as the policy branch of the Ontario Human Rights Commission has pointed out, in the current moment, "the ground of sexual orientation would likely not protect transgendered persons from discrimination based on gender identity" in *Toward a Commission Policy on Gender Identity: A Discussion Paper* (Toronto: Ontario Human Rights Commission, 1999) at 10.

[FN18]. See, barbara findlay et al., *Finding Our Place: Transgendered Law Reform Project* (Vancouver: High Risk Project Society, 1996).

[FN19]. See, The Ontario Human Rights Commission, "Toward a Commission Policy on Gender Identity: A Discussion Paper" *supra* 17 at 14-19.

[FN20]. In A.N. Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (London: Cavendish Publishing Ltd., 2002) at 39 (the author uses the neologism "(bio)logic" to convey the ways that the law attempts to naturalize its construction of sex using biological discourses, which locates the "truth of sex" at the moment of birth.

[FN21]. *Vancouver Rape Relief*, *supra* note 4 at para. 50.

[FN22]. C.A. MacKinnon, *Sex Equality* (New York: Foundation Press, 2001) at 1183.

[FN23]. It should be mentioned also how surprising it is to find a feminist organization, that has as a core principle that "women have a right to choose who their sexual partners are" taking such a position. Again, it points to the ways that Rape Relief betrayed its own principles by latching on to any argument, no matter the normative costs or the contradictions, in order to win its case.

[FN24]. S. Boyd, *supra* note 3 at 9 ("... the patriarchal assumptions that inform mainstream economics result in a failure to account for women's generally unpaid labour in both household and community"). Also, for a discussion on the implication of the public/private divide in structuring the value of the work that women do, see generally P. Armstrong, "Restructuring Public and Private: Women's Paid and Unpaid Work" in S. Boyd ed. *supra* note 3. On recent statistics of volunteering in Canada see, StatsCan, *Caring Canadians, Involved Canadians: Highlights from the 2004 Canada survey on giving, volunteering and participating* (Ottawa: Statistics Canada, 71-542-XIE) on-line: StatsCan http://www.statcan.ca/bsolc/english/bsolc?catno=71-542-X.

[FN25]. L. Mailoux, H. Horak, & C. Godin, "For the Volunteer Sector Initiative Secretariat", *Motivation at the Margins: Gender Issues in the Canadian Voluntary Sector* (Ottawa: Government of Canada and

Voluntary Sector Forum, 2002), online: <http://www.vsi-isbc.ca/eng/knowledge/motivation_ margins/index.cfm>. This document is online and does not have page numbers. The following quotations are in the Conclusion of the document: "... women make up a large portion of the voluntary sector, sometimes accounting for as much as 80-90% of staff and volunteers in the health and social spheres." "... women ... are still by and large under-represented in the upper levels of management structures, both as paid employees and volunteers, particularly for larger and more prestigious organizations."

[FN26]. *Ibid.,* in the part, "Differences: Women vs. Men", "[o]f those surveyed who considered themselves volunteers, 73% of men were employed full time, compared to only 38%; 16 % of the men were not in the labour force, compared to 40% of women." It should be noted however that these percentages were appropriated from a study in 1987 by the Volunteer Sector Initiative as a gender analysis has not been undertaken of more recent statistics at this time. Nonetheless, the Volunteer Sector Initiative posited that the numbers still reflected the current pattern of inequality between men and women in the volunteer sector.

[FN27]. *Ibid.*, in the section "Motivations for Giving, Volunteering and Participating": "[w]omen are more likely than men to use volunteering as a means to obtain paid work since they enter or re-enter the workforce at different stages of their life."

[FN28]. *Ibid.*, "... women were able to gain much that was of value to them: broadened experiences, skills, social relationships and feelings of self-worth."

[FN29]. See K. Silbaugh, "Turning Labor into Love: Housework and the Law" (Fall 1996) 91 Nw. U.L. Rev. 1.

[FN30]. Rape Relief Legal Argument, Part 2, presented by Victoria Gray, January 24-26, 2001, online: <http://www.rapereliefshelter.bc.ca/issues/knixon_ vgray_argum.html>.

[FN31]. *Nixon* Human Rights Tribunal, *supra* note 4 at para. 163.

[FN32]. See generally, Jean B. Elshtain, *Public Man, Private Woman: Women in Social and Political Thought* (Princeton: Princeton University Press, 1993). Note that usually the dichotomy of public man/ private woman serves the interest of those associated with the "public". In this case, as the argument centred on privacy interests, it was the reverse.

[FN33]. In addition, it is worth noting that Rape Relief acknowledged that they had provided services to transgendered women on at least two occasions, see *Nixon* Human Rights Tribunal, *supra* note 4 at para. 22. Presumably, the comfort and "privacy" of these women were not construed as being violated by the fact that their peer counsellors were not transsexual women.

[FN34]. C. Boyle, *supra* note 7.

[FN35]. *Ibid*. at 66, quoting *X, Y, and Z v. United Kingdom* (1997) 24 E.H.R.R. 143 at para. 47 [*X, Y, and Z*].

[FN36]. *Id*.

[FN37]. A foundational critique of the best interest of the child standard is found in, Robert H. Mnookin, "Child-Custody Adjudication: Judicial Function in the Face of Indeterminacy" (1975) 39 Law & Contemp. Probs. 226. For a more

contemporary application of the indeterminacy critique see, Jon Elster, "Solomonic Judgments: Against the Best Interest of the Child" (1987) 54 U. Chicago. L. Rev. 1 at 7, "... the principle [of best interest of the child] is indeterminate, unjust, self-defeating, and liable to be overridden by more general policy considerations. See also, Ellan London, "A Critique of the Strict Liability Standard for Determining Child Support in Cases of Male Victims of Sexual Assault and Statutory Rape" (2004) 152 U. Pa. L. Rev. 1957 at 1994, "Critical thinkers cannot simply accept the purported "best interests of the child" [...] There is, at the most basic level, a problem with the court assuming that it can determine a child's "best interests" while excluding lesbian and gay families, deliberately single-parent families, or other nontraditional family forms. Further investigation into the underlying policy of the "best interests of the child" rhetoric reveals that it is a part of the state's continual insistence on a private, marital, heterosexual family unit that does not require state resources. Left thinkers must demand more than this, not only because this is a system that upholds traditional stereotypes of what is an acceptable family, but also because it has proven to be an inadequate solution to providing for children and their caretakers." For a critique of a judge's discretion with regards to which community would best serve the interest of the child, see Linda K. Thomas, "Child Custody, Community and Autonomy: The Ties that Bind?" (1997) 6 S. Cal. Rev. L. & Women's Stud. 645 at 670, "... the "best interests of the child" standard invites judges to give force to their own conceptions of whether and which community ties are important to a child's best interests." For a critique of judges using the rubric of "best interest of the child" to impose speech restrictions, see, Eugene Volokh, "Parent-Child Speech and Child Custody Speech Restrictions" (2006) 81 N.Y.U. L. Rev. 631.

[FN38]. W. Eskridge & N. Hunter, *Sexuality, Gender and the Law* (New York: Foundation Press, 2004) at 1166. See also, D.G. Casswell, *Lesbians, Gay Men, and Canadian Law* (Toronto: Edmond Montgomery Publications Limited, 1996) at 248-249 (it was noted that judges have considered the best interest of the child to include having a heterosexual role model and being spared societal disapproval of one's parent's sexual orientation. In addition, historically judges have expressed concerns that the gay or lesbian parent may "proselytize" the child, expose the child to abnormality, pornography or overt sexuality, abuse the child, or subject the child to an unstable home environment. All of these concerns have been couched by the rhetoric of "best interests of the child").

[FN39]. In his concurring judgment, Judge Pettiti states more strongly his objection to transsexual parents at, *supra* note 35 at 30, "[s]tudies have shown that not all transsexuals have the same aptitude for family life (after an authorised operation) as a non-transsexual". It is worth noting however that out of the two studies he cites, - "Alby *et al.*, International Freudian Association, "Sexual Identity and Transsexuals", and the study by L. Pettiti, "Les Transsexuels, Que Sais-je?", Presses Universitaires de France" - one was a study he authored himself, raising an issue about his own possible bias. It is also worth noting that his other source, "Sexual Identity and Transsexuals" referred to a roundtable discussion between a group of law professors, medical professors, doctors, psychoanalysts and psychiatrists. It was not a "study" as he so described, but rather a debate with significant disagreement between the participants, see J.M. Alby *et*

al., "Table Ronde" in M. Czermak & H. Frignet, *Sur L'identite sexuelle: A propos du Transsexualisme* (Paris: Association Freudienne Internationale, 1996) at 79. Finally, neither of articles were cited by the majority opinion, and they were both written in French raising a serious doubt about whether the United Kingdom produced these documents at all or whether Pettiti, having written on the subject of transsexualism and psychoanalysis, simply referred to them on his own accord. If this was the case, counsel on both sides was not given an opportunity to study or make submissions on the documents.

[FN40]. *X, Y, and Z, supra* note 35 at 180, "[i]t is nonetheless necessary for the Court to establish whether the present situation under British law, whereby the transsexual "father" of a child conceived by AID was denied the possibility to be recognised as such in law, struck a fair balance between the individuals' rights to respect for family life and any countervailing general interest. In striking this balance, the welfare of the child should be the prevailing consideration, irrespective of the manner of his or her conception or the transsexuality of the "social father" ... For these reasons, I find violations of Articles 8 and 14 of the Convention." [emphasis added]

[FN41]. C. Boyle, *supra* note 7 at 64.

[FN42]. *Nixon* Human Rights Tribunal, *supra* note 4 at para. 221.

[FN43]. *Ibid*. at para. 165. Under cross-examination, it was adduced that Dr. Pacey had virtually no experience with transgendered people having only treated two transgendered individuals, both of whom were female-to-male.

[FN44]. *Id*. at para. 167.

[FN45]. *Id*. at paras. 33, 44.

[FN46]. For example in Vancouver, Women Against Violence Against Women (WAVAW) Rape Crisis Center supports and welcomes transgendered women. In addition, b. findlay reported that a study conducted in 2000 found that 73% of responding women's centres in British Columbia offered services to transsexual women, *supra* note 6 at para. 62, citing C. White, *Re/Defining Gender and Sex: Educating for Trans, Transsexual and Intersex Access and Inclusion to Sexual Assault Centres and Transition Houses* (M.Ed., University of British Columbia, 2002).

[FN47]. *Nixon* B.C. Supreme Court, *supra* note 4 at para. 145.

[FN48]. *Ibid*. at para. 154.

[FN49]. See N. Fraser, "Sex, Lies, and the Public Sphere: Reflections on the Confirmation of Clarence Thomas," in J. B. Landes ed., *Feminism, the Public and the Private: Oxford Readings in Feminism* (Oxford: Oxford University Press, 1998) at 331 [N. Fraser]: ("... male-supremacist constructions enshrine gender hierarchy by privatizing practices of domination like sexual harassment"). See J. Morgan, "Sexual Harassment and the Public/Private Dichotomy: Equality, Morality and Manners" in M. Thornton ed., *supra* note 2, 89-110.

[FN50]. *Nixon* B.C. Supreme Court, *supra* note 4 at para. 161.

[FN51]. See, generally, *supra* note 3.

[FN52]. A. L. Allen, *supra* note 3.

[FN53]. *Nixon* B.C. Supreme Court, *supra* note 4 at para. 161.

[FN54]. See N. Fraser, *supra* note 49 at 331, where she states, with regards to sexual harassment, "women are effectively asked to choose between quiet abuse in private and noisy, discursive abuse in public."

[FN55]. *Nixon* B.C. Supreme Court, *supra* note 4 at para. 160.

[FN56]. *Ibid*. at para. 158.

[FN57]. Furthermore, by using a male character in his analogy, Justice Edwards derides Nixon's sexual identity in the public forum of a judicial decision.

[FN58]. *Nixon* Court of Appeal, *supra* note 4.

[FN59]. *Caldwell. v. Stuart,* [1984] 2 S.C.R. 603, 156 D.L.R. (4th) 1.

[FN60]. *Nixon* Human Rights Tribunal, *supra* note 4 at paras. 178-207.

[FN61]. *Nixon* Court of Appeal, *supra* note 4 at para. 59.

[FN62]. J. Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* (New York: Routledge, 1993).

[FN63]. For studies on the acutely marginalized position of transsexual and transgendered people, see: V. K. Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (Chicago: University of Chicago Press, 2000); L. J. Moran & A. N. Sharpe, "Violence, Identity and Policing: The Case of Violence Against Transgender People" (2004) 4:4 Criminal Justice 395.; Darke and A. Cope, *Trans Inclusion Policy Manual For Women's Organizations* (Vancouver: Trans Alliance Society, 2002); E. Lombardi, *et al.*, "Gender Violence: Transgender Experiences with Violence and Discrimination" (2001) 42 Journal of Homosexuality 89; C. White, *Re/defining Gender and Sex: Educating for Trans, Transsexual, and Intersex Access and Inclusion to Sexual Assault Centres and Transition Houses* (M.Ed., University of British Columbia, 2002); and N.R. Brown, *Queer Women Partners of Female-to-male Transsexuals: Renegotiating Self in Relationship* (Ph.D. thesis, York University, 2005) at 267. For feminist writing that stigmatizes transsexual people: see K. Mantilla & J. Ruby "Men in Ewes' Clothing: The Stealth Politics of the Transgender Movement" in *Off our Backs* (April 2000); S. Jeffreys, "Chapter 3. Transfemininity: 'Dressed' Men Reveal the Naked Reality of Male Power" in *Beauty and Misogyny: Harmful Cultural Practices in the West* (New York: Routledge, 2005); and J.G. Raymond, *The Transexual Empire: The Making of the She-male* (New York: Teachers College Press, 1994).

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