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Allison Smith

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STORIES OF 0s: TRANSGENDER WOMEN, MONSTROUS BODIES, AND THE CANADIAN PRISON SYSTEM

Allison Smith*

ABSTRACT

Prisons regulate identities and what rights get recognized and protected in a prison setting. Gender is a core element of identity that is policed by the prison system and by the law that governs prisons. Focusing on developments within Canadian transgender jurisprudence, this paper explores how prisoners' bodies that do not conform to a strict gender binary are defined as inhuman. By critically assessing the prison system and prison policy, this essay demonstrates how Canadian law has often failed to address the needs and lived experiences of transgender women in their interactions with the penal system.

As case law demonstrates, the rights of cisgender women—that is, women whose gender and anatomy have aligned since birth—tend to trump the rights of transgender women. Implicit in this tendency is a judgment as to whom the law will recognize as 'real.' This paper challenges the logic of protecting women deemed authentic when such protection comes at the expense of transgender women. To that end, the pivotal cases of *Kavanagh v Canada (Attorney General)* and *Forrester v Peel (Regional Municipality) Police Services Board* are examined. These cases show how the law's reliance on genitals as the primary signifier of gender contributes to the dehumanization of the transgender subject in a prison setting. In order to query this logic of genitocentrism, this paper also examines developments in transgender jurisprudence outside the prison context. It concludes with an analysis of *XY v Ontario (Minister of Government and Consumer Services)* in order to track the movement of Canadian law away from a transphobia that allows body parts to speak for individuals.

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* Allison Smith, B.A., M.A., is a third year law student at the Schulich School of Law. She will graduate in Spring 2014.

I. INTRODUCTION

Prisons, like bathrooms, bedrooms, streets, and courtrooms, are spaces in which identities are continuously negotiated and reinforced. In each of these spaces, people in positions of power repeatedly answer the question as to who fits the category of human. By its very nature, a prison is a space in which the power of individuals is severely limited or else taken away entirely. In order to function as regulatory bodies, prisons strip individuals of their power over their ability to move freely, to eat and sleep when they desire, to interact with others, and to engage in other activities that non-incarcerated individuals practice with a far greater degree of liberty. Prisons narrow the world for those inside, both in terms of literal space and also in terms of the conceptual space of individual capacity for choice and self-determination.

In addition to regulating and limiting activities, the prison system also polices and regulates identities. One of the elements of identity that is most rigidly policed by the prison system, as well as the law that informs and governs it, is gender. Focusing on developments within Canadian transgender jurisprudence, this paper explores how bodies that are not easily readable and recognizable in terms of a strict gender binary are placed outside the space of the human within Canada's prison system. It employs an analysis of the prison system as a case study in order to query how Canadian law has failed to address particular issues facing transgender women in their interactions with the legal system. In particular, its focus is on how Canadian jurisprudence has often privileged some individuals as more 'authentic' than others. As my analysis of case law will demonstrate, the rights of transgender women have often been disregarded or compromised for the sake of protecting cisgender women. Cisgender women—that is, women whose gender and anatomy have aligned since birth—have often been treated as more 'real' under the law than transgender women. This tendency of the law to privilege cisgender women continues despite advancements in jurisprudence that extend protection and recognize the right of transgender Canadians to equal treatment and the preservation of dignity. The purpose of this paper is to query the logic of protecting women deemed 'authentic' at the expense of transgender women. Implicit in this logic is an unexamined and destructive transphobia that silences voices and instead allows body parts to speak for individuals. It demonstrates a desire to categorize, to objectify, and to hierarchize human subjects. Given Canadian law's *Charter*-era commitment to equality rights, this logic must be questioned and dismantled.

II. BACKGROUND AND LEGAL CONTEXT

Historically, the law and its subsidiary, the penal system, have had difficulty conceptualizing the meaning of gender identity and its distinctness from biology. It is all too often taken for granted by not only law, but culture more generally, that the gender of individuals will conform to sexual anatomy. As Judith Butler explores in her seminal work, *Bodies that Matter*, when a girl is born, the phrase "It's a girl!" initiates her into a gendered category that she is expected to adhere to through her gender presentation

and behaviours.¹ In Butler's words, "Gender norms operate by requiring the embodiment of certain ideals of femininity and masculinity, ones that are almost always related to the idealization of the heterosexual bond."² Society, culture, politics, law, and other regulatory entities all interact to steer bodies into pre-determined identity categories. Butler's work suggests that gender is *performed* rather than set by anatomy. This is not to say that gender is easily altered on whim, but instead that it is dependent on factors more influential and nuanced than the mere fact of having a male or female body.³ Law is but one social force that expects coherence between sex and gender. Within the legal system, systems of discipline and punishment serve to teach and reinforce expected gendered behaviour.

Canadian law is evolving in some matters relating to gender identity and expression. Historically, however, Canadian law has resisted conceptualizing gender as a matter of self-determination. Instead, our legal system has fundamentally and rigidly relied on anatomy to determine how an individual should be treated and understood. The tendency to reduce individuals to body parts is particularly striking in relation to penal law and policy. Central to this paper is the pivotal 2001 federal human rights case of *Synthia Kavanagh*, in which Ms. Kavanagh (a post-operative transgender woman) was incarcerated in a women's prison, but in a decision that made clear that transgender women who had not undergone sex reassignment surgery would not be allowed housing in women's prisons.⁴ *Kavanagh* is the leading case that sets prison policy on where transgender inmates will be housed in Canadian prisons—that is, in accordance to genitals rather than identity. Despite the evolution in thought reflected in other areas of Canadian law, the penal system is one area of our law in which individuals are still categorized by and reduced to what is between their legs.

Following an analysis of *Kavanagh*, I examine various modern legal histories that articulate (or, in some cases, compromise) transgender rights. My purpose in this historical examination is to trace the movement in the collective legal consciousness relating to gender identity, and to theorize how this collective consciousness has impacted law and policy that is relevant to incarcerated transgender individuals. In addition to Canadian law, I also explore some legal cases and policy coming out of the American and English context. I do this for the sake of comparison, but also on the premise that, even when precedent is not binding, Canada is still influenced by legal thought in other countries, particularly those with whom we share a common legal tradition.

Following my exploration of gender identity and legal history, I explore the 2006 case of *Forrester*, in which a transgender woman was strip-searched by Ontario police. Because Ms. Forrester had male anatomy, she was subjected to a "split search," in which female officers searched her top half and male officers searched her from the waist down.⁵ Ms. Forrester felt degraded and humiliated by this experience.⁶ Though prison policy has changed with regard to strip-searching transgender individuals, the responses of some of the officers demonstrate assumptions and attitudes that are worth exploring in depth. Uncertain of how to conceptualize Ms. Forrester, some of the offic-

¹ Judith Butler, *Bodies that Matter: On the Discursive Limits of "Sex"* (New York: Routledge, 2003) at 232.

² *Ibid* at 231-32.

³ *Ibid* at 226-37.

⁴ *Kavanagh v Canada (Attorney General)*, [2001] CHR D No 21 (available on CanLII), (CHRT) [*Kavanagh*].

⁵ *Forrester v Peel (Regional Municipality) Police Services Board*, 2006 HRTO 13 at para 1, [2006] OHRTD No 13 (QL) [*Forrester*].

⁶ *Ibid* at para 35.

ers referred to her in their notes by derogatory names or phrases that placed her outside gender entirely. One officer defined Ms. Forrester by an incongruous “0” in his notebook—a mark that could signify either an “O” for “other” or a “0” as in zero.⁷ By either meaning, this officer’s notation marked what Ms. Forrester was to him—either something outside normal categories of understanding, or something so unrecognizable that it constituted a zero, nothing at all. These ways of understanding Ms. Forrester—as either other or nothing—are, for the purposes of my research, a metonym of how Canadian law, and in particular the penal system, has conceptualized transgender individuals as abnormal, subhuman, or unrecognizable. The stories of transgender women are often the stories of 0s—the stories of those who are disregarded, othered, displaced, misrecognized, or subject to erasure. While there were policy improvements ordered in *Forrester* with reference to how transgender people are handled in a strip search situation,⁸ the fact that transgender people are still assigned by genitalia in the prison context is itself dehumanizing and validates a ranking of rights in which the rights of transgender women are compromised.

As I have noted, I am interested in examining how transgender rights are compromised through deference to the rights of other groups. The federal Human Rights Tribunal’s decision in *Kavanagh* reflects a highly paternalistic logic that has as its stated motivation the protection of cisgender women. The decision justifies disallowing pre-operative transgender women (which includes transgender women who never intend to have genital surgery) from being housed in women’s prisons on the basis of the fear and possible misunderstanding on the part of biologically female inmates, some of whom have been subject to male violence and so presumably would not be comfortable housed with a person who has male genitalia. In other words, infringing the dignity of pre-operative transgender women is deemed justifiable in the name of protecting cisgender women. This kind of logic is implicitly problematic in that it rests on the notion that cisgender women are especially delicate and in need of protection. By this logic, cisgender women are coded as feminine (delicate, weak, unthreatening), whereas transgender women are still coded as masculine (strong, hostile, threatening). As I have stressed, it is also problematic because of its enforcement of a hierarchy of rights. The *Vancouver Rape Relief Society v Nixon* case reflects some of the same paternalistic reasoning as in *Kavanagh*, both on the part of the Rape Relief Shelter and the British Columbia Court of Appeal, where the case was heard in 2005.⁹ The Shelter refused to permit Ms. Nixon, a transgender woman, to give volunteer counselling services to women who had experienced male violence because of her status as a transgender woman. This triggered Ms. Nixon’s human rights complaint, which was successful at the Tribunal level¹⁰ but ultimately overruled at the Court of Appeal level. The reasoning in both *Nixon* and *Kavanagh* are based in the notion that cisgender women need protection from transgender women.

It is beyond the scope of this paper to suggest an ideal solution for where and how transgender women should be housed in Canadian prisons. Instead, the purpose of this work is to query the ways in which essentialist attitudes that define gender by anatomy still exist in Canadian law and in particular Canadian penal law. The reality of

⁷ *Ibid* at para 285.

⁸ *Ibid* at para 476.

⁹ *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601, 262 DLR (4th) 360.

¹⁰ *Nixon v Vancouver Rape Relief Society*, 2002 BCHRT 1, 2002 CarswellBC 3557 (WL Can).

transgender women as authentic women is still questioned within Canadian law, where there is still little protection on the basis of gender identity and gender expression. These grounds exist in the Human Rights Codes of Ontario, Manitoba, the Northwest Territories, and Nova Scotia.¹¹ However, on the national level, vital protections are not yet guaranteed in human rights law through the inclusion of gender identity and gender expression as protected grounds. It remains to be seen how the growing reflection of transgender rights in Canadian law will affect the status of transgender individuals in Canadian prisons.

III. KAVANAGH: ANATOMY, PLACEMENT, AND THE ERASURE OF IDENTITY

In her essay “Transsexuals in Canadian prisons: An equality analysis,” lawyer and transgender rights advocate barbara findlay¹² suggests that “[t]he assumption that there exist two and only two genders in humankind is deeply entrenched in the Canadian legal system, as it is in Canadian society.”¹³ findlay acted as counsel for Ms. Kavanagh in her human rights complaint against Corrections Services Canada (CSC). findlay stresses that incarceration is particularly difficult for transgender individuals because they are held in the facility appropriate to their birth sex rather than their gender identity, except in cases in which they have had sex reassignment surgery.¹⁴ As an example of the dehumanizing attitudes of law enforcement towards transgender individuals, findlay quotes the words of a sheriff in the courtroom where Ms. Kavanagh’s human rights complaint was heard: “As far as we are concerned they are male until they get the piece of paper saying that they are female. It is that simple.”¹⁵

The facts of *Kavanagh* are as follows. Synthia Kavanagh was a male-to-female transgender woman who was housed in a men’s prison. She was born with male anatomy, but lived as a woman since she was 13 years old. In 1993, Ms. Kavanagh filed three complaints with the Canadian Human Rights Commission. At the time of her incarceration for a life term, Ms. Kavanagh had been undergoing hormone therapy. In prison, however, she was not permitted to continue this hormone therapy. The changes in her body that had manifested because of this treatment began to reverse.

Ms. Kavanagh’s human rights complaints alleged discrimination on the basis of sex and disability.¹⁶ The foundation for her disability claim was that she had been medically diagnosed with gender dysphoria. Ms. Kavanagh argued that CSC had discriminated against her by withholding hormone treatment, denying her request for sex reassignment surgery, and placing her in a male institution.¹⁷ She argued that CSC should be required to change its policies with regard to where pre-operative transgender inmates

¹¹ *Human Rights Code*, RSO 1990, c H19 s 1; *The Human Rights Code*, CCSM c H175 s 9(2); *Human Rights Act*, SNWT 2002, c 18; Bill 140, *An Act to Amend Chapter 214 of the Revised Statutes, 1989, the Human Rights Act, to Protect the Rights of Transgendered Persons*, 4th Sess, 61 General Assembly, Nova Scotia, 2012 [Bill 140].

¹² findlay deliberately spells her name without capital letters.

¹³ barbara findlay, “Transsexuals in Canadian prisons: An equality analysis” (Paper delivered at the Justice and Equality Summit, 1999) at 9, [unpublished], [findlay, “Equality analysis”].

¹⁴ *Ibid* at 19.

¹⁵ *Ibid*.

¹⁶ *Kavanagh*, *supra* note 4 at para 7.

¹⁷ *Ibid* at para 7.

were housed, suggesting that the current policy did not “acknowledge the psychological need to be imprisoned with other members of one’s psychological sex.”¹⁸ The second part of her claim alleged discrimination because sex reassignment surgery was unavailable to incarcerated individuals under section 31 of CSC’s Health Services policy.¹⁹

The Canadian Human Rights Tribunal agreed with Ms. Kavanagh that the policy of housing transgender women in male prisons had adverse effects on pre-operative transgender women.²⁰ In the Tribunal’s view, CSC had not adequately taken into account the special vulnerabilities of pre-operative transgender inmates.²¹ The Tribunal ordered that CSC develop a policy in consultation with the Canadian Human Rights Commission to ensure that transgender inmates are accommodated with reference to placement.²² However, the Tribunal also held that CSC was justified in not placing pre-operative transgender individuals in the facility that corresponds with their gender identity. In other words, while the Tribunal called for development of further policy, it also approved and affirmed the policy, which still stands, that places transgender people in prisons according to their genitals rather than their identities.

The Tribunal also held in *Kavanagh* that the absolute ban on sex reassignment surgery while in prison was not justified.²³ It required CSC to amend its policy in consultation with the Tribunal in order to allow for better access to sex reassignment surgery. Under the Commissioner’s Directive on Health Services, section 36 now states:

Sex reassignment surgery shall be considered during incarceration only when:

1. a recognized gender identity specialist has confirmed that the offender has satisfied the real life test, as described in the Harry Benjamin Standards of Care, for a minimum of one year prior to incarceration; and
2. the recognized gender identity specialist recommends surgery during incarceration.²⁴

What this means is that if a transgender inmate completes a qualifying period during which he or she lives as his or her target gender and is recommended for surgery by a specialist, sex reassignment surgery will be permitted. Section 37 of the Directive states that if the specialist determines that the surgery is an essential medical service, CSC will pay the cost of the procedure.²⁵

While there are elements of the *Kavanagh* decision that allow for increased protection and access to health services for transgender inmates, there are also elements of the decision that are problematic. Ms. Kavanagh herself, once she had undergone sex reassignment surgery, was placed in a women’s facility, as she desired. Whatever victory this entails, however, it must be remembered that the decision neglects the needs of

¹⁸ *Ibid* at para 92.

¹⁹ *Ibid* at paras 168-71.

²⁰ *Ibid* at para 141.

²¹ *Ibid* at para 166.

²² *Ibid* at para 200.

²³ *Ibid* at para 183.

²⁴ Correctional Service Canada, *Commissioner’s Directive on Health Services* CD 800 (April 18 2004), s 36.

²⁵ *Ibid*, s 37.

transgender individuals who either cannot have sex reassignment surgery or who choose not to.

Under the guise of protecting cisgender women from the threat of male bodies, transgender women who have not had sex reassignment surgery were completely denied housing in women's prisons as a result of the decision. While the Tribunal acknowledges the special vulnerabilities of transgender inmates, it is ultimately more deferential to the vulnerabilities of cisgender women. While cisgender women deserve to be free from the threat of violence or other safety concerns in all spaces, including prisons, it is notable that, in the policy that exists, this protection comes at the expense of the dignity of transgender women. It could be argued that where one is housed is not important so long as one's identity is acknowledged and respected. However, where one is housed is by its very nature a confirmation or denial of one's gender identity. To set up prisons according to the gender binary—that is, men's prisons and women's prisons—and then to assign individuals to these prisons according to genitalia is to affirm the notion that sex and gender are synonymous. This logic is at odds with the growing awareness in Canadian law and culture that the recognition of gender identity by the state is vital to human dignity. This recognition is affirmed most notably in the 2012 case of *XY v Ontario (Minister of Government and Consumer Services)*.²⁶ In *XY*, the Ontario Human Rights Tribunal held that legislation requiring a person to have “transsexual surgery” before being permitted to change the sex designation on their birth certificate is discriminatory.²⁷ The significance of *XY* is that Canadian jurisprudence is beginning to recognize the human right to self-define and be granted state recognition in accordance with one's gender identity.

It is worth examining in depth the Tribunal's logic in *Kavanagh* in order to understand how it neglects gender non-conforming individuals. In the decision, the Tribunal explores CSC's rationalization for denying pre-operative transgender individuals housing with their target gender and subjects this to the justification stage of the *Meiorin* and *Grismer* test. The Human Rights Commission, acting as intervener, argued that pre-operative transgender individuals should be housed according to gender identity. The Tribunal summarized the Commission's argument as follows:

According to the Commission, the evidence adduced by CSC to justify its refusal to allow pre-operative transsexuals to be placed in institutions that accord with their target gender is highly impressionistic. The Commission further submits that CSC's contention that pre-operative male to female transsexuals cannot be placed in female prisons because of the reaction of female inmates is extremely troubling, as it gives legitimacy to the prejudicial attitudes of others, which attitudes are based upon fear and misinformation. It is up to CSC, the Commission says, to address these discriminatory attitudes through education, and, if necessary, through improved security.²⁸

The Tribunal, however, refused to accept the suggestion that the potential negative reaction of cisgender inmates to pre-operative transgender women should be addressed through educating cisgender inmates. Instead, the Tribunal opined that the threat posed

²⁶ *XY v Ontario (Minister of Government and Consumer Services)*, [2012] OHRTD No 715, 74 CHRR D/331 [XY].

²⁷ *Ibid* at paras 14-18.

²⁸ *Kavanagh*, *supra* note 4 at para 147.

by pre-operative transgender women in women's prisons was insurmountable because of the special needs of cisgender women. To quote from the decision itself:

It...strikes us as overly simplistic to say that the female inmate population would be reacting out of fear and ignorance, and that, with a little education, they could be taught to accept an anatomically male inmate in their facility. The difficulties that female inmates have in dealing with men are based, in part on lack of knowledge, but are also based on painful life experience. It appears from the evidence that many of these women are psychologically damaged, as a consequence of the physical, psychological and sexual abuse they have suffered at the hands of men. Like transsexuals, female inmates are a vulnerable group, who are entitled to have their needs recognized and respected.²⁹

While the needs of cisgender women should be fully addressed, the needs of transgender women should not as a consequence be disregarded. It is well worth noting that Ms. Kavanagh herself, when housed in a men's prison, faced continuous harassment. Her experience of showering with male prisoners and being strip searched by male prison guards was in her words "humiliating."³⁰ Ms. Kavanagh was subject to taunting and sexual assault while housed with the general male population and tried to cut off her penis in desperation.³¹ Following these events, she served several years in segregation.³² Transgender women in such a position (pre-operative and housed with men) are realistically in a similar position to many of the cisgender women that the Tribunal wanted to protect from the threat of male bodies and male violence: these women, like their cisgender counterparts, also regularly experience living in fear of the threat of sexual assault and violence at the hands of men. However, as it stands, the prison system has yet to provide adequate protection that is not demeaning.

In the Canadian context, there is a scarcity of data about the occurrence of sexual assault committed on transgender inmates. However, in the introduction to a volume of essays on the rights of transgender individuals, Paisley Currah, Richard M. Juang, and Shannon Price Minter note the general trend of violence against transgender people that occurs in all spaces.³³ This violence is widespread, insidious, and has significance for the humanity and dignity of the transgender community at large. Currah, Juang, and Minter discuss the 2003 murder of transgender teenager Gwen Araujo, which they suggest is not an isolated event but part of a systemic mechanism of oppression which often finds its outlet in violence.³⁴ Extrapolating on these ideas, they note the gravity of violence against transgender women in the prison context:

While this epidemic of actual violence goes largely unnoticed by the mass media, it is an ever-present reality for transgender people—and especially for transgender women, who are most often the victims of such crimes. This

²⁹ *Ibid* at para 158.

³⁰ Vancouver Prison Justice Committee, "Transgender Prisoners in Canada" (July 2007), online: PASAN <http://www.pasan.org/Toolkits/Trans_Prisoners.pdf>.

³¹ *Ibid*.

³² *Ibid*.

³³ Paisley Currah, Richard M Juang & Shannon Price Minter, "Introduction" in Paisley Currah, Richard M Juang & Shannon Price Minter, eds, *Transgender Rights* (Minneapolis: University of Minnesota Press, 2006).

³⁴ *Ibid* at xiv.

vulnerability is amplified in prisons and jails, where transgender prisoners typically are housed by their birth sex and where transgender women are particularly vulnerable to rape by both fellow prisoners and guards.³⁵

Even without data recording the numbers of assaults against transgender women in Canadian prisons, it is easy to envision how they as a group are particularly vulnerable.

Within a prison environment, any individual is implicitly vulnerable because of the power imbalance at the heart of the prisoner and guard relationship. However, some individuals become more vulnerable because of the highly gendered power hierarchy that is formed in this environment, by both guards and inmates themselves. Activist and sociologist Lori Girshick comments on how prisons reinforce the gender binary in troubling ways. In her words, “Men’s prisons are set up to emasculate men, and women’s prisons are designed to reinforce dependence and passive roles for women... Female prisoners are expected to be passive, emotional, weak, submissive, and dependent.”³⁶ As Girshick’s analysis makes clear, femininity is associated with weakness and passivity, and thus becomes a basis for abuse. Placed in a men’s prison only because she has a penis, a transgender woman would likely be vulnerable to harassment and other forms of victimization because she does not fit the codes of masculinity expected by other men in the prison environment.

One of very few articles exploring the situation of transgender inmates in Canada is by Rebecca Mann, who comments on the particular problems faced by transgender inmates not only in Canada but in the American and Australian contexts as well.³⁷ Mann comments on the problems with placing transgender women within men’s prisons because of the high possibility of assault. In her words,

Genitalia-based placement puts the transgender inmate, the male-to-female transgender inmate in particular, at a significant risk of being beaten, raped, or even killed... The nature of the prison hierarchy in a male facility ranks prisoners based on their fighting ability and “manliness.” Transgender inmates are often considered “queens.” They take on traditionally feminine tasks such as doing the laundry and cleaning, and are often used for prostitution, either by choice or by being beaten into submission.³⁸

Though these particular comments are with reference to research on the American prison system, they are useful in analyzing the way that prison culture in general conforms to a hierarchical structure in which gendered violence is perpetuated on those who are deemed feminine. As I have discussed, the decision in *Kavanagh* to deny pre-operative transgender women housing in women’s prisons was done for the purpose of protecting cisgender women. However, it is notable that the Tribunal does not specifi-

³⁵ *Ibid* at xiv.

³⁶ Lori Girshick, “Out of Compliance: Masculine-Identified People in Women’s Prisons” in Eric A Stanley & Nat Smith, eds, *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Baltimore: AK Press, 2011) 191.

³⁷ Rebecca Mann, “The Treatment of Transgender Prisoners, Not Just an American Problem – A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a ‘Universal’ Recommendation To Improve Treatment” (2006) 15 Law & Sex 91 [Mann, “Treatment”].

³⁸ *Ibid* at 105.

cally contemplate the threat of violence faced by transgender women placed in men's institutions. The Tribunal notes that the vulnerabilities of pre-operative transgender inmates must be taken into account in terms of assessing placement.³⁹ However, what is glaringly lacking from its decision is an analysis of how transgender women in particular are victimized and subject to violence because they are transgender *women*. To ignore the particular gender-based vulnerability of transgender women as women, involves an implicit denial that these women are indeed women.

IV. SAVING 'REAL' WOMEN: THE RANKING OF RIGHTS AND THE BESTOWAL OF AUTHENTICITY

The Tribunal's failure to acknowledge the particular problems faced by pre-operative transgender women creates a hierarchy in which the needs of certain women (cisgender women) are ranked above the needs of other women (transgender women). The effect is to reinforce a binary whereby some women are explicitly served and others are conceptually erased. The refusal to place pre-operative transgender women in women's prisons for the purpose of protecting cisgender women is, though undoubtedly well intentioned, paternalistic at its core. It is evocative of postcolonial theorist Gayatri Spivak's famous statement about "white men...saving brown women from brown men."⁴⁰ Referring to Western concerns about the Indian practice of widow suicide in India, "white men saving brown women" has come to generally refer to the racialized paternalism that is used to justify colonialist practices in the name of liberating racialized women who, by Western standards, are seen as oppressed. In other words, the West justifies certain oppressive acts by acting in the name of liberating racialized women.

Shahnaz Khan describes how Spivak's phrase is manifest in events where Third World women are used as justification for Western intervention. Khan's analysis centres on the invasion of Afghanistan by the United States. She notes that the First Ladies of Britain and the United States both used the rhetoric of feminism in order to justify the notion that "Afghanistan needed rescuing."⁴¹ In Khan's words, "The desire to save brown women from brown men...as a strategy, or excuse if you like, for military involvement in their countries...is another example of colonial feminism."⁴² Colonial feminism is a feminism that uses the supposed weakness of women as a rationale and justification for behaviour which itself should be subject to anti-oppressive analysis. Because women are seen as naturally weak and in need of protection, it becomes easy to justify problematic acts in the name of liberating these women. Khan's analysis does not ignore the fact that Afghani women were and are subject to gender-based oppression. However, her point is to critique the West's tendency to frame particular issues in terms of essentialist and paternalistic notions about racialized women who need to be saved. The suggestion that brown women need liberation gives the public simple, emotionally

³⁹ *Kavanagh*, *supra* note 4 at para 165.

⁴⁰ Gayatri Spivak, "Can the Subaltern Speak?" in L Grossberg & C Nelson, eds, *Marxism and the Interpretation of Culture* (Chicago: University of Chicago Press, 1987).

⁴¹ Shahnaz Khan, "Afghan women: the limits of colonial rescue" in Robin L Riley, Chandra Talpade Mohanty & Minnie Bruce Pratt, eds, *Feminism and War: Confronting U.S. Imperialism* (New York: Zed Books, 2008) 162.

⁴² *Ibid* at 162.

charged content to digest, while ignoring the nuances of complex issues. If invading Afghanistan can be framed as a mission to save oppressed women, other issues, such as stories of victims and collateral damage, can be given less media attention.⁴³ Ultimately, the concept of “saving brown women” paints one group as oppressive (racialized men) through painting another group as oppressed (racialized women). The effect of this is to ignore and erase all the individuality within these groups, and to efface the fact that those doing the liberating may be contributing to oppression themselves.

I bring up Spivak and Khan’s analysis for the purposes of drawing an analogy between the practice of saving brown women from brown men and the practice of saving cisgender women from transgender women in a prison context. The cost of protecting female inmates from pre-operative transgender women is that the latter group is lumped together as an object of threat. While the Human Rights Commission argued in *Kavanagh* that the refusal to house pre-operative transgender women in women’s prisons gave legitimacy to prejudices about transgender women,⁴⁴ the Tribunal ignored this argument. Whether a pre-operative transgender woman actually constituted such a threat was not considered. The Tribunal had good intentions in not wanting to subject incarcerated cisgender women to the threat of male violence. However, it is hard to divorce the Tribunal’s logic from the stereotype-based logic that says that women should be sheltered, and that the presence of a penis entails the threat of violence. I do not dispute that a significant number of these women have been subject to physical and psychological violence by men before incarceration, as the Tribunal suggests. However, to associate pre-operative transgender women with male violence is to erase the identity and the uniqueness of these people as individuals and instead define them by anatomy and all that is associated with this anatomy.

The paternalism of the Tribunal is also strikingly similar to the logic used by opponents of transgender rights who claim that allowing transgender women to use female washrooms would mean putting cisgender women in jeopardy. A recent example of this logic occurred in October 2012 when Calgary Member of Parliament Rob Anders expressed his desire to stop Bill C-279, a private member’s bill that would add gender identity and gender expression to the *Canadian Human Rights Act* and to the hate crime section of the *Criminal Code* as protected grounds. Anders referred to the bill as the “bathroom bill” and suggested that its purpose was to give transgender women (whom he mistakenly referred to as transgender men) access to women’s washrooms.⁴⁵ Randall Garrison, who introduced the bill, criticized Anders’ comments, suggesting that they equated transgender individuals with sexual predators.⁴⁶ Sadly, the kind of rhetoric used by Anders, which suggests that transgender women are a threat to cisgender women, is not uncommon. Its logic grounds itself in protecting women, but only protecting those women it deems authentic women. It is also grounded in condescending assumptions about women needing protection; this point is evident in comments such as Anders’, which are inevitably about the threat of transgender women in women’s bathrooms, rather than transgender men in men’s bathrooms.

⁴³ *Ibid* at 173.

⁴⁴ *Kavanagh*, *supra* note 4 at para 147.

⁴⁵ “MP Rob Anders criticized over ‘bathroom bill’ comments” *CBC News* (4 Oct 2012), online: CBC <<http://www.cbc.ca>>.

⁴⁶ *Ibid*.

Before I move on from *Kavanagh*, I should note that, while the decision made clear that in Canada transgender inmates are to be housed based on their genitalia, pre-operative transgender women are not always placed with the male population. An alternative option is segregation. Mann writes of a pre-operative transgender woman who, at the time of her article, was housed at the Bath Institution, a medium security men's prison in Ontario. This woman was given a separate living area and was allowed to dress in women's clothing and wear cosmetics. However, elsewhere in her article, Mann comments on the problems with segregating transgender individuals from the general population. In her words, "segregation is a convenience for the system and only solves the problem from the prison administration's point of view, while simultaneously increasing the problems for transgender inmates."⁴⁷ Mann notes that one of the greatest problems with segregation is that it deprives inmates of human contact.⁴⁸ While placing a transgender inmate in segregation or protective custody may be done with the intention of keeping this person safe, there is an inherent dehumanization in withholding social contact.

Prison is already a restrictive space in which human dignity and comfort are compromised; to put someone in a place of isolation further strips them of dignity and comfort. In addition, to segregate one individual and not others is to differentiate that person and to define them by this difference. Segregation confirms individuals as social outcasts not only through the actual placement of them in a space outside society, but also through their conceptual placement in a space of difference. Putting individuals in a separate space not only physically removes them from social company, but also marks them as different and abnormal. Although writing in the context of the *Nixon* case, in which a transgender woman was prohibited from volunteering at a women's shelter, barbara findlay's analysis about excluding transgender women from women's spaces is fitting. As findlay explains, "It is the quintessential nature of the oppression faced by transgendered people that their gender and their right to be in, or participate in gendered spaces is constantly and derisively challenged."⁴⁹ As a solution, segregation provides advantages (increased physical safety), but also disadvantages: social isolation, marginalization, and the confirmation that those who are segregated are outside the space of normality. Rather than allowing segregation to operate as a solution to the problems faced by prison administrators, it is vital to analyze the situation of those more directly impacted by these problems—namely, the prisoners themselves.

V. TRANSGENDER BODIES AND LEGAL HISTORY

In *Transgender Jurisprudence: Dysphoric Bodies of Law*, Andrew Sharpe draws on various Western legal histories in order to analyze the way that law defines individuals by their sexual anatomy. He explores what he terms "the genitocentrism of law that is masked, at least partially, by the language of (bio)logic."⁵⁰ (Bio)logic, the assumption that bodies

⁴⁷ Mann, "Treatment", *supra* note 37 at 108.

⁴⁸ *Ibid* at 108.

⁴⁹ barbara findlay, "Real Women: *Kimberly Nixon v Vancouver Rape Relief*" (2003) 36 UBC L Rev 57.

⁵⁰ Andrew Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (London: Cavendish Publishing Limited, 2002) at 9.

define individuals, is privileged over an individual's self-definition. The body is effectively allowed to speak on behalf of the person. In other words, the supposed truth of the body is deemed more authentic and valid than the truth of how a person self-defines.

Importantly, Sharpe explores how, with this reduction of people to body parts, it is certain body parts rather than others that become the location of truth. Sharpe explores how in many significant cases, it is the genitals of an individual that are inevitably used to define that person's sex rather than any other sexual feature of that body. This is significant in that it is based in flawed logic about genitalia as the definitive marker of sex. Sharpe explains how privileging genitalia as the signifier of sex is neither legally nor medically determinative. To borrow Sharpe's words, "[I]n a manner that questions legal fidelity to science...genitalia are privileged over other factors irrespective of the specificity of (bio)logical approach."⁵¹ In other words, determining sex on the basis of one part of the anatomy is biologically insufficient at best. It is as much informed by the cultural definition of bodies as it is informed by scientific reality about bodies.

Sharpe discusses at length the English case of *Corbett v Corbett*, in which the validity of a marriage between a biologically male person, Arthur Corbett, and a post-operative transgender woman, April Ashley, was questioned. According to Justice Ormrod, the primary issue to be determined in court was the authentic sex of Ms. Ashley. As Sharpe discusses, "Ormrod J. held that *sex is determined at birth* and by a congruence of chromosomal, gonadal, and genital factors."⁵² While Justice Ormrod allows for physical criteria other than genitals to factor into a determination of sex, he makes clear that genitals are the most important factor. Sharpe notes that, of the three factors listed in the decision, Justice Ormrod held that in an event of "incongruence" (in which gonadal structure, genitalia, and chromosomes did not align in terms of male or female sex), genitalia would likely be the deciding factor used to assess sex.⁵³

Sharpe refers to a kind of legal reasoning which he terms the "ossification of the gender order."⁵⁴ This ossification occurs when courts become flexible enough to recognize transgender people as their target gender, but only if and when these individuals have had sex reassignment surgery. It is an ossification because, though it recognizes the identity of post-operative transgender people, it still rigidly defines identity in terms of genitals alone. Sharpe terms this approach the "psychological and anatomical harmony" approach.⁵⁵ In cases such as *Corbett*, courts become flexible enough to bestow post-operative transgender people legal recognition as the gender by which they self-identify. However, this approach inevitably excludes those who cannot or do not want to undergo invasive surgery to alter their genitals.

Dean Spade has rightly pointed out the problems with the legal dependence on sex reassignment surgery as the basis for identity. In his words,

[T]he reliance on medical evidence in all legal contexts in which transgender and other gender-transgressive people struggle for recognition is highly problematic... [It] is problematic because access to gender-related medical intervention is usually conditioned on successful performance of rigidly de-

⁵¹ *Ibid* at 9.

⁵² *Ibid* at 41; *Corbett v Corbett*, [1970] 2 All ER 33 at 48 Divorce Ct (Eng) [*Corbett*].

⁵³ Sharpe, *supra* note 50 at 48; *Corbett*, *supra* note 51 at 54.

⁵⁴ Sharpe, *supra* note 50 at 57.

⁵⁵ *Ibid* at 58-75.

fined and harshly enforced understandings of binary gender, because many gender-transgressive people may not wish to undergo medical intervention, and because medical care of all kinds, but particularly gender-related medical care, remains extremely inaccessible to most low-income gender-transgressive people.⁵⁶

Indeed, as Sharpe points out, the entire concept of pre-operative and post-operative people is problematic in that it creates a rigid alignment between sex reassignment surgery and authenticity.⁵⁷ Transgender people are perceived as more authentic if their genitals match their gender, a logic which places individuals in a troubling hierarchy.

In addition to *Corbett*, Sharpe explores the English case of *S-T (formerly J) v J*, in which the 17-year long marriage between Ms. S-T and Mr. J was the subject of legal question.⁵⁸ Mr. J was a transgender man who had undergone a bilateral mastectomy and was undergoing hormone treatment. However, because Mr. J lacked a penis, the court found that the marriage was, as quoted by Sharpe, a “legal impossibility.”⁵⁹ The court decided it did not even need to apply *Corbett* and its test for “psychological and anatomical harmony” to determine whether the marriage was legal. The question of whether Mr. J was a man was, to the court, not even a real question. Because Mr. J lacked a penis, the marriage was a same-sex union and thus deemed invalid by the court.

A similar sweeping genitocentrism appears in *Re the Marriage of C v D (falsely called C)*, an Australian case in which the court rejected the validity of an 11-year marriage between a biological woman and an intersex man. Sharpe explores this case in depth, noting that at birth Mr. C had a penis, an ovary, and a uterus, and what the court called “a normal female sex chromosome complement.”⁶⁰ Before his marriage, Mr. C underwent a double mastectomy, a hysterectomy, and “corrective” surgery on his genitalia, the result of which was that the court, following *Corbett*, held that he “exhibited as male in two of the three criteria.”⁶¹ Sharpe notes that, though the decision was much criticized, ultimately Mr. C’s marriage was deemed null and void because he was, in Bell J.’s words, “a combination of male and female.”⁶² Essentially, Mr. C, by being both male and female, was neither. As Sharpe notes, the result of this judgment was that Mr. C would not be able to legally marry anyone, thus effectively rendering him outside the human.⁶³ I address a comparable dehumanization below in terms of the *Forrester* case. Ms. Forrester, like Mr. C was treated with suspicion and aversion because she had features of both male and female anatomy. In Ms. Forrester’s case, it was the police rather than the courts that dehumanized her in this manner. Still, the cases are worth comparing in order to highlight a similar logic that, when faced with anatomy outside the sexual binary, treats people as if they are monstrous.

Transgender people as a group are historically marginalized and as such must be granted protection that acknowledges the ways in which they have been the objects of

⁵⁶ Dean Spade, “Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy” in Currah, Juang & Minter, *supra* note 33, 228.

⁵⁷ Sharpe, *supra* note 50 at 2.

⁵⁸ *Ibid* at 44; *S-T (formerly J) v J*, [1998] 1 All ER 431 [*S-T (formerly J)*].

⁵⁹ Sharpe, *supra* note 50 at 44; *S-T (formerly J)*, *supra* note 58 at 450.

⁶⁰ Sharpe, *supra* note 50 at 46; *Re the Marriage of C v D (falsely called C)*, [1979] 35 FLR 340 [*Marriage of C*].

⁶¹ *Marriage of C*, *supra* note 59 at 344.

⁶² Sharpe, *supra* note 50 at 46; *Marriage of C*, *supra* note 60 at 341.

⁶³ Sharpe, *supra* note 50 at 46.

discriminatory treatment. Bill 140, the *Transgendered Persons Protection Act*, proposed adding gender identity and gender expression to Nova Scotia's *Human Rights Act*.⁶⁴ On second reading in the Nova Scotia House of Assembly, MLA Leonard Preyra addressed the commonly held belief that transgender people are already granted protection in Canadian human rights law because the protected category "sex" encompasses their needs.⁶⁵ Preyra compares this belief to historical debates around whether women were encompassed by the term "persons," whether the term "man" can reasonably include women as well, and whether "sex" was sufficient to cover sexual orientation as a concept.⁶⁶ In all of these examples, the particular experiences and needs of individuals are erased in language. Their particular hardships cannot be acknowledged without the creation of linguistic and conceptual categories that recognize their distinctness as a group. "Sex" as a protected ground could theoretically grant protection to a gay person, but only in some instances. For example, if a gay woman faced discrimination by virtue of being a gay *woman*, there is an element of this discrimination that occurred because she was a woman. However, if the discrimination happened solely because of her sexuality, "sex" would be insufficient to grant her protection. Similarly, "sex" as a category is insufficient to give necessary protection to transgender individuals. There are inevitably instances when transphobic discrimination can be encompassed by the category "sex." However, as a category, "sex" is insufficient to encompass all instances where transgender people face discriminatory treatment. The recent inclusion of gender identity and gender expression in Nova Scotia's *Human Rights Act* and other protective legislation allows for a greater scope of protection. It allows for the recognition that people may be targeted not only because they are male or female, but specifically because of the way they express their gender and self-define in terms of gender. In the words of Preyra, "We want to leave no doubt in the minds of our Nova Scotian people, wherever they may be, in the eyes of the public, in the eyes of the law, that transgender people are entitled to the same human rights protection as everyone else."⁶⁷

Preyra's comments are an acknowledgement of the ways in which transgender people have been historically marginalized and oppressed because of their difference. This historical oppression is important to acknowledge in any discussion about incarceration and transgender individuals. As Findlay has pointed out, transgender people are at a higher risk of incarceration than other groups.⁶⁸ They are also at greater risk than other populations for ending up on the street as teenagers, turning to sex work, committing criminal offences, and experiencing addictions.⁶⁹ Spade also comments on systemic disempowerment of transgender people, which, from youth, means they face harassment and abuse at home, in school, and in the job market.⁷⁰ Spade notes that the adult homeless shelter system is often inaccessible to transgender individuals because most of these facilities segregate by sex and thus will not easily accommodate transgender people.⁷¹

⁶⁴ Bill 140, *supra* note 11.

⁶⁵ Nova Scotia, Legislative Assembly, *Hansard* 61st Assembly, 4th Sess. (23 November 2012) at 4258 (Leonard Preyra).

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Findlay, "Equality analysis", *supra* note 13 at 19.

⁶⁹ *Ibid.* at 19.

⁷⁰ Spade, *supra* note 56 at 219.

⁷¹ *Ibid.* at 219.

Within the prison system itself, this systemic discrimination is reinforced and perpetuated. Law professor Sarah Lamble notes that “queer, trans, and gender-non-conforming people in Canada, the United States, and Britain are frequently over-policed, over-criminalized, and over-represented in the prison system.”⁷² Lamble affirms that the system of law enforcement that already oppresses transgender people further contributes to their oppression within the prison setting:

Because most prisons divide people according to their perceived genitals rather than their self-expressed gender identity, prisoners who don’t identify as ‘male’ or ‘female’ or who are gender-non-conforming are often sent to segregation or forced to share a cell with prisoners of a different gender, often with little regard for their safety.⁷³

Prisons unquestioningly affirm and maintain the gender binary. In the American context, Wesley Ware discusses how incarcerated youth are pathologized for behaviours and appearance outside the gender binary. Ware founded BreakOUT!, a project of the Juvenile Justice Project of Louisiana that advocates for LGBTQ youth in the justice system. In his words, “Nowhere is the literal regulation and policing of gender and sexuality, particularly of low-income queer and trans youth of color [sic], so apparent than in juvenile courts and in the juvenile justice system in the South.”⁷⁴ Ware cites specific examples of how the gender expression of youth is regulated in the prison context: “In Louisiana’s youth prisons, queer and trans youth have been subjected to ‘sexual-identity confusion counselling,’ accused of using ‘gender identity issues’ to detract from their rehabilitation, and disciplined for expressing any gender-non-conforming behaviours or actions.”⁷⁵ As an example of such discipline, Ware mentions one youth who was put on lockdown for having long hair.⁷⁶ This type of regulation of gender expression implies that the state and the legal system are in a better position than the affected individuals to know who they are and to define their identities. Regardless of whether or not such dire examples of gender policing such as mentioned by Ware exist in Canadian prisons, the Canadian penal system still regulates gender by way of defining individuals by anatomy. The treatment of transgender individuals by police is yet another way in which law, through the arms of law enforcement, dehumanizes those who do not adhere to the gender binary.

VI. FORRESTER: A STORY OF 0

In Sharpe’s analysis of the genitocentrism of law, he suggests that much legal reasoning demonstrates an inability to reimagine bodies. In his words, “[the] legal preoccupation with sex reassignment surgery is...an effect of law’s inability to reimagine

⁷² S Lamble, “Transforming Carceral Logics: 10 Reasons to Dismantle the Prison Industrial Complex Through Queer/Trans Analysis and Action” in Eric A Stanley & Nat Smit, *supra* note 36, 240.

⁷³ *Ibid* at 242.

⁷⁴ Wesley Ware, “Rounding Up the Homosexuals: The Impact of Juvenile Court on Queer and Trans/Gender-Non-Conforming Youth” in Eric A Stanley & Nat Smit, *supra* note 36, 78.

⁷⁵ *Ibid* at 80.

⁷⁶ *Ibid*.

bodies. In this regard, the pre-operative or non-surgical body emerges as monstrous.⁷⁷ Sharpe's invocation of the concept of the monstrous is key. The law often treats transgender individuals as if they are outside the human. They are bodies that, because they cannot be easily defined by known binaries, are monstrous bodies.

The case of *Forrester v Peel (Regional Municipality) Police Services Board* demonstrates how Canadian law enforcement places transgender individuals in the space of the monstrous.⁷⁸ *Forrester* was heard before the Ontario Human Rights Tribunal. It concerns a complaint put forward by Ms. Rosalyn Forrester, a pre-operative transgender woman. Ms. Forrester was arrested by Ontario police and strip searched, after which she was taken to a Brampton court for a bail hearing, where she was strip searched a second time. Ms. Forrester's complaint was founded on the protected ground of sex under sections 1 and 9 of Ontario's *Human Rights Code*. The basis of this complaint was two-fold: that she was verbally harassed by police officers, and that the "split" strip search performed on her violated her rights.⁷⁹ This "split" search meant that female officers searched Ms. Forrester's torso, while male officers searched her lower body because she had a penis. Ms. Forrester alleged that she repeatedly asked for female officers to perform the search, but that her requests were not granted.⁸⁰

The decision of the Ontario Human Rights Tribunal was sympathetic to Ms. Forrester concerning her experiences. It ordered that the respondent Peel Police Services Board provide pre-operative transgender detainees a choice of whether male or female officers strip search them.⁸¹ The Tribunal heard the testimony of Dr. Andrew Joseph Toplack, an expert on mental health issues experienced by transgender individuals. Dr. Toplack stated his opinion that a "split" search did not constitute equitable treatment of transgender detainees, because of the fact that, in his words, the "most important reality is the gender identity and not the external genitalia."⁸²

The decision on the whole reflects an awareness of how Ms. Forrester's dignity would have been compromised by the nature of the searches performed on her. The Police Services Board admitted liability and suggested a new policy whereby only female officers would search pre-operative transgender women.⁸³ However, the Police Services Board wanted to include a caveat that if a female officer should express discomfort with searching a transgender woman, then she could be relieved from having to perform the search.⁸⁴ In this proposed caveat, there is a similar logic to that employed by the Tribunal in *Kavanagh*—the logic that cisgender women should be protected from transgender women. Importantly, the Tribunal rejects this caveat on the basis that to allow it would validate discriminatory treatment. In the words of the Tribunal:

To allow for the Respondent to include an "opt out" in its new Directive for some officers, would be to sanction a "chain of discrimination," namely indirect discrimination, on the transsexuality [sic] community by permitting an "opt out" of an involuntary service performed on them, where no equivalent

⁷⁷ Sharpe, *Transgender Jurisprudence*, *supra* note 50 at 7.

⁷⁸ *Forrester*, *supra* note 5.

⁷⁹ *Ibid* at para 1.

⁸⁰ *Ibid*.

⁸¹ *Ibid* at para 25.

⁸² *Ibid* at para 87.

⁸³ *Ibid* at para 36.

⁸⁴ *Ibid*.

“opt out” is provided when the service is performed on anyone else, yet alone any other distinct and insular minority, which has suffered from historical disadvantage.⁸⁵

To allow a police officer to refuse to perform her duty because of fear or disgust of the body she has to search would be tantamount to institutionalized transphobia. The Tribunal ordered that the only time when an officer would be allowed to opt out would be when an officer has *Charter* or human rights interests of her own to protect, which would have to be documented and authorized by the officer in charge.⁸⁶

While the Tribunal in *Forrester* expressed aversion to validating transphobia in law, what is disturbing about the case is the documented treatment of Ms. Forrester by the police officers that dealt with her. The reactions of these officers, taken from cross-examinations and from their notes, are recorded in the decision itself. While it is vital to note that some of the officers who were examined expressed genuine awareness and respect for Ms. Forrester’s dignity, others either were not sure how to treat her or treated her in an overtly undignified manner, particularly in terms of the language they used to refer to her. Concern for the well-being of Ms. Forrester herself was strikingly absent from some of the officers’ recorded comments. This is especially troubling given the invasive and implicitly derogatory nature of a strip search itself, which Angela Davis has likened to sexual abuse of prisoners.⁸⁷

Some of the officers encountered by Ms. Forrester were unabashedly discriminatory in their responses to her. For example, Special Constable Charles Boersma referred to Ms. Forrester in his notes by the derogatory term “he/she.”⁸⁸ Constable Aaron Sveda similarly referred to Ms. Forrester in his notes as “him/her.”⁸⁹ Such terms exhibit at best a significant ignorance about transgender issues, and at worst a wilful interest in dehumanizing Ms. Forrester through language. In addition to the transphobic language used by the officers, it is notable that both Constable Sveda and another officer testified that Ms. Forrester was belligerent and verbally hostile when facing the police.⁹⁰ Though in the case there is no allegation of racialized treatment of Ms. Forrester, a black woman, it is well worth questioning to what degree the assessment of Ms. Forrester as hostile and abusive was informed by racial stereotypes about the aggressiveness of black women.

One of the most noteworthy instances of transphobic language by police was the use of a simple “0” on an official police document filled out when Ms. Forrester was taken into custody. This “0” was used to signify Ms. Forrester’s sex. Detective Sergeant Sue Watson, when questioned why Ms. Forrester’s sex was marked as “0” on this document, testified that she assumed it meant “other,” but could not say for certain.⁹¹ Ms. Forrester’s own response to this “0,” is worth quoting at length:

As a woman, I wasn’t being respected as a woman, and was being told I wasn’t a woman, or in some documents my sex was “zero”—what does that

⁸⁵ *Ibid* at para 463.

⁸⁶ *Ibid* at para 74.

⁸⁷ Angela Y Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003) at 81.

⁸⁸ *Forrester*, *supra* note 5 at para 222.

⁸⁹ *Ibid* at para 306.

⁹⁰ *Ibid* at paras 263 and 307.

⁹¹ *Ibid* at para 285.

mean, I'm a thing? It's horrendous to be—I don't know how to describe how I felt, completely put out there, so everybody could see how I felt about what happened to me...I guess the best word I can come up with is "brutalized."⁹²

To be marked down as either "zero" or "other," depending on how the "0" is interpreted, entails a significant erasure of fundamental human dignity. It is to be relegated to the monstrous, the subhuman, and the unrecognizable. Though the Tribunal distances itself from the officers' transphobic comments and treatment of Ms. Forrester, it is notable how a similar logic still informs much Canadian law—that is, a logic which suggests transgender individuals (especially pre-operative transgender individuals) are neither authentically male nor female, but exist in a category outside. This category is marked only by its difference: it is outside, foreign, unnatural. Those within this category must be dealt with through isolation, segregation, and scrutiny.

Though sexual orientation and gender identity are not the same and should not be conflated, some parallels can be drawn between the treatment of gay men and lesbians and the treatment of transgender people. Martha Nussbaum's work on sexual orientation and constitutional law in an American context is helpful in that it defines what she terms a "politics of disgust."⁹³ According to Nussbaum, this politics of disgust, by which homosexuality is conceptually linked with bodily waste and objects of contempt, has formed the basis for much anti-gay sentiment and anti-gay law. Nussbaum discusses how lawmakers have cited disgust in order to rationalize various legal restrictions, such as sodomy laws and laws against same-sex marriage.⁹⁴ As one example of the politics of disgust, Nussbaum explores how in 1950s England Lord Patrick Devlin advocated the view that "the disgust of the average member of society was a sufficient reason to make a practice illegal, even if it caused no harm to nonconsenting third parties."⁹⁵

Though Nussbaum does not discuss gender identity, it is evident from the cases discussed in this essay that a similar politics of disgust informs the treatment of transgender individuals. The dehumanizing treatment of Ms. Forrester by law enforcement officers, for example, bears witness to how our system of justice classes some individuals as less than human. The recorded statements of these officers demonstrate a wilful refusal to see Ms. Forrester as a full human being. They reduced Ms. Forrester to either "zero" or "other," neither of which allows room for a recognition of a fellow person deserving of dignity. Susan Stryker, a professor of Gender Studies at the University of Arizona, discusses how the transgender body has been historically connected with the idea of monstrosity. In Stryker's words,

I am not the first to link Frankenstein's monster and the transsexual body. [Feminist theologian] Mary Daly makes the connection explicit by discussing transsexuality in "Boundary Violation and the Frankenstein Phenomenon," in which she characterizes transsexuals as the agents of a "necrophilic invasion" of female space... Janice Raymond, who acknowledges Daly as a formative influence, is less direct when she says that "the problem of trans-

⁹² *Ibid* at para 361.

⁹³ Martha Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (Oxford: Oxford University Press, 2010) at xiii.

⁹⁴ *Ibid* at xiii, 2-12.

⁹⁵ *Ibid* at xiii.

sexuality would best be served by morally mandating it out of existence,” but in this statement she nevertheless echoes Victor Frankenstein’s feelings towards the monster: “Begone, vile insect, or rather, stay, that I may trample you to dust. You reproach me with your creation.”⁹⁶

Stryker’s analysis demonstrates how transphobia is, at its root, a fear about bodies that cannot be easily classified. In the case of Ms. Forrester, the transgender body is subject to ridicule and even erasure (that is, made a zero) because it is not recognizable to the officers examining her.

Stryker’s examples of Daly and Raymond demonstrate how transphobia exists not only in traditionally conservative forums, but also arises from feminist camps. Mary Daly’s notion of “necrophilic invasion” is rooted in the fear that transgender women will corrupt spaces reserved for real women. Daly, though an advocate of women’s rights, did not extend her advocacy to transgender women, whom she viewed with disdain. Daly’s notion of “invasion” invites comparison to the reasoning in *Kavanagh*, in which it is made clear that transgender women who have not had sex reassignment surgery will not be housed in prisons with other women; separate spaces must be maintained. Though the intention on the part of both Daly and the Ontario Human Rights Tribunal is to protect women, the effect is to regulate who does and who does not constitute a valid woman. It is a way of policing the boundaries of gender and, in doing so, rigidly excluding those whose anatomy places them outside comfortably established categories.

Daly’s invocation of necrophilia also invites comparison to Ms. Forrester’s relegation to a zero. Daly’s use of necrophilia as a concept suggests that, to her, the transgender body is an empty body without moral or spiritual value. It is a body without human value or content, a lifeless body. Janice Raymond’s comments, also cited by Stryker, above, are also evocative of the ominous “0” in *Forrester*, in that they call for “mandating [transsexuality] out of existence.” It could certainly be argued that the police in *Forrester* did exhibit the level of conscious transphobia shown by Raymond and Daly. One could say that their responses to Ms. Forrester were because of ignorance rather than hatred. However, the behaviour of the police was informed by a mindset that, if not similar in severity to Raymond and Daly, is at least similar in genesis. It is a mindset that sees unrecognizable bodies as the objects of fear and threat. To draw on Nussbaum, it is a clear illustration of the politics of disgust.

VII. XY: THE BEGINNINGS OF CHANGE

XY v Ontario (Minister of Government and Consumer Services) is not related to incarceration, but is worth examining because of its significant implications in terms of transgender jurisprudence in Canada. XY represents a significant victory for transgender rights in Canada through the unhinging of anatomy from gender in a state-administered context. The issue in XY was brought forth by XY, a transgender woman. It concerned

⁹⁶ Susan Stryker, “My Words to Victor Frankenstein above the Village of Chamounix: Performing Transgender Rage” in Susan Stryker and Stephen Whittle, eds, *The Transgender Studies Reader* (New York: Routledge, 2006) 245.

whether section 36 of the *Vital Statistics Act (VSA)*, which required that an individual have “transsexual surgery” before being able to change the sex designation on his or her birth certificate, was discriminatory under sections 1 and 11 of Ontario’s *Human Rights Code*.⁹⁷ In 2008, XY obtained a bilateral orchiectomy (the removal of both testicles) in order to meet the requirement of “transsexual surgery” under the *VSA* and have the sex on her birth certificate changed.⁹⁸ XY’s decision to have this procedure done was in part because of the requirement under the *VSA*.⁹⁹ XY felt compelled to alter her body in order for her gender to be recognized. A birth certificate, which is the foundation for obtaining many other documents, such as passports, is a vital means of recognition by the state. Its inability to reflect an individual’s authentic identity not only causes inconvenience but can be the foundation for discriminatory treatment beyond the document itself. XY testified that she had significant fears of assault and discrimination in employment and housing situations when presenting herself as a woman but showing identification that marked her as male.¹⁰⁰

The Ontario Human Rights Tribunal, which heard the case, held that the requirement under the *VSA* was discriminatory on the basis of the protected grounds of sex and disability.¹⁰¹ The Tribunal held that section 36 of the *VSA* resulted in “distinct and disadvantageous treatment of the applicant on the basis of her status as a transgendered person.”¹⁰² Furthermore, the Tribunal noted that the requirement that Ontario birth certificates reflect an individual’s birth sex unless this person has had “transsexual surgery,” was “substantively discriminatory because it perpetuates stereotypes about transgendered persons and their need to have surgery in order to live in accordance with their gender identity.”¹⁰³ To paraphrase, the requirement for surgery effectively designated some transgender people as authentic and some as inauthentic. In the words of Tribunal,

The message conveyed [through s 36 of the *VSA*] is that a transgendered person’s gender identity only becomes valid and deserving of recognition if she surgically alters her body through “transsexual surgery.” This reinforces the prejudicial view in society that, unless and until a transgendered person has “transsexual surgery,” we as a society are entitled to disregard their felt and expressed gender identity and treat them as if they are “really” the sex assigned at birth. After all, if the law says that a transgendered woman is not “female” until she has had and proved that she has had “transsexual surgery,” how can we expect more from citizens at large?¹⁰⁴

XY raised this point at the Tribunal, testifying that she felt insulted and degraded because the truth of her gender was judged only in accordance with her genitals.¹⁰⁵

Many of the statements made in the XY decision are significant in terms of their recognition of the importance that the state and the law affirm an individual’s right to

⁹⁷ XY, *supra* note 26 at paras 1-5.

⁹⁸ *Ibid* at headnote.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid* at para 124.

¹⁰¹ *Ibid* at para 14.

¹⁰² *Ibid*.

¹⁰³ *Ibid* at para 15.

¹⁰⁴ *Ibid* at para 172.

¹⁰⁵ *Ibid* at para 72.

self-determine his or her identity. The Tribunal recognized that the surgical requirement of section 36 of the *VSA* further disadvantages an already disadvantaged group and unjustifiably requires members of this group to undergo intrusive and painful surgery in order to have their gender identity recognized on such a vital state document.¹⁰⁶ While some transgender people desire sex reassignment surgery, many do not. To use surgery as the basis for recognition means denying and invalidating the core identity of many individuals.

I have drawn on the *XY* case in order to demonstrate how Canadian jurisprudence is moving away from the historical tradition of defining people in accordance with their genitals. Though it is difficult to conceive of a prison system that does not adhere so rigidly to the gender binary, it is vital to question how prisons can and must better serve the needs of transgender inmates. The decision in *Kavanagh*, while advancing some elements of transgender rights, was also rigid in defining individuals in terms of their sexual anatomy. Through the inclusion of gender identity and gender expression in the *Human Rights Codes* of four provinces and the decision in *XY* that state recognition of gender is not dependent on genitals, transgender rights are gaining momentum in Canada. What this will mean for incarcerated transgender women is not easy to predict.

As a recent human rights case, *XY* represents the right of transgender people to be treated with dignity and granted due recognition under the law. However, another recent human rights case, *Nixon*, privileges the right of cisgender women to be protected from transgender women. If a case like *Kavanagh* were heard today, in which a pre-operative transgender woman challenged her placement in a male prison, the logic of *XY* would clash with *Nixon*. I am not suggesting that these two cases would necessarily be cited in this scenario; however, for the purposes of this paper, they epitomize two camps of thought that would likely be in issue if a similar case arose. The logic of *XY* recognizes an individual's right to be acknowledged by the state as his or her lived gender. It also demonstrates an awareness of the power the state has to legitimize identity through its recognition and how this power can either confirm or compromise one's dignity. The logic of *Nixon*, however, recognizes the rights of cisgender women to be protected from transgender women because of past experiences with male violence.

In theory, *Forrester* represents a compromise where these two logics can be reconciled. While the Tribunal in *Forrester* refused to allow the Police Services Board an "opt out" clause, by which female officers would not have to strip search pre-operative transgender women, it did allow for special circumstances in which a cisgender woman officer could opt out if her own *Charter* or human rights interests were compromised.¹⁰⁷ Such a scenario might arise when such an officer had in her past experienced male violence and would be negatively affected by having to perform a search on or near male anatomy. The Tribunal in *Forrester* recognized that there might be cases in which cisgender women need and should have protection. However, it did not allow transgender individuals' rights to be compromised solely because of the possibility that cisgender women could feel discomfort. The Tribunal in *Forrester* recognized that there are some instances where the agenda of protecting women is based in actual, documentable need, but there are other instances where this agenda could be used to legitimize transphobic fears through problematic law and policy. Genital-based placement in prisons does not sufficiently distinguish between these two bases. Current policy still defines individuals

¹⁰⁶ *Ibid* at para 176.

¹⁰⁷ *Forrester*, *supra* note 5 at para 74.

by sexual anatomy, thus lending credence to the essentialist notion that what is between a person's legs should speak for and define that person. This logic reduces people to but one aspect of their bodies and, in doing so, erases an aspect of identity that is one of the most fundamental parts of human identity.