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THE MIRROR HAS MANY FACES: RECOGNIZING GENDER IDENTITY IN CANADIAN ANTI-DISCRIMINATION LAW

FRANK DURNFORD[†]

ABSTRACT

Owing to our failure to acknowledge the complexity and diversity of gender identity, gender and gender politics are contentious subjects in Canadian anti-discrimination law. On the one hand, Queer theorists continue to challenge the rigidity of the male/female binary, while on the other hand, Canadian law insists that identity is invariably determined by one's biological sex. The result is a power struggle, pitting those who fit neatly into rigid male/female categories against the marginalized Other—the transgendered community.

Transgendered persons have encountered many barriers in their search for equality in the law, partly owing to a lack of a proper legal foundation on which to base their discrimination claims. This paper argues that the failure of the already established grounds of discrimination to fully protect and represent transgendered persons requires Canadian anti-discrimination law to incorporate gender identity as a new ground of discrimination.

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*And since you know you cannot see yourself, so well as by reflection,
I, your glass, will modestly discover to yourself,
that of yourself which you know not of.*

– *Julius Caesar*, Act I, scene ii

Anti-discrimination law in Canada has proven itself to be a site of contention with respect to gender and gender politics, failing to reflect the complexity and diversity of gender identity. While gender and Queer theorists continue to deconstruct our social and cultural notions of gender and identity, Canadian law insists that the “discovery” of biological sex is the construction of identity. From biological sex, the law constructs a normative identity – how we should look, act, and feel, which in turn informs the jurisprudence of gender discrimination. Such an assumption implicitly asserts that there are but two genders, male and female, and that the world is necessarily constructed on that premise. However, as Gloria Anzaldúa observes, the very creation of a gendered frontier rouses the possibility of an other.¹ The gendered Other, the transgendered, exists in law in marginalized and unprivileged spaces, outside of and dominated by the male/female binary.

Therein lies the primary battleground of Queer theorists, who reject the belief that gender identity is a natural event, coinciding with birth and biological sex. Queer Theory generates a discourse wherein fundamental categories of identity, such as gender, are cultural and social productions, or in other words, *performative*.² While biological sex anticipates the normative gender role and identity of a person, these are behaviours and actions that must be learned. To follow Michel Foucault’s illustration, the individual or the body is “the inscribed surface of events,” the site where history and present converge and are coloured by race, class, geography, culture, sexuality, and of course, gender.³

Yet, transgendered persons are forced to modify their own self image, often their bodies, in order to conform and be accepted into the male/female paradigm. Self-revision is equally necessary if the trans-

¹ Gloria Anzaldúa, “Borderlands/La Frontera” in Vincent Leitch, ed., *Norton Anthology of Theory and Criticism* (New York: Norton, 2001) 2211 at 2213.

² Jonathan Culler, *Literary Theory: A Very Short Introduction*, (Oxford: Oxford University Press, 1997) at 102.

³ Judith Butler, “Gender Trouble” in Vincent Leitch, ed., *Norton Anthology of Theory and Criticism*, (New York: Norton, 2001) 2488 at 2498.

gendered person is to succeed in seeking protection under Canada's anti-discrimination regime, where claims hinge on evoking enumerated or analogous grounds of discrimination. The struggle, then, is a power struggle in which transgendered people must resist both the imposed gender binary and the notion that transgenderism is a disease or problem to be remedied. Marjorie Garber proposes that "to change gender is to slide along a power differential," whereas "to change power is to change gender."⁴

Changing gender, then, is a necessary undertaking in order to ensure equality of the marginalized Other. It involves recognizing the inadequacy of a number of grounds as they relate to transgenderism, keeping in mind that grounds themselves are not ineffectual. Indeed, grounds as a mechanism in the operation of anti-discrimination law are quite necessary. Grounds, however, must be assigned and developed cognisant of the political power struggles anti-discrimination law hopes to balance.

Recent jurisprudence demonstrates exactly how narrow a view Canadian anti-discrimination law has adopted of gender, but also how the transgendered Other continues to challenge our rigid conceptions of gender and identity. To fully protect transgendered persons in the manner intended by human rights legislation and the *Charter*, it is crucial that the law create a safe territory that reflects the fractured reality of the gendered Other. Gender dysphoria must be embraced, not as deviant or perverse behaviour, but as a very real and nuanced identity experience, with not one or two, but many expressions. The failure of the already established grounds of discrimination to fully protect and represent transgendered persons requires that Canadian anti-discrimination law adopt *gender identity* as a new ground.

⁴ Marjorie Garber, *Vested Interests: Cross-dressing and Cultural Anxiety*, (New York: Routledge, 1992) as cited in Kate Bornstein, *Gender Outlaw: On Men, Women and the Rest of Us*, (New York: Routledge, 1994) at 97.

I. GENDER BORDER CROSSING

*“Who are YOU?” said the Caterpillar.
Alice replied, rather shyly,
“I-I hardly know, sir, just at present—
at least I know who I WAS when I got up this morning,
but I think I must have been changed several times since then.”*

— Lewis Carroll, *Alice’s Adventures in Wonderland*

The problem which many Queer theorists address is that gender dysphoria is considered abnormal, a disorder that needs to be treated, if not cured, thereby leading Queer theorists to challenge the boundaries of not only gender, but of normalcy itself.⁵ Anything which seemingly deviates from the background norm of the male/female binary and its prescribed gender roles and identity is deemed defective and perverse. As noted earlier, society expects congruence between biological sex and gender, and it expects that if there is gender dysphoria it should be corrected. This adoption of a false reality is not supported by Queer theorists. In her work *Compulsory Heterosexuality*, Adrienne Rich argues that “the retreat into sameness – assimilation for those who can manage it, is the most passive and debilitating of responses to political oppression, [and] economic insecurity.”⁶ Such a retreat is a concession to marginalization and to being defined and regulated against a background norm.

The background norm then, is essentially a power-based ideology that is fundamentally linked to the gender binary. Foucault observes that “power is traditionally seen as repressing behaviours that it finds unproductive, threatening, or otherwise undesirable.”⁷ Power is exerted to repress so-called abnormal gender behaviour in the same way it is exerted to repress highway traffic violations or tax fraud, ultimately marginalizing such behaviour, making transgendered persons powerless. The gender binary promotes a classification of citizens as male, female, and other, which in turn encourages the development and solidification

⁵ Carl Stychin, “Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada” (1995) 8 *Can. J. L. & Juris.* 49 at 61.

⁶ Adrienne Rich, “Compulsory Heterosexuality and Lesbian Existence” in Vincent Leitch, ed., *Norton Anthology of Theory and Criticism* (New York: Norton, 2001) 1762 at 1763.

⁷ *Supra* note 3 at 1619.

of an oppressive class system made all the more dangerous by the belief that it is an entirely natural state of affairs.⁸

Our society's institutions are founded upon this system, which essentially recognizes the male/female gender binary, but does not provide space for the other, the marginalized transgendered community. Queer Theory aims to subvert this structure, to blur the lines of gender identity by stretching gender borders. As Kate Bornstein notes, "a group remains a group by being inflexible: once it stretches its borders, it's no longer the same group."⁹ The goal, then, as explained by cultural theorist Marjorie Garber, is the proliferation of the third, "that which questions binary thinking and introduces crisis...the "third" is a mode of articulation, a way of describing a space of possibility."¹⁰ In effect, the goal is not only to avoid assimilation into the male/female paradigm, but to deconstruct it altogether in favour of a gender that is multi-faceted, dynamic, and most certainly realistic.

As mentioned earlier, Garber's own argument is that "to change gender is to slide along a power differential. To change power is to change gender."¹¹ Whether the transsexual who undergoes sex reassignment surgery (SRS) or the butch lesbian who dons the garb and mannerisms of a male, changing gender is simply further imbedding themselves in the hierarchy, and therefore subjecting themselves to the power struggle.¹² Described by Adrienne Rich as the "retreat into sameness," such a change in gender is merely a shift from the space of the third to actively and tenaciously holding the central dominating discourse in place.¹³ It is not a power gain, nor does it legitimize the marginalized voices of those who do not or cannot fit into the binary model. Instead of advocat-

⁸ Bornstein, *supra* note 4 at 105.

⁹ *Ibid.* at 92.

¹⁰ *Supra* note 4 at 105.

¹¹ *Supra* note 4 at 105.

¹² Terri Webb, in Richard Ekins and Dave King, eds., *Blending Genders: Social Aspects of Cross-dressing and Sex-changing*, (New York: Routledge, 1996) at 193, expresses the belief that all male transsexuals do violence to women and themselves in their need to adopt a women's skin. The effort to become female reflects the desire to own a female body, to own female emotions; an act which is not dissimilar to a "healthy" heterosexual male's desire to own women in a possessive and misogynist sense. Likewise, as female transsexuals or transgendered lesbians try to assimilate maleness, they try to assimilate power, recognizing the lack of power possessed by their female bodies.

¹³ Rich, *supra* note 6 at 1763.

ing change, the adoption of one gender is the proliferation of the many silences at the periphery of accepted human behaviour. The solution then, is to defy the model. In *Finding Our Place*, barbara findlay and Sandra LaFramboise suggest that “our culture should re-invent itself as a rainbow to incorporate transgender, instead of a black and white dichotomy.”¹⁴ Similarly, Bornstein emphasises that “there is no gender inequity that does not first assume there is gender – and only two genders at that.”¹⁵ To that end, the power imbalance can only be corrected when our notions of gender are broadened, recognizing that congruency is not the ‘natural’ norm. We must depart from our boxes, stray from linear thinking, and insist our cultural institutions see gender not as the one-dimensional result of biology, but as the ongoing result of the relationship between biology, history, and culture.

II. CRITICAL MANEUVERING

*“If homosexuality is a disease,
then we should all call in queer to work.
“Hello? Work? Yeah, can’t come in today...
yeah, still queer.”*

— Robyn Tyler, activist [emphasis added]

Having identified the crisis, it becomes necessary to locate its articulation in real social practice. For the specific purposes of this discussion, the questions stand: how does the gender power struggle play out in law, what questions does it raise as to the legitimacy of the law, and, more importantly, can the law begin to embark on the path of responding to Queer Theory? The answers to these questions are closely linked with the position of the Canadian legal community in the essentialist/constructionist dialogue and will inevitably require a change in our approach to *Charter*¹⁶ and human rights law, such that “gender identity” be established as a ground of discrimination.

¹⁴ barbara findlay and Sandra Laframboise, “Finding Our Place: Transgendered Law Reform Project” in *Law Reform Project* (Vancouver: High Risk Project Society, 1996) at 15.

¹⁵ *Supra* note 8 at 115.

¹⁶ *Canadian Charter of Rights and Freedoms*, R.S.Q. c.C-12 [Charter].

Before embarking on such a path, I think it is necessary to first acknowledge another dialogue which is part of the larger, contemporary discussion of grounds. In *Egan v. Canada*, the dissenting judgment of Madame Justice L'Heureux-Dubé attempts to revisit the “fundamental purpose of section 15 of the *Charter*” in a manner that places a great deal of emphasis on the protection of, and respect for, basic human dignity.¹⁷ Specifically, L'Heureux-Dubé J. argues that a definition of discrimination should focus on “impact (i.e. discriminatory effect) rather than on constituent elements (i.e. the grounds of the distinction) and that the former must be considered with respect to the perspective of the victim.”¹⁸ While the judgment of L'Heureux-Dubé J. in *Egan* does eventually help shape the discussion of step three of the section 15 analysis in *Law*, parts of the judgment have nonetheless met with criticism.

In particular, the suggestion is made by L'Heureux-Dubé J. that:

...the effect of the ‘enumerated or analogous grounds’ approach may be to narrow the ambit of section 15, and to encourage too much analysis at the wrong level...By looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk understanding an analysis that is distanced and desensitized from real people’s real experiences.¹⁹

Arguably, then, L'Heureux-Dubé J. is suggesting an approach that is more liberal in its scope, focusing on the autonomous individual, her sense of human dignity, and her right to not have that infringed. Such an approach could plausibly generate a shift away from grounds, the basis of discrimination, to a discussion that focuses on simply the effects, or the aftermath of discrimination. Dianne Pothier argues that this actually detracts from the goals of anti-discrimination law and that we should be concentrating on developing a “fuller appreciation of the significance and complicated nature of grounds.”²⁰

As Pothier rightfully notes, “grounds of discrimination are not a purely legal construct...[they] reflect a political and social reality to

¹⁷ *Egan v. Canada*, [1995] 2 S.C.R. 513 at 542 (SCC) [*Egan*].

¹⁸ *Law v. Canada*, [1999] 1 S.C.R. 497 (SCC) [*Law*].

¹⁹ *Supra* note 17 at 545 [emphasis in original].

²⁰ Dianne Pothier, “Connecting Grounds of Discrimination to Real People’s Real Experiences.” (2001)13 *Can. J. W. & L.* 38 at 39.

which the law has, belatedly, given recognition.”²¹ Grounds are essential to anti-discrimination law, as it operates at the moment. A ground of discrimination, from its conception to its implementation, (ideally) becomes a space in which the struggles of marginalized communities and discourses may be articulated in a legal context. That there is a ground such as sex is indicative of the real people who are subject to a real power struggle and who experience real discrimination. The existence of that particular struggle is acknowledged and understood in law through that particular ground. Sherene Razack suggests in her book *Looking White People in the Eye* that “without an understanding of how responses to subordinate groups are socially organized to sustain existing power arrangements, we cannot hope either to communicate across social hierarchies or to work to eliminate them.”²² It is equally important then that grounds not be static or historically fixed icons of discrimination. Rather, grounds should be maintained through constant vigilance, countering shifts in political power relationships that are manipulated by history, culture, and social change.

If we are to gain anything from Butler’s notion of performative gender, it is necessary to understand that gender is not historically and geographically fixed. Rather, as an acquired social identity it is historically and geographically contingent.²³ One of the fundamental criticisms of the male/female gender binary is that gender is so much more; it is multi-vocal, multilingual, and multi-faceted. Attempts at inclusion mean imposing definitions, establishing regulations. Such rigid approaches do not work because they operate within the traditional categorical modes of thinking, thereby engaging the political in the process of identification. Lise Gotell warns it is necessary for the judiciary to avoid such traps. In “Queering Law: Not by *Vriend*,” Gotell insists that, “in order to destabilize the neat divide between straight inside and queer outside, there is a pressing need to resist the strategic attractions of sexual identity politics.”²⁴ Accordingly, and for other reasons, arguing human rights or section 15 *Charter* claims where a transgendered person is alleg-

²¹ *Ibid.* at 41.

²² Sherene Razack, *Looking White People in the Eye* (Toronto: University of Toronto Press, 1998) at 11.

²³ Vincent Leitch et al., “Michel Foucault: Introduction” Vincent Leitch, ed., *Norton Anthology of Theory and Criticism* (New York: Norton, 2001) 1615 at 1618.

²⁴ Lise Gotell, “Queering Law: Not by *Vriend*” (2002) 17 *Can. J. L. & Soc’y* 89 at 93.

edly discriminated under the purview of the enumerated or analogous grounds of sexual orientation, sex, or disability does not work.

1. Sexual Orientation

Sexual orientation is simply an inadequate and improper ground upon which a transgendered person might advance a discrimination complaint. Quite frankly, the two are barely, if at all, related. However, it is a common misconception of our society that the two are linked.²⁵ Bornstein notes that “those who practice non-traditional sex are seen by members of the dominant culture as a whole with those who don non-traditional gender roles and identities.”²⁶ Despite our willingness to group that which does not conform to societal norms into an(other) category, we cannot deny that “there are straight transgendered people, gay transgendered people, and bisexual transgendered people” and that sexuality orientation is not contingent on one’s sex, either biological or self-perceived.²⁷

In the American case *Underwood v. Archer Management Services*, a complaint brought forward by a transsexual person on the ground of sexual orientation was actually dismissed because it was devoid of any claim of discriminatory conduct based on the plaintiff’s real or perceived preference or practice of sexuality.²⁸ The Court was correct to differentiate between the sex to which we are attracted and the sex, or lack thereof, with which we associate. Transgenderism and sexual orientation, then, are two quite different and independent aspects of one’s self.

²⁵Minnesota was the first state to enact a non-discrimination statute that specifically includes transgendered persons within the definition of a protected class: sexual orientation. Section 1, Minnesota Statutes 1992, section 363.01 subd. 23 and 45 read: “Sexual orientation” means... having, or being perceived as a having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.”

²⁶ *Supra* note 4 at 38.

²⁷ findlay and Laframboise, *supra* note 14 at 27.

²⁸ 857 F Supp 96 [D DC 1994].

2. Sex

Unfortunately, Canadian jurisprudence has generally failed to embrace Butler's understanding of gender and has, instead, adopted a notion of gender that is primarily essentialist, immutable, and inherently linked to sex. The Federal Court of Appeal, stated in *Thibaudeau v. R.* that, "sex differs significantly from the other enumerated grounds."²⁹ The case was a section 15(1) *Charter* claim challenging a provision of the *Income Tax Act*.³⁰ In obiter, Hugessen J. went on to say that, "[t]here are only two sexes. One excludes the other. A male is always the opposite of a female and vice versa." Likewise, in a footnote, Hugessen J. does not deny that "homosexuals or transsexuals [may] constitute a third or even a fourth sex," and that such a decision "would necessarily do so on the basis that each of the sexual categories so found was exclusive of all others."³¹

Other than the fact that homosexuality or heterosexuality has little to do with sex, there are other problems with these statements. The creation of a third or a fourth sex would merely create a paradigm that would reshape the boundaries of the gender power struggle and reaffirm the gender hierarchy. Females and the transgendered other would still be subject to the dominating patriarchal discourse because of efforts at avoiding exclusionary practices. Furthermore, the two marginalized groups would be, and indeed are, forced to compete for space and voice. Most recently, this has been demonstrated in the case *Nixon v. Vancouver Rape Relief Society*.³²

Kimberly Nixon is a male to female transsexual who claimed that Vancouver Rape Relief Society (hereinafter Rape Relief) denied her both a service and employment in violation of sections 8 and 13 of the British Columbia *Human Rights Code*³³ on the basis of sex. Nixon was successful in her challenge at the tribunal, but that decision was later set aside at trial. Essentially, Nixon as a transgendered person who had gone through sex reassignment surgery (SRS) was denied the right to work as a peer counsellor at Rape Relief on the basis that she had not

²⁹ *Thibaudeau v. R.*, [1994] 114 D.L.R. (4th) 261 at para. 23, 21 C.R.R. (2d) 35 (FCA), rev'd on other grounds [1995] 2 S.C.R. 627 (SCC) [*Thibaudeau*].

³⁰ R.S.C. 1985 (5th Supp.), c.1.

³¹ *Thibaudeau*, *supra* note 29.

³² (2003), 22 B.C.L.R. (4th) 254.

³³ *Human Rights Code*, R.S.B.C., c. 210 (the "Code").

fully lived her life as a woman. “A woman,” Nixon was informed by Rape Relief, “had to be oppressed since birth to be a volunteer at Rape Relief,” and that she, Nixon, did not belong to that particular identifiable group.³⁴

As such, when Rape Relief concedes that, “sex is not a binary concept but a continuum” it is recognizing the complexity of physical changes that many transgendered persons may experience but it is not advocating an advantageous concept of gender.³⁵ While creating a space for transgendered (specifically transsexual) persons, this continuum serves merely to further complicate the hierarchy such that individuals will be considered “more of a woman” or “not woman enough.” Marginalization, then, takes on a new form as individuals are defined by their sexual characteristics which place them either inside or outside of an identifiable group (woman since birth, woman post-SRS, cross-dressing men). Gender role and gender identity provide a background narrative that has little consequence in an assessment that is still grounded in sex and sexual identity politics.

In accepting Rape Relief’s arguments, the British Columbia Supreme Court also revisited the Supreme Court of Canada’s decision in *R. v. Powley*, which determined how membership in an “identifiable group” may be defined.³⁶ Particularly, the Court discusses the third part of the test in *Powley*, which provides that “the core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions...[that] distinguish it from other groups.”³⁷ Edwards J. observes, “If the *Powley* test for an ‘identifiable group’ were applied in this case, Ms. Nixon would be excluded from Rape Relief’s self-defined ‘identifiable group’ of women who have always lived exclusively as girls and women...certainly on the community acceptance criterion.”³⁸ In this circumstance, the *Powley* test plays into the essentialist notion of gender, and therefore challenges the legitimacy of not only Nixon’s womanhood, but of her gender identity, by contemplating what Nixon is as opposed to who she is. In so doing, Nixon as a transgendered person is forced into a definition, while being forced out of an identifiable

³⁴ *Supra* note 32 at 261.

³⁵ *Supra* note 32 at 271.

³⁶ (2003), 230 D.L.R. (4th) [*Powley*].

³⁷ *Ibid.* at para. 33.

³⁸ *Supra* note 32 at 274.

group. Nixon is subjected to a political power struggle whereby Rape Relief's efforts to empower women are deemed incompatible with, and even superior to, the rights of an individual that is 'less' than a woman.

Nixon v. Vancouver Rape Relief is not the only Canadian case in recent history to grapple with issue of incorporating transgenderism under the enumerated ground of sex. In *Sheridan v. Sanctuary Investments Ltd. (No. 3)*, a pre-operative transsexual woman, Tawni Sheridan, was refused use of the women's washroom in a bar despite having a letter from the gender clinic which was treating her saying that she was required to live full-time as a woman for two years as a condition of her sex reassignment surgery.³⁹ Tribunal Member Humphreys ultimately found that there was discrimination and that Sheridan was entitled to use the women's washroom. In delivering the decision, the Tribunal acknowledged that "the law...assumes that sex is a bipolar characteristic and that an individual is either male or female" but that "given the large and liberal interpretation which the Supreme Court of Canada has emphasized must be applied to human rights legislation...discrimination against a transsexual constitutes discrimination on the basis of sex."⁴⁰

Similarly, in New York Supreme Court case *Maffei v. Kolaeton Industry Ltd.*, Lehner JSC. rules that transsexualism will fall under sex as a prohibited ground of discrimination because "although...a person may have both male and female characteristics, society only recognizes two sexes" such that a transsexual may be a "sub-group" of either men or women, accordingly.⁴¹

The United Kingdom's jurisprudence walks the same path as a the Canadian and American courts. In *P. v. S. and Cornwall County Council*, where a town manager is to be dismissed for having undergone SRS, "the United Kingdom and the Commission submit that to dismiss a person because he or she is a transsexual or because he or she has undergone a gender-reassignment operation does not constitute sex discrimination for the purposes of the directive."⁴² The Court of Justice of the European

³⁹ (1999), 33 C.H.R.R. D/467, [1999] B.C.H.R.T.D. No. 43 (QL) (B.C. Trib.) [*Sheridan* cited to C.H.R.R.].

⁴⁰ *Ibid.* at paras. 91 and 93. This reasoning was later adopted by the British Columbia Human Rights Tribunal in *Mamela v. Vancouver Lesbian Connection* (1999), 36 C.H.R.R. D/318 (B.C. Trib).

⁴¹ 626 N.Y.S. 2d 391, 1995 N.Y. Misc LEXIS 115, at 556.

⁴² [1996] NLOR No. 3408 at para. 14.

Communities ultimately rejected the argument, ruling it contrary to the dignity and freedom of a person to discriminate a person because she falls outside of the man/woman dichotomy.

In keeping with the trends in Canadian and International jurisprudence, the Ontario Human Rights Council (OHRC) adopted a *Policy on Discrimination and Harassment because of Gender Identity* that supports “a progressive understanding of the ground ‘sex’ to include ‘gender identity.’”⁴³ The OHRC Policy is correct and clear in differentiating gender identity from sexual orientation but in its “purposive and liberal interpretation of the ground of sex,” the OHRC Policy demonstrates its lack of appreciation for the political power struggle that underlies the enumerated ground of sex.⁴⁴ The Ontario Human Rights Commission is not, or is choosing not to be, cognisant of the inherent restrictions of the gender binary, but more specifically, of the manner in which the binary marginalizes those who are not a perfect fit. In particular, the Commission says in its policy that it is committed to “promoting the dignity and equality of those whose gender *does not conform to traditional social norms*.”⁴⁵ Already it is quite clear that transgendered persons are merely being regulated into a category not because they identify with it, but because they do not. The language suggests that transgendered people are being protected because they are different and that there is a dominant social identity against which they are being compared.

Like the aforementioned case law, the Ontario Human Rights Commission bases its anti-discrimination efforts on methods of categorization that make assignments of similarity and difference. Nitya Iyer observes that “legal categories tend to assign two sorts of difference: difference as distinction and difference as hierarchy.”⁴⁶ The former indicates difference as “an expression of a relationship,” that difference cannot exist in isolation.⁴⁷ A person is tall because there is someone who is short. I am male by virtue of the fact that I am *not* that which my sister is: female. Such distinctions allow us to form the categories which

⁴³ Ontario, Ontario Human Rights Commission, *Policy on Discrimination and Harassment because of Gender Identity* (Toronto: OHRC, 2001) at 1.

⁴⁴ *Ibid.* at 4.

⁴⁵ *Ibid.* at 2 [emphasis added].

⁴⁶ Nita Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993) 19 *Queen’s L.J.* 179 at 183.

⁴⁷ *Ibid.* at 185.

are the driving mechanisms of anti-discrimination law, but that are also the basis of difference as hierarchy. These categories inevitably express hierarchal relationships and assertions of power.⁴⁸ In the case of sex, the dominant sexual identity is embedded in the basic social structure so that the background norm is solidified and is, therefore, perpetually male. ‘Male’ retains power by having ‘female’ as a basis of distinction, as a second link in a hierarchal structure. The incorporation of the third, of the transgendered, does not detract from that power as it gains space in the gender binary only as an exception. “In the contemporary legal discourse,” argues Gotell, “the solidification of identity categories becomes a means by which groups who depart from the silent...norm are reduced to a characteristic that both contains and constitutes them.”⁴⁹ By creating an exception that exists both inside and outside of the gendered hierarchy, the governing discourse has established a stable minority that requires its protection that needs advocacy, and compassion. Consequently, whether at the hands of legislatures, administrative decision makers, or the judiciary, the power struggle is won in the guise of protecting the position of the status quo, and it is in this way that the dominant social identities are able to resist change.

3. Disability

That a complaint of discrimination against a transgendered person would be grounded in the ground of disability is a testament to early and contemporary notions of transgenderism as a disease or disorder. Gender Identity Disorder (GID), also termed gender dysphoria, is listed in the *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*, published by the American Psychiatric Association (302.6 and 302.85).⁵⁰ Gender experts have also devised a set of guidelines called *The Harry Benjamin International Gender Dysphoria Association’s Standards of Care For Gender Identity Disorder*. This universal consensus gives medical professionals a set of guidelines by which they

⁴⁸ *Ibid.* at 185.

⁴⁹ *Supra* note 24 at 108.

⁵⁰ *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Washington, D.C.: American Psychiatric Association, 1994) [*DSM-IV*]. Homosexuality had been removed from the publication in 1973, but it has since been restored with respect to those who suffer with their homosexuality in a homophobic society.

may manage patients seeking hormones and surgery.⁵¹ Unfortunately, transgendered people are also impaired by the treatment they receive in society, through social alienation and a denial of access to social programs.⁵² Findlay and Laframboise suggest that if a transgendered person is affected to some degree by gender dysphoria and any related psychological complications, “their lifelong condition can be recognized as a medical condition, a condition that can be diagnosed and potentially treated through medical intervention.”⁵³ To that end, it seems that all transgendered people should find protection in the ground of disability in human rights legislation.

Synthia Kavanagh, a male to female transsexual, was successful in her discrimination claim on the grounds of both sex and disability in the case *Kavanagh v. Canada (AG)*.⁵⁴ Kavanagh, who had been living as a woman, was convicted of second degree murder and was consequently incarcerated in a male federal prison, despite the recommendation of the judge that she be placed in a female prison. Kavanagh claimed that, as a transgendered person, she was denied both her regular hormonal treatment and her sex reassignment surgery, for which she was preparing. Furthermore, she argued her dignity and freedoms were being infringed by being placed in a male prison. Ms. Kavanagh was successful in all her complaints, on both the grounds of sex and disability.⁵⁵

Likewise, Leslie Ferris, a transgendered person, was successful in her complaint of discrimination on the basis of “sex and/or disability” for being denied access to the women’s washroom at her workplace.⁵⁶ Tribunal Member Iyer observed that both sex and disability were reasonable grounds upon which to base a discrimination claim. The judgment notes, “I have difficulty accepting the proposition that recognizing discrimination because of transgendered status as discrimination on the

⁵¹ “Becoming Ayden,” (the fifth estate, 13 October 2004), online: CBC.ca <<http://www.cbc.ca/fifth/becomingayden/medical.html>> .

⁵² In *Kavanagh v. Canada (AG)* (2000), 41 C.H.R.R. D/119 [*Kavanagh*], the Canadian Human Rights Tribunal describes the tremendous torment, including the social ostracism, suffered by individuals who perceive their bodies as incongruent with their subjective sense of who they really are.

⁵³ *Supra* note 14 at 25.

⁵⁴ *Supra* note 50.

⁵⁵ *Supra* note 50 at paras. 5-9.

⁵⁶ *Ferris v. Office and Technical Employees Union, Local 15* (1999), 36 C.H.R.R. D/329 at para. 1 (BC HRT).

basis of physical disability is somehow less dignified than recognizing it as discrimination on the basis of sex.”⁵⁷ Despite the reassurances of the Tribunal, it seems likely that there is a greater issue at large that would make disability an undesirable ground upon which a transgendered person might pursue a discrimination claim. That there is even the suggestion of a hierarchy among grounds requires further investigation into disability.

The case law indicates that disability is a mirror with many faces. That is, disability is not only determined by a person’s self-perception, but equally by the perceptions and prejudices of others. findlay and Laframboise note that, “To constitute a disability, a condition does not have to “inherently impair” the individual...It is the discrimination on the basis of the function which brings it under the disability umbrella rather than a necessary impairment of function.”⁵⁸ Furthermore, a person need not actually be disabled if she is *perceived* to be disabled and is discriminated on that basis.⁵⁹

There are a number of points to consider here. Certainly, for the individual, the opportunity to succeed in the assertion of a particular complaint on the ground of disability is, admittedly, quite appealing. It offers both affirmation that your rights were violated and vindication to the extent that your disorder is no longer your fault. For a transgendered person to succeed on a claim of disability acknowledges transgenderism as a disorder that is beyond the control of the claimant, but that is very real. Success at the tribunal level or in the courts would solidify the disorder. Other victories would follow, possibly lending credibility to struggles for financial coverage of medical bills and SRS, and opening doors to other disabled communities, resources, and funding.⁶⁰

However, the victory is perhaps a little short-sighted. Ultimately, it is necessary to consider the political and power-based effects of transgenderism as a disability. Disability is generally not perceived as positive. Indeed, that is the very reason why it is labelled as a ground needing protection. Merriam-Webster Online defines disability as “a disqualifi-

⁵⁷ *Ibid.* at para. 85.

⁵⁸ *Supra* note 14 at 25.

⁵⁹ *Hamlyn v. Cominco Ltd.* (1989), 11 C.H.R.R. D/333 (B.C.C.H.R.). The complainant’s rights were violated by her employer who discriminated against her because her obesity was perceived as a disability, despite the complainant’s thoughts to the contrary.

⁶⁰ findlay and Laframboise, *supra* note 14 at 26.

cation, restriction, or disadvantage.”⁶¹ To appropriate such a definition as a self-defining quality, the transgendered community is conceding that transgenderism is, at its origins, a problem, thereby alleviating the pressure on society to change its views, to reshape the dominant discourse. If effect, as self-proclaimed disabled persons, transgendered people who pursue discrimination claims on the grounds of disability position themselves at the lower end of the political hierarchy.

As with the ground of sex, any discrimination claim based on disability must contend with a rigid and power-driven hierarchy. Richard Devlin and Dianne Pothier observe that “historically, we have tended to adopt a binary conception of disability: there are the disabled and the able-bodied.”⁶² Similar to the male/female gender binary, the binary approach to disability generates a philosophy of *I am that I am that you are not*, which is akin to Iyer’s description of “difference as distinction.”⁶³ The dominant, able-bodied discourse defines itself in opposition to those who are disabled, who “need” protection, and who are inevitably denied space and voice. To that end, “difference as hierarchy” is engaged such that the power rests with the able-bodied majority while the disabled are powerless and marginalized.⁶⁴ The able-bodied majority are left to determine “the performance benchmarks we utilize to assess people” and continue with “its oppressive characterization of an impairment.”⁶⁵

Transgendered as disabled in anti-discrimination law simply offers more problems than its potential successes are worth. As a course of action “it is inconsistent with a political strategy that demands society change its idea of normal and healthy and non-disabled to include transgendered people, rather than to continue to treat them as aberrations, which in turn reinforces the mistreatment they receive.”⁶⁶ As a ground of discrimination, it actually robs transgendered people of autonomy. Politically, legally, and socially, the situation is complicated not only by the complexity of a myriad of perceived gender identities, but of the

⁶¹ Merriam Webster Inc., “Disability,” online <<http://www.merriamwebster.com>>.

⁶² Richard Devlin and Dianne Pothier, “Introduction: Toward a Critical Theory of Disitizenship” in Richard Devlin and Dianne Pothier, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* [publication forthcoming from U.B.C. Press].

⁶³ *Supra* note 46.

⁶⁴ *Supra* note 46.

⁶⁵ *Supra* note 60.

⁶⁶ Findlay and Laframboise, *supra* note 14 at 26.

increasingly nuanced marginalization experienced by not fitting into the male/female gender binary because of a disability.

III. OPEN GROUND

“What’s convenient for the government is that they keep this scapegoat called the queer voice. Silence does equal death – and we are being silenced.”

— Lori E. Seid, Producer *Taboo* [emphasis added]

Having established that grounds are necessary and core to anti-discrimination law, and that neither sexual orientation, nor sex, nor disability are adequate or appropriate grounds on which transgendered persons should advance discrimination complaints, it remains to proffer a ground which may prove adequate. Indeed, the establishment of gender identity as an independent protected ground offers both an inclusive and fluid space for transgendered people to pursue discrimination claims, and a space which is void of inherent hierarchies.

There is no doubt that transgendered people, those who experience all levels of gender dysphoria, need a discursive space of their own within the framework of Canadian anti-discrimination laws. Dianne Pothier insists, “the conception of the ground has to be apparent.”⁶⁷ Accordingly, it is necessary that the ground be established to explicitly protect all persons who experience gender dysphoria, whether transsexual or transvestite, gender blender or gender bender. Moreover, the ground of gender identity must be determined by the interests of those it is designed to protect: it must be open, dynamic, fluid. Keeping Butler in mind, constructing a transgendered space necessarily requires a lack of borders and responsiveness to a person’s self-perceived gender identity, and not their apparent sex. Transgendered persons should not be forced to categorize themselves, to fit into definitions, paradigms, or any other politically devised construct.

By virtue of its design, the ground of gender identity as a space for transgendered persons within landscape of anti-discrimination law should be void of inherent hierarchies. The creation of the space decon-

⁶⁷ *Supra* note 20 at 49.

structs both difference as distinction and difference as hierarchy faced within the boundaries of both sex and disability. The comparisons and the rigid constructions will still exist in those grounds. However, the establishment of gender identity as a ground relocates transgendered people on a parallel plane, affording them rights protection on their own terms.

Kate Bornstein says that “the correct target for any transsexual rebellion would be the gender system itself. But transsexuals won’t attack that system until they themselves are free of the need to participate in it.”⁶⁸ The establishment of gender identity would be a first step in that direction, toward a rebellion located in anti-discrimination law, fought on the principles of equality.

There is room in human rights legislation to change the gender system, to help not only cure but prevent the discrimination of transgendered people. For example, the Nova Scotia *Human Rights Act* states in section 24(1)(b), “The Commission shall develop a program of public information and education in the field of human rights to forward the principle that every person is free and equal in dignity and rights...”⁶⁹ That particular section, and sections 24(1)(c-f) would provide many other opportunities for the promulgation of transgender issues and the balancing of the gender power struggle. Legal institutions have an opportunity to engage in a dialogue geared toward understanding and acceptance, synthesizing the theoretical, medical, cultural and historical. Furthermore, human rights commissions have a statute-based obligation to move beyond dialogue to effect change.

IV. CONCLUSION

Alice laughed: “There’s no use trying,” she said; “one can’t believe impossible things.” “I daresay you haven’t had much practice,” said the Queen. “When I was younger, I always did it for half an hour a day. Why, sometimes I’ve believed as many as six impossible things before breakfast.”

— Lewis Carroll, *Alice’s Adventures in Wonderland*.

⁶⁸ *Supra* note 4 at 83.

⁶⁹ R.S.N.S., c. 214, s. 1.

Gender is a difficult thing to change. Indeed, what exactly are we changing when we change gender? Kate Bornstein writes, “As I looked at gender, I needed to fix it with a definition, just long enough for me to realize that each definition I came up with was entirely inadequate and needed to be abandoned in search of a deeper meaning.”⁷⁰ The history of gender is indicative of its multifarious manifestations throughout culture and geography and its importance to social and political issues of anti-discrimination law.

Transgender is not the invention of a politically contentious and increasingly complicated society. Transgender is not a protest mechanism, nor a fashionable social deviance. Rather, its very origins are within our social constructions of gender and society’s construction of the subject. From the moment our biological sex is proclaimed, we become a site of construction, shaped by the relationships inherent to a politically charged power struggle over gender-based discursive space. In real practice, this entails the marginalization of the gender other, the transgender community, and often competition between marginal groups, such as women and homosexuals, in favour of a dominant heterosexual patriarchy.

While Queer Theory attempts to subvert this rigid practice of marginalization and oppression, it can only succeed insofar as its narrative is adopted by the power-based structures of our society. Shauna Labman argues that “the law has the ability to both mirror and construct social norms.”⁷¹ The recent case law, law reform reports, and legal commentary would suggest that the rights of transgender persons are being recognized within the operation of anti-discrimination law. However, such recognition comes at the price of being defined by and subjected to a discourse which does not appreciate the transgender perception of self. Instead, the current legal discourse is based upon a philosophy of categorical thinking intent upon reflecting its own views of gender on transgender persons. As such, the legal discourse, while generally exhibiting good intentions, is limiting the ground upon which transgender rights can be fully recognized outside of existing political power struggles inherent to both sex and disability.

⁷⁰ *Supra* note 4 at 21.

⁷¹ Shauna Labman, “Left in Legal Limbo: Transsexual Identity and the Law” (2001) 7 *Appeal* 66 at 72.

By adopting a Queer Theory approach to gender identity, and by establishing gender identity as a protected ground of discrimination, anti-discrimination law in Canada will be making its first participatory steps in deconstructing the rigidity of gender. Effectively, the creation of space for transgender through gender identity would change the balance of power by placing identity in the hands of the transgender community. Fluid, dynamic, and realistic, the self-described notions of gender identity would empower the marginalized discourse. To change power, of course, is to change gender.