

Recasting Encounters Between Women and the Transgendered:
A Sensitive Analysis of *Nixon v. Vancouver Rape Relief Society*

by

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BA, University of Calgary, 2003

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Abstract

In *Nixon v. Vancouver Rape Relief Society*, a legal case involving the exclusion of a male-to-female transsexual from a volunteer position with a women-only organization, the question of *what a woman is* is one of the central questions being addressed. Questions of this kind place significant limits on cases like *Nixon* that involve women-only organizations and transgendered persons, since they can only address the place of women, and not the transgendered, in an organization like Rape Relief. This thesis examines two of the decisions that have emerged from *Nixon* – *Nixon v. Vancouver Rape Relief Society* and *Vancouver Rape Relief Society v. Nixon* – in order to account for their shared investment in determining *what a woman is*. It then utilizes select writings of Jacques Derrida, Michel Foucault and Emmanuel Levinas to consider how the discussion taking place in *Nixon* might be recast in a manner that better accounts for the claims of women *and* the transgendered, enabling a responsive encounter between the one and the other.

Table of Contents

Abstract	iii
Table of Contents	iv
Acknowledgments	v
Prelude	1
Introduction: "Do we <i>truly</i> need a <i>true</i> sex?"	2
I. A question of <i>what a woman is</i>	10
<i>i. Nixon v. Vancouver Rape Relief Society</i>	11
<i>ii. Vancouver Rape Relief Society v. Nixon</i>	17
<i>iii. Two cases, one question: of what a woman is</i>	21
II. Inclusions, exclusions, and their implications	24
<i>i. Women-only organizations: distinguishing and empowering</i>	25
<i>ii. Transgendered persons: the affects of being otherwise</i>	31
<i>iii. Towards responsive encounters between women and the transgendered</i>	36
III. Responsivity: Derrida, Foucault, Levinas	39
<i>i. Jacques Derrida: a decentered encounter</i>	40
<i>ii. Michel Foucault: an implicated way of life</i>	48
<i>iii. Emmanuel Levinas: a responsive relationship</i>	56
IV. Between women and the transgendered	63
<i>i. Recasting encounters between women and the transgendered</i>	64
<i>ii. The broader social significance of gender identity</i>	70
Bibliography	73

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Prelude

Since these concepts are indispensable for unsettling the heritage to which they belong, we should be even less prone to renounce them. Within the closure, by an oblique and always perilous movement, constantly risking falling back within what is being deconstructed, it is necessary to surround the critical concepts with a careful and thorough discourse – to mark the conditions, the medium, and the limits of their effectiveness and to designate rigorously their intimate relationship to the machine whose deconstruction they permit; and, in the same process, designate the crevice through which the yet unnameable glimmer beyond closure can be glimpsed.

- Jacques Derrida, *Of Grammatology*

Introduction: “Do we *truly* need a *true* sex?”

In an introduction to *Herculine Barbin: Being the Recently Discovered Memoirs of a Nineteenth-Century French Hermaphrodite*, Michel Foucault begins by posing the following question: do we *truly* need a *true* sex?¹ At first glance, Foucault appears to be questioning the arbitrary manner in which one assumes a true sex, and the memoirs that follow Foucault’s introduction support this first impression. The memoirs tell the story of a young woman named Alexina, who through a series of incidents involving her community, including the religious, legal, and medical establishments that operate within it, is later found to be a man, and unable to adapt to this new identity, finally commits suicide. Alexina’s memoirs, and moreover Foucault’s question, are an indictment against the unnecessary limits imposed on people, which incite them to acknowledge and affirm their *true* sense of self. Yet this indictment is also accompanied by an account of the social apparatus invested in this *true* sense of self – the religious, legal and medical institutions that incite people such as Alexina to acknowledge and affirm what they *truly* are.² And so Foucault’s question ultimately leads to a second, and certainly more complicated

¹ Foucault, Michel. *Herculine Barbin: Being the Recently Discovered Memoirs of a Nineteenth-Century French Hermaphrodite*. New York: Pantheon Books, 1980, vii.

² “Biological theories of sexuality, judicial conceptions of the individual, forms of administrative control in modern nations, led little by little to rejecting the idea of a mixture of the two sexes in a single body, and consequently to limiting the free choice of indeterminate individuals. Henceforth, everybody was to have one and only one sex. Everybody was to have his or her primary, profound, determined and determining sexual identity; as for the elements of the other sex that might appear, they could only be accidental, superficial, or even quite simply illusory.” See *Ibid*, viii.

question: *how* is it that we *truly* need a *true* sex? Or more precisely, what is at stake in the ways we understand ourselves, where our notions of self are inextricably bound to the particular social frameworks in which they emerge?

It is this second set of questions that motivates the present study – a study concerned with how people understand themselves and the implications of this understanding for how they then respond to the conditions that make them *what they are*. Certainly, the difference between these initial questions is minute; however the implications for how one then understands and responds to the story of Alexina, and indeed other stories of this kind, is significant. Whereas the question of *do we truly need a true sex?* leads to either an affirmative or a negative response, a “yes” or a “no”, the question of *how is it that we truly need a true sex?* incites an examination of the conditions that make these truths necessary, thereby enabling a critical analysis impossible with the former. Rather than affirming or negating the arbitrary conditions through which *truth* emerges, this second approach requires engaging with these conditions, appreciating how they structure the lives of those within them, if only to undermine them with greater sensitivity. Asking *how* truth emerges demands that one investigate *how* society functions, after which it is then possible to interrogate, challenge and transform the conditions through which *truth* emerges as it does.

And so it is with this second line of questioning that this study approaches a particular set of court decisions, *Nixon v. Vancouver Rape Relief Society* and its judicial review, *Vancouver Rape Relief Society v. Nixon*, in order to better appreciate

the questions and concerns that motivate these decisions and the claims that gave rise to them. At issue here is the exclusion of a male-to-female transsexual named Kimberly Nixon from a peer-counseling position with Vancouver Rape Relief Society, on the grounds that only a woman, born and raised as such, could carry out the requirements of the position.³ That Nixon is recognized legally as a woman makes this exclusion problematic; yet further complicating the exclusion is the fact that Rape Relief is entitled, under certain circumstances, to make exclusions of this kind. As a women-only organization whose primary purpose is promoting the interests and welfare of women as an identifiable group, Rape Relief is entitled under the BC Human Rights Code to provide preferential treatment to members of this identifiable group.⁴ And consequently, *Nixon* revolves around questions concerning *what a woman is*, what this distinction means in this particular context, and how this distinction of *what a woman is* is determined in the courts.

That *what a woman is* has the importance that it does for Nixon and for Rape Relief suggests that attention cannot be devoted solely to *Nixon* and its accompanying decisions – here it is also necessary to account for the wider implications of *what a woman is* for women-only organizations and transgendered persons. For an organization like Rape Relief whose primary purpose is promoting the interests and welfare of women as an identifiable group, it is necessary to

³ As noted in *Nixon*: “Rape Relief submits that its rationale for removing Ms. Nixon from the training session was that only a woman, born so, and who grew up understanding what it means to be a girl and a woman in an oppressive society, could understand Rape Relief’s political view of male violence and, therefore qualify as a ‘peer’ for Rape Relief’s purposes.” See *Nixon v Vancouver Rape Relief Society* [2002] BCHRT 1, 44.

⁴ *Ibid*, 208-212.

distinguish *what a woman is* in order to facilitate the services and activities exclusive to the organization in question. Similarly, people like Nixon who wish to contest the exclusionary practices of these organizations can do so only by identifying as women and then demanding inclusion on this basis. In cases such as *Nixon*, both women-only organizations and transgendered persons are required to identify as women in order to make their respective claims for inclusion or exclusion. And in this respect, the conflict taking place in *Nixon* demonstrates how both women-only organizations and transgendered persons are invested in *what a woman is* as well as the ongoing negotiation of this distinction in the courts.

Here in the words of Judith Butler, “the dilemma with which we are faced in the end has to do with the terms by which social recognition is constrained.”⁵ Yet it is important to recognize that these constraints have different implications for Nixon and for Rape Relief. For organizations that provide services exclusive to women, *what a woman is* serves as the basis for their exclusivity and the particular forms of empowerment that this exclusivity affords them. Here *what a woman is* is necessary for engaging in these kinds of practices, as well as for contesting them in the courts, and for this reason the question of *what a woman is* is one with practical implications for Nixon and for Rape Relief. These implications, however, are considerably different for people like Nixon who, set apart from women, often are unable to contest the exclusionary practices to which they are subjected. If *what a woman is* is necessary for making claims in cases such as *Nixon*, either for inclusion or exclusion, the inability to identify as a woman comes at a significant cost. And for Nixon, and

⁵ Butler, Judith. *Undoing Gender*. New York: Routledge, 2004, 100.

indeed other transgendered persons, the failure to identify as a woman results in an incapacity to respond in instances where they are set apart from women, excluded from spaces and services available to those identified as such.

Nixon therefore poses a problem that cannot be addressed solely in reference to *what a woman is*, or for that matter the terms of inclusion and exclusion that currently limit the discussion taking place in this case. By limiting the discussion to *what a woman is*, courts cannot account for the unique affects of exclusionary practices on people like Nixon, who often are subject to exclusions for no other reason than failing to conform to predetermined notions of *what a woman is* or should be.⁶ This does not deny the importance of *what a woman is* or matters of inclusion and exclusion, which clearly have significant implications for women-only organizations and transgendered persons in cases such as *Nixon*. However, by limiting the discussion to these terms, courts cannot account for the particular dynamics involved in cases such as *Nixon*, which not only concern the place of women in women-only organizations, but also those identified otherwise, who nonetheless lay claim to these organizations and the services they provide. Here it is necessary to ask a different set of questions that account for both women *and* the transgendered, set apart from one another, and for this reason requiring their own consideration by the courts. And it is these kinds of questions that this study poses as a possible way towards another discussion than the one evidenced by *Nixon*, which remains limited to the question of *what a woman is*.

⁶ findlay, barbara. *An Introduction to Transgender Women*. Aug. 2000. Law Office of barbara findlay, Q.C. 6 Nov. 2003 <<http://www.barbarafindlay.com>>, 13.

Such questions cannot be posed, however, without first making changes to the existing legal framework, and so, in addition to examining the limits of the discussion taking place in *Nixon*, this study explores the possibilities that exist for recasting this dispute in a manner that better appreciates the unique circumstances that underlie conflicts between women-only organizations and transgendered persons. Again, under current conditions, courts cannot account for the claims of the transgendered *as* transgendered, which renders those identified as such incapable of responding in instances where they are set apart from men and women. As a result, there are efforts underway to establish a new ground for making discrimination claims, entitled gender identity, which does not require claimants to identify as either men or women in order to make their claims in cases such as *Nixon*. Gender identity would shift the discussion in a manner that acknowledges the distinct claims of those on both sides of the dispute – men and/or women, as well as those identified otherwise. And in this respect, the importance of gender identity lies in the different dynamics it would foster in cases like *Nixon*, allowing women and the transgendered to meet on the ground of their differences and then recast these differences in light of their unique implications in cases such as this.

In order to further account for this shift in dynamics, this study draws on select writings of Jacques Derrida, Michel Foucault and Emmanuel Levinas – all of which demonstrate a shared interest in limits and how they are contested and negotiated by and between those who are subject to them. Indeed, questions concerning limits lie at the core of the dispute taking place in *Nixon*, and gender identity is one attempt to think through the implications of limits in cases such as

this. One of the significant aspects of gender identity is that it offers possibilities for those who evade conventional modes of identification to respond in instances where they are set apart as such. Gender identity would not, however, situate the transgendered beyond the reach of men and women – on the contrary, it would ensure that men and women were an essential consideration in cases such as *Nixon*. Set apart from one another in response to one another, indeed as the *one-for-the-other*,⁷ women and the transgendered would be able to engage with one another at the point of difference that at one and the same time separates and implicates them. And as Derrida, Foucault and Levinas suggest, each in their own way, it is here at this point of difference that women and the transgendered could then undertake the difficult yet necessary task of negotiating between their respective positions, mindful of their implications in cases like *Nixon*.

Consequently, this study assumes this point of difference as a starting point for reflecting on *Nixon*, and utilizes the conceptual tools provided by Derrida, Foucault and Levinas to trace out the contours of this dispute, as well as the possibilities that exist for a more responsive encounter between women and the transgendered than are currently possible within the terms of the existing legal framework.⁸ Again, as *Nixon* demonstrates, there are clear limits to the kinds of

⁷ Levinas, Emmanuel. *Otherwise than Being or Beyond Essence*. Pittsburgh: Dusquesne University Press, 2002.

⁸ Following Foucault's analysis of power relations, this approach "consists in taking the forms of resistance against different forms of power as a starting point. To use another metaphor, it consists in using this resistance as a chemical catalyst so as to bring to light power relations, locate their position, find their point of application and the methods used. Rather than analyzing power from the point of view of its internal rationality, it consists of analyzing power relations through the antagonism of

discussions can take place in cases such as this, limited as they are to the question of *what a woman is*; and furthermore, these limits have practical implications for those involved in these disputes that cannot be taken lightly. The question that then emerges is how the courts might better account for the unique dynamics that exist in cases such as *Nixon*, here involving women-only organizations *and* transgendered persons, who find themselves mutually implicated in their conflicted interactions with one another. And the contention being made here, supported by the writings of Derrida, Foucault and Levinas, is that it is *between* women and the transgendered that it would be possible to recast their interactions with one another, sensitive to the implications that this recasting would have for those involved in *Nixon* and other cases involving women and the transgendered.

strategies.” See Foucault, Michel. “The Subject and Power.” *Power*. Ed. James Faubion. New York: The New Press, 2000, 329.

I. A question of *what a woman is*

What is remarkable about the decisions that have emerged from *Nixon* is that, in spite of their differences, these decisions share between them an interest in *what a woman is* and the conditions under which it is possible to identify as such. The complaint on which these decisions are based arose from a relatively simple act of exclusion, in which Kimberly Nixon, a male-to-female transsexual, was expelled from a volunteer training program with Vancouver Rape Relief Society, on the grounds that only a woman, born and raised as such, could effectively carry out the requirements of the position. From this seemingly simple act of exclusion emerged a complex discussion on *what a woman is* – a distinction with great implications for organizations like Rape Relief and people such as Nixon. The discussion taking place in *Nixon* addresses the conditions under which it is possible for people to identify as women, included in or excluded from the membership of an organization like Rape Relief. And in this respect, the contrasting decisions of the BC Human Rights Tribunal and the BC Supreme Court, ruling first in Nixon's favor and later in Rape Relief's, both operate within the space of a single question, concerned with *what a woman is* and the implications of *what a woman is* for those identified as women or transgendered.

This chapter traces out the discussion that passes through these decisions and their respective rationales in order to identify their shared investment in *what a woman is*, along with the importance of this distinction for women-only organizations and transgendered persons. For this reason, a critical comparison or

evaluation of these decisions is not essential here, regardless of how important such undertakings might be. The contrasting decisions arrived at by the Tribunal and the Supreme Court – each contestable and recently contested in the BC Court of Appeal⁹ – should not obscure the common problematic in which they operate, where Nixon’s self-identification conflicts with Rape Relief’s exclusionary privileges as a women-only organization. *Nixon* demonstrates the degree of investment that lies in *what a woman is*, both for Nixon and for Rape Relief, as well as the courts adjudicating their dispute. And so it is to *Nixon v. Vancouver Rape Relief Society* and *Vancouver Rape Relief Society v. Nixon* that this study turns in order to identify this shared investment in *what a woman is*, which brings together these contrasting decisions, as well as the respective claims of Nixon and of Rape Relief.

i. Nixon v. Vancouver Rape Relief Society

The events that gave rise to the complaint were themselves seemingly straightforward and not debated by either Nixon or Rape Relief. In 1995, Nixon responded to an advertisement posted by Rape Relief requesting female volunteers willing to be trained as peer-counselors for victims of male violence, with the only requirements being the acceptance of Rape Relief’s stated political beliefs and, of

⁹ At the time of this study’s submission, the BC Court of Appeal ruled in favor of Rape Relief, stating that Rape Relief “was entitled to exercise an internal preference in the group served, to prefer to train women who had never been treated as anything but female.” See *Vancouver Rape Relief Society v. Nixon* [2005] BCCA 601.

course, being a woman.¹⁰ After a pre-screening interview and having accepted these beliefs, Nixon was then invited to attend the next available training session for the position. However, upon attending the training session, one of the facilitators identified Nixon as someone who had not always been a woman, and requested that she leave the training session. Rape Relief emphasized that Nixon's qualifications as a counselor were not the reason she was asked to leave, but rather the fact that she was not born a woman, and that only a woman "oppressed since birth" could fulfill the role of a peer-counselor.¹¹ Soon afterwards, Nixon made a complaint to the BC Human Rights Commission, claiming she was discriminated against on the basis of sex.¹²

That Nixon is medically and legally a woman, having undergone a complete transition to her target gender, would appear to support her claim that an organization like Rape Relief could not treat her otherwise. However, the status of Rape Relief as a women-only organization complicated the complaint in significant ways; as an organization with a primary purpose of promoting the interests and welfare of an identifiable group or class of persons, Rape Relief is entitled under

¹⁰ These political beliefs include: 1. Violence is never a woman's fault; 2. Women have the right to choose to have an abortion; 3. Women have the right to choose who their sexual partners are; and 4. Volunteers agree to work on an on-going basis on their existing prejudices, including racism. See *Nixon v. Vancouver Rape Relief Society*, 23.

¹¹ *Ibid*, 31.

¹² Nixon's complaint was initially amended to include an allegation that Rape Relief's policy of restricting volunteer opportunities to women who were born women discriminated against transgendered women, and also against women whose appearance might cause staff or clients to believe that they were, or had been, a man; however, these amendments were later abandoned. See *Ibid*, 2.

section 41 of the BC Human Rights Code to make distinctions of this kind – permitting preferential treatment in instances where it is necessary to further the fundamental objects of the organization. Section 41 states that: “If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by... a common... sex... [or] political belief, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.”¹³ And so determining whether or not Nixon was discriminated against required the courts to consider not only Nixon’s status as a woman, but also Rape Relief’s entitlement under the Code to determine *what a woman is* for the purposes of promoting the interests and welfare of women as an identifiable group.

Rape Relief argued that its ability to determine *what a woman is* was necessary to carrying out its expressed purposes, and therefore justified the exclusion of people such as Nixon. Again, Rape Relief did not dispute Nixon’s qualifications as a counselor, but contended that “only a woman, born so, and who grew up understanding what it means to be a girl and a woman in an oppressive society, could understand Rape Relief’s political view of male violence, and therefore qualify as a ‘peer’ for Rape Relief’s purposes.”¹⁴ This experience was deemed necessary for the work they do, and according to Rape Relief, no amount of effort on their part could

¹³ Ibid, 208-212.

¹⁴ Ibid, 44.

compensate for this deficiency in life-experience.¹⁵ For this reason, Rape Relief contended that its volunteer work was subject to a bona fide occupational requirement of this life-long experience as a woman, and furthermore that any attempts to accommodate those deficient in this life-experience would lead to undue hardship on the behalf of Rape Relief.

To support this contention before the BC Human Rights Tribunal, Rape Relief drew on testimonies of medical professionals and members of its own collective to argue that such deficiencies in experience could be determined, and moreover shown to be detrimental to the work of Rape Relief. Particularly in the testimony of Dr. Ingrid Pacey, a psychiatrist with expertise in the treatment and counseling of assault victims, deficiencies in life-experience were claimed to have troubling affects for victims of male violence, and were for this reason a vital consideration for an organization such as Rape Relief.¹⁶ According to Pacey, gender reassignment would not address the years spent as a man, confused between their inner and outer selves, and this experience would undoubtedly affect the dynamics of counseling activities.¹⁷ Especially for women responding to the effects of male violence, where maleness is often perceived to be a threat, such confusion could

¹⁵ "Rape Relief submits that lifelong experience of being treated as a female, and no experience as being treated as a male, is reasonably necessary for the work they do. Further, they submit that the usual forms of accommodation such as, equipment, money, training or reorganization of work, cannot solve that deficiency in life experience. They submit that the only possible accommodation for Ms. Nixon was on the house funding committee where others who support Rape Relief's political views, but who do not have the appropriate life experience, are accommodated." See Ibid, 200.

¹⁶ Ibid, 152-162.

¹⁷ Ibid, 158.

undermine attempts to respond to these effects, and further disturb women already traumatized by male violence. Here the particularities of experience would arguably make a difference, requiring peer-counselors to mirror the experience of the women they counsel, having lived through the milestones of a woman's experience such as childhood, adolescence, menstrual periods, first sexual experience and taking the place as a woman in the world.¹⁸

When the case appeared before the Tribunal, Rape Relief's demand for this shared life-experience was contested, and indeed rejected, on the grounds that no such life-experience was common to all women or the volunteers counseling them. While supporting Rape Relief's entitlement to a women-only hiring policy, the Tribunal questioned Rape Relief's assumption that all women who access Rape Relief for its services have a homogenous life experience, and furthermore that it could demand this experience from its volunteers.¹⁹ Here section 41 would not justify Rape Relief's rationale for excluding Nixon, since Rape Relief's purpose was not to promote the shared life-experience of women, even if such a life-experience existed. Quoting the decision: "Rape Relief is an organization that has as a primary purpose the promotion of the interests of all women in responding to male oppression and violence. There was no evidence before me that there is, in fact, a shared life experience that is common to all non-transsexual women, and Rape Relief called no evidence to show that it requires its volunteers, or its clients, to have such a

¹⁸ Ibid, 160.

¹⁹ Under cross-examination, Pacey acknowledged that not all women share the milestones outlined in her testimony, and that these milestones do not exhaust the experiences of women. See Ibid, 167.

common experience. In fact, the evidence that they did call leads me to the opposite conclusion.”²⁰

Without this common experience to distinguish the members of its collective, Rape Relief’s exclusion of Nixon was viewed by the Tribunal as an inevitable result of assumptions and prejudices regarding transsexual women. According to the Tribunal, the testimonies used by Rape Relief to support its exclusion of Nixon lacked any substantial experience of transsexual women within an organizational context, and were rather indicative of the intuitive opinions of those holding them. Pacey was noted to have limited involvement with transgendered men and women, and as such her testimony merely reflected how she thought a victim of male violence would respond to a transsexual such as Nixon – notions that were repeated by other witnesses testifying on the behalf of Rape Relief.²¹ These testimonies, termed “hypothetical” by the Tribunal, were contrasted with the experiences of Nixon, who had participated successfully as a peer-counselor in other women’s organizations.²² Since other organizations of this kind included transsexual women in their membership without incident, the Tribunal would not accept Rape Relief’s contention that it had made any effort to accommodate Nixon, and most certainly not to the point of undue hardship. And so the Tribunal ruled in favor of Nixon, stating

²⁰ Ibid, 222.

²¹ Ibid, 171-173.

²² Following her removal from Rape Relief’s training program, Nixon served as a volunteer for Battered Women’s Support Services, which involved group facilitation and crisis line work. She was later asked to represent the BWSS on the Lesbian, Gay, Transgendered, Bisexual Caucus of the Vancouver Co-ordination Committee on Violence Against Women. See Ibid, 32 and 174.

that Rape Relief discriminated against Nixon on the basis of sex, and that this act of discrimination was not exempted under section 41 of the Code.

ii. Vancouver Rape Relief Society v. Nixon

The consequences of the Tribunal's decision were not lost on either Nixon or Rape Relief. For an organization like Rape Relief, the inability to distinguish *what a woman is* would severely limit its capacity to monitor and restrict its membership, even in instances such as this involving victims of male violence, where restrictions were deemed necessary for the counseling services being provided. Though the decision would not require Rape Relief to accept someone who was not legally certified as a female, it would require acceptance in cases where these certifications were already in place; here the legal apparatus would set the conditions of *what a woman is*, and Rape Relief could either comply with or contest its outcomes.²³ Consequently, and as Nixon's legal counsel barbara findlay rightfully noted, the vindication of Nixon in the Tribunal's decision came at the possible expense of an organization like Rape Relief; in the words of findlay: "Depending on your political view, it is either a strength or a weakness of the human rights system that the law requires a women-only service organization to employ, and offer its services to, all

²³ barbara findlay notes that the decision could potentially extend protection on the ground of sex beyond transsexuals to transgendered people more broadly: "existing human rights jurisprudence suggests that a pre-operative, or non-operative, transsexual would have the same rights that Nixon has." See findlay, barbara. "Real Women: Kimberly Nixon v. Vancouver Rape Relief." *University of British Columbia Law Review* 36.1 (2003), 62.

women. The issue is whether it is worth the overall cost to human rights jurisprudence to assert the right to limit who one employs or provides services to.”²⁴

That the BC Supreme Court reversed the Tribunal’s decision on this very issue, asserting Rape Relief’s right to limit whom it employs and provides services to, was therefore a marked shift in reasoning from the Tribunal to the Supreme Court. The contrast between these decisions could not be more acute: whereas the Tribunal argued that Rape Relief was unable to distinguish between women, the Supreme Court stated that Rape Relief was entitled to distinguish between women, and furthermore that in this case it was justified objectively in doing so. This contrast derived, in part, from their differing interpretations of section 41, and also of *Law v. Canada*, a pivotal legal case involving section 15(1) of the *Charter of Rights and Freedoms*, which according to the Supreme Court necessarily governed the determination of discrimination in cases such as this.²⁵ While agreeing on the events that led to Nixon’s complaint, these different interpretations of section 41 and *Law* led the Supreme Court to view these events differently from the Tribunal, resulting in the decision outlined in *Vancouver Rape Relief Society v. Nixon*.

Again, section 41 of the Code states that an organization such as Rape Relief, with the primary purpose of promoting the interests and welfare of an identifiable group, could grant preference to members of this identifiable group when its primary purposes demanded it. Since Rape Relief was unable to prove that its primary

²⁴ Ibid, 58.

²⁵ In *Reaney*, the BC Court of Appeal held that the analytical framework set out in *Law* for determining discrimination under s. 15 of the *Charter* “must govern the determination of discrimination under s. 13 of the Human Rights Code.” See *Vancouver Rape Relief Society v. Nixon* [2003] BCSC 1936, 70.

purpose was promoting the interests of women who fit their definition of *what a woman is*, the Tribunal would not justify the exclusion of Nixon. However, in its review the Supreme Court disagreed, stating that Rape Relief was not obligated to prove this primary purpose or even that excluding Nixon would help it to achieve this primary purpose – according to the Supreme Court, it was simply enough for Rape Relief to believe the exclusion of Nixon would have this result. Quoting the decision: “Rape Relief did not have to prove that exclusion of male to female transsexuals from its peer counselor training program would actually benefit its clients any more than it had to prove its clients would benefit from the exclusion of men.”²⁶ Here, that Nixon is legally and medically a woman was not determinative of the issue, since Rape Relief is entitled under the group rights exemption of section 41 to discern *what a woman is* for its purposes as a women-only organization.²⁷

This conclusion followed from the Supreme Court’s application of *Law*, a legal case that provides a framework for approaching discrimination claims in a substantive manner, acknowledging that distinguishing between persons might be justified under section 15(1) of the *Charter*. *Law* involved a discrimination complaint in which a 30 year-old woman was denied survivor’s benefits under the Canadian Pension Plan because of her age, and in this case the Supreme Court of Canada ruled that the denial was not based on the unfair stereotyping of younger

²⁶ Ibid, 119.

²⁷ This line of reasoning is reflected in the Supreme Court’s use of a test for determining group membership drawn from *R. v. Powley*; here membership is determined in three steps: through proof of self-identification, ancestral connection, and community acceptance. Nixon would therefore be excluded from Rape Relief’s identifiable group of women by failing the standard of community acceptance, and potentially ancestral connection as well. See Ibid, 94-107.

persons but on the actual circumstances of people these benefits were meant to support. Such distinctions were not necessarily discriminatory, and therefore required the courts to apply a contextual analysis to determine whether or not these distinctions discriminated “in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage.”²⁸ This approach would then lead the courts to view instances of differential treatment with greater nuance, considering how distinctions often operate to ameliorate disadvantage rather than promoting it.

And so, having recognized that a distinction was made between Nixon and women with a life-long experience as women, and that Rape Relief was entitled to make these kinds of distinctions, the Supreme Court was then required to determine whether or not this distinction was made in the substantive sense outlined in *Law*. Here the question was whether a person such as Nixon, dispassionate and similarly situated, fully apprised of the circumstances in which she found herself, would view this distinction as an indignity, and the Supreme Court ruled in the negative. While acknowledging the subjective sense of indignity felt by Nixon, the Supreme Court found that she could not maintain this position objectively in the case of an exclusion from a small, relatively obscure, self-defining, private organization. Quoting the decision: “Rape Relief provides access to only a tiny part of the economic, social and cultural life of the province. By reason of Rape Relief’s self-definition, perhaps reflected in its small number of members, exclusion from its programs is quite evidently exclusion from a backwater, not from the mainstream of the economic,

²⁸ *Law v. Canada* [1999] 1 SCR 497, 170 DLR, 39.

social and cultural life of the province. It may be an important backwater to its members and to Ms. Nixon, but that is a subjective assessment.”²⁹ The Supreme Court ruled that the Tribunal exaggerated the impact of the distinction on Nixon, lending an “aura of objectivity to Ms. Nixon’s subjective sense that her dignity had been compromised by Rape Relief’s exclusion of her,”³⁰ and reversed the decision in favor of Rape Relief.

iii. Two cases, one question: of what a woman is

That these two decisions diverge so drastically raises numerous issues that have less to do with *what a woman is* per se than the often-conflicting ways that discrimination claims are viewed by the courts. In spite of *Law*’s attempt to bring a more contextual analysis to discrimination claims, its application nonetheless poses difficulties in cases like *Nixon*, since *Law* addresses government legislation and not the services or employment provided by a non-governmental entity such as Rape Relief, governed here by the BC Human Rights Code.³¹ While the Code implicitly takes the *Charter* into account in cases such as *Nixon*, the bodies that adjudicate disputes under the Code tend toward a more formal determination of discrimination than those under the *Charter*, oftentimes jumping from the finding of a distinction to

²⁹ *Vancouver Rape Relief Society v. Nixon*, 154.

³⁰ *Ibid*, 162.

³¹ *Vancouver Rape Relief Society v. Nixon*, 127.

a *prima facie* case of discrimination.³² The courts are therefore required to reconcile these conflicting approaches to discrimination, and for this reason it is possible to view the contrasting decisions of the Tribunal and the Supreme Court on the basis of unresolved differences that exist between *Charter* and human rights jurisprudence.

However, in spite of these differences, the decisions of the Tribunal and the Supreme Court remain complementary attempts to address the question of *what a woman is* in light of the importance this question assumes for women-only organizations and transgendered persons. Neither decision ultimately contests the act of distinguishing *what a woman is*, or for that matter Rape Relief's entitlement to do so – even Nixon does not dispute Rape Relief's entitlement to exclude people from its clientele and employment under section 41 of the Code.³³ Where they disagree is over *what* constitutes a woman and *how* this is then decided; while Rape Relief contends that its integrity as a woman-only organization rests on its ability to determine *what a woman is*, Nixon insists that Rape Relief is not entitled to treat her as anything but a woman, regardless of her pre-surgical characteristics. Here the dispute certainly involves *what a woman is*, but also the manner in which this distinction is determined, and “what the law provides to resolve their conflicting

³² In contrast, under *Law* such a distinction would only be considered discriminatory in circumstances that perpetuate or promote the view that the person is less capable or worthy of recognition or value as a human being or as a member of Canadian society. See Boyle, Christine. “The Anti-Discrimination Norm in Human Rights and Charter Law: *Nixon v. Vancouver Rape Relief*.” *University of British Columbia Law Review* 37.1 (2004), 47.

³³ *Nixon v. Vancouver Rape Relief Society*, 91.

views of which characteristics identify a person as female for purposes of obtaining the services of, or employment with, Rape Relief.”³⁴

That this dispute revolves so essentially around the question of *what a woman is* therefore requires that further attention be given to the broader social context in which this distinction has the importance that it does for Nixon and for Rape Relief, as well as the courts adjudicating their dispute. While the Tribunal and the Supreme Court differ in their respective decisions, they nonetheless agree that in certain circumstances an organization such as Rape Relief would be justified in restricting their membership, due to the unique ways in which these organizations operate to promote the interests and welfare of women as an identifiable group. The problem arises when a person like Nixon claims to be included in this identifiable group, and is supported in this claim by legal documentation. Here the claims of Nixon and of Rape Relief converge on the question of *what a woman is*, and for this reason it is necessary to examine the conditions under which Nixon and Rape Relief conflict over *what a woman is* in order to appreciate their shared investment in this distinction and its ongoing negotiation in the courts.

³⁴ *Vancouver Rape Relief Society v. Nixon*, 27.

II. Inclusions, exclusions, and their implications

The dispute that emerges here between Nixon and Rape Relief is not an isolated incident, but rather indicative of a much more far-reaching set of conflicts that exist between certain women-only organizations and transgendered persons over *what a woman is*. Organizations like Rape Relief are entitled by law to restrict their membership in circumstances where these restrictions enable them to promote the interests and welfare of women as an identifiable group, and both Nixon and the courts support Rape Relief's entitlement to do so. However, promoting the interests and welfare of women in this manner often proves problematic for people like Nixon, who through their evasion of conventional gender categories routinely find themselves subject to exclusions of this kind. Nixon's exclusion reveals the difficulties encountered by those who do not conform to determined notions of gender, which are required in order to secure the protections and entitlements that the law provides. And for this reason, promoting the interests and welfare of women as an identifiable group not only concerns those identified as women, but also those identified otherwise, who are nonetheless subject to the affects of empowering women in this manner.

This chapter identifies the conditions under which *what a woman is* has the importance that it does for women-only organizations such as Rape Relief and transgendered persons such as Nixon, resulting in the kinds of conflict evidenced by *Nixon*. As already mentioned, women-only organizations are able to restrict their membership only in circumstances where the interests and welfare of women

demand it, and as a result these organizations are necessarily invested in determining who these *women* are that demand their services. This, however, has significant implications for transgendered persons, who often find themselves excluded as such, and are then unable to access a wide range of services and entitlements afforded those identified as women. The importance of *what a woman is*, both for women-only organizations and transgendered persons, demonstrates the degree of social investment in conventional gender categories that do not easily accommodate ambiguity. And in those instances where ambiguity encroaches on these conventional categorizations, it is possible to identify the complex ways that people like Nixon and organizations like Rape Relief are implicated in these categories, as well as the social and political limits that accompany them.

i. Women-only organizations: distinguishing and empowering

Organizations like Rape Relief embody a particular approach to the social and political challenges encountered by those identified as women that entails organizing as a collective through exclusive women-centered institutions. Developed by radical feminists in the 1960s, this approach acknowledges the concrete affects that gender inequalities have on organizations and institutions, often reinforcing the subordination of women, and thereby rendering these organizations and institutions incapable of challenging the inequalities that they either intentionally or unintentionally generate.³⁵ Women-only organizations are an attempt to establish

³⁵ Shugar, Dana R. *Separatism and Women's Community*. Lincoln: University of Nebraska Press, 1995,

alternative institutions that allow women to organize autonomously without male intervention, empowered and mobilized to challenge existing inequalities through a wide range of separatist initiatives and strategies, of which the support services provided by Rape Relief are one example. While these organizations assume many different forms, and are less utopian than this initial formulation suggests,³⁶ their function remains to provide spaces limited to women, from which women might better respond to the unique conditions in which they find themselves identified as such.

Women-only organizations are therefore highly politicized, and operate to support and empower women to transform themselves and the societies they inhabit. Here empowerment amounts to equipping women to engage with their circumstances differently, no longer dominated by patriarchal forces, and able to respond to and undermine these forces in new and imaginative ways. As Belinda Sweeney writes: “Women created autonomous spaces that could not only provide safety, but a source of creativity as well.... While the motivations toward seeking out and establishing women-only space were evidently varied, it was undoubtedly a mainspring of early feminist strategies towards a new system of social organization.”³⁷ For organizations like Rape Relief, the aim is not only to provide a space free from male intervention,

³⁶ According to Chunn and Lacombe, radical feminists realized that they could not operate in isolation from existing institutions, and consequently developed ways of engaging with these institutions while maintaining a certain degree of autonomy. See Chunn, Dorothy E. and Dany Lacombe. “Introduction.” *Law as a Gendering Practice*. Eds. Dorothy E. Chunn and Dany Lacombe. New York: Oxford University Press, 2000, 6.

³⁷ Sweeney, Belinda. “Trans-ending Women’s Rights: The Politics of Trans-Inclusion in the Age of Gender.” *Women’s Studies International Forum* 27 (2004), 81-82.

but also one that empowers women to challenge the conditions they are subjected to, where violence against women is all too common. And in this respect, the restriction of access to women-only spaces serves to cultivate an environment where women are able to challenge the prevailing social order, and in doing so affirm themselves as a political force.

In order to facilitate this particular form of empowerment, the law assumes a crucial role in enabling practices and activities characteristic of these organizations, and is for this reason integral to their ongoing functioning. Protections such as section 41 of the BC Human Rights Code entitle women-only organizations to practices that otherwise would be considered discriminatory, due to the unique circumstances in which these organizations operate and within which these protections are applied.³⁸ Here the importance of legal protections such as section 41 cannot be overemphasized, since it is only through these protections and their careful application that women-only organizations are entitled to the exclusionary practices through which they operate. As *Nixon* demonstrates, the ability of an organization such as Rape Relief to regulate its membership is contingent on the circumstances in which they operate, and how the courts then regard these circumstances. And so the autonomy of women-only organizations is not intrinsic to these organizations or the women inhabiting their spaces, but is rather dependent on the legal mechanisms through which this autonomy is facilitated and negotiated in the courts.

Consequently, determining *what a woman is* has weighty implications for organizations such as Rape Relief, since it is only through this distinction that

³⁸ L'Heureux-Dube, Claire. "The Changing Face of Equality." *Canadian Woman Studies* 19.1&2 (1999), 35.

women-only organizations are able to secure the protections that enable them to empower women as they do. Section 41 permits women-only organizations to restrict their membership in circumstances where the interests and welfare of women require it, and for this reason it is necessary to determine what this *woman* is, whose interests these organizations operate to promote. This, however, poses the unavoidable problem of actually determining *what a woman is* – this identity by which women-only organizations are entitled to these protections and the practices they enable. The experiences of women are by no means singular, and multiply along the lines of age, sexuality, race and class, among others. The challenge is to then determine where these differences converge and diverge with respect to the distinct purposes of the organization in question, and for Rape Relief, this entails determining the different factors that might impair the counseling services it provides, due to the women who partake of these services, whose interests Rape Relief operates to promote.

In this respect, women-only organizations do not merely operate to ameliorate the disadvantage experienced by women, but moreover contribute to the ongoing formation of the identity that distinguishes them as such. By their very nature, organizations such as Rape Relief presuppose that a certain *woman* exists, distinguished from those identified otherwise, and in particular need of the services provided and facilitated by their spaces. Distinguished otherwise, organizations such as Rape Relief would be unable to secure the protections necessary to regulate their spaces, since it is only by promoting the interests and welfare of women as an identifiable group that these organizations are able to operate under the protection of

section 41. Women-only organizations are therefore invested in the ongoing determination of *what a woman is* and serve as sites that both exclude and produce – operations that are by no means exclusive from one another, but are rather intimately connected. Determining *what a woman is* establishes the conditions by which this distinction is extended or withheld, including or excluding people from spaces this distinction marks as such.³⁹

That women-only organizations operate in this manner has led some critics to either question or deny the radical potential these spaces are supposed to possess. Here the overriding concern is that, by presupposing a certain notion of *what a woman is* to secure the protections on which they depend, women-only organizations do more to limit women than empower them, immobilizing and reifying identities that are otherwise shifting and impermanent.⁴⁰ While remaining attentive to these concerns, it is important to recall that determining *what a woman is* empowers those identified as such, facilitating practices and activities that challenge the limits constitutive of this identity. Women-only organizations undoubtedly participate in determining *what a woman is* – a process with potentially coercive and regulatory

³⁹ As Judith Butler writes in *Gender Trouble*: “The domains of political and linguistic ‘representation’ set out in advance the criterion by which subjects themselves are formed, with the result that representation is extended only to what can be acknowledged as a subject. In other words, the qualifications for being a subject must first be met before representation can be extended.” See Butler, Judith. *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge, 1990, 1-2.

⁴⁰ Here I refer specifically to the writings of Wendy Brown and Nancy Fraser – both of which express suspicion towards separatist strategies and identity politics more generally for, among other reasons, their tendency to simplify group identities, often in troubling ways. See Brown, Wendy. *States of Injury: Power and Freedom in Late Modernity*. Princeton: Princeton University Press, 1995, 73-74; Fraser, Nancy. “Rethinking Recognition.” *New Left Review* 3 (May June 2000), 108.

consequences, both for those included in and excluded from their spaces.⁴¹ However, through their involvement in this process, these organizations are necessarily engaged in questioning the limits of *what a woman is* and how they affect the operations of the organization in question.⁴² Rather than immobilizing or reifying *what a woman is*, women-only organizations provoke an ongoing discussion of how this distinction affects their spaces, as well as the broader social context in which these organizations operate and regulate their spaces.

Through these spaces, it is therefore possible to witness a complex process of identity formation that far exceeds, or perhaps complicates, the mere empowerment of women through women-centered institutions. Women-only organizations are invested in determining *what a woman is*, and it is through this distinction that organizations such as Rape Relief are able to secure the legal protections that enable the practices and activities characteristic of these organizations. Through their involvement in determining *what a woman is*, these organizations serve as sites for contesting the limits constitutive of this particular notion of *what a woman is*, including the social, legal and institutional conditions in which this distinction

⁴¹ “Indeed, the premature insistence on a stable subject of feminism, understood as a seamless category of women, inevitably generates multiple refusals to accept the category. These domains of exclusion reveal the coercive and regulatory consequences of that construction, even when the construction has been elaborated for emancipatory purposes.” See Butler, *Gender Trouble*, 4.

⁴² In *Line Drawings*, Cressida Heyes suggests that interrogating *what a woman is* enables women-only organizations to improve their services and organizational strategies, acknowledging and addressing differences among women. Here, according to Heyes, “differences between women are the motor of feminist organizing not a barrier to its success, no matter how difficult they may be to negotiate.” See Heyes, Cressida. *Line Drawings: Defining Women Through Feminist Practice*. Ithaca: Cornell University Press, 2000, 8.

emerges. Here the process in which women-only organizations participate not only affects these spaces and the women who find their place within them, but also the wider social field on which their practices and activities come to bear. And in this respect, the empowerment of women has a much broader social significance, with affects that reach beyond the borders of their spaces to all that they exclude, but nonetheless affect, in the process of empowering women.

ii. Transgendered persons: the affects of being otherwise

Of those excluded from women-only organizations, transgendered persons are especially vulnerable to the harmful affects of these kinds of exclusions, and are for this reason requiring their own singular attention. In many ways, the exclusion of Nixon from Rape Relief is a typical and indeed necessary consequence of the ways women-only organizations operate to distinguish the women inhabiting their spaces. However, Nixon's exclusion is but one instance of a much broader series of exclusions experienced by those who either reject or transgress their birth-assigned gender identities, including cross-dressers, intersexed persons, drag kings and queens, gender impersonators, and transsexuals such as Nixon. While this group is clearly diverse, all evade conventional gender categories and are routinely excluded from services and institutions otherwise available to those identified as men or women.⁴³ And consequently, the exclusionary practices of women-only

⁴³Ontario Human Rights Commission. *Toward a Commission Policy on Gender Identity: Discussion Paper*. Oct. 1999. 6 Nov. 2003 <www.ohrc.on.ca/english/publications/index.shtml>, 8; findlay, *An Introduction to Transgender Women*, 3-4.

organizations pose unique challenges to transgendered persons such as Nixon, for whom exclusions of this kind, while often justifiable, are all too familiar and commonplace.

Rape Relief's reluctance to include the transgendered is characteristic of certain women-only organizations, whose members express concerns that allowing transgendered access to their spaces would undermine the integrity of these spaces, and moreover limit their ability to carry out the practices and activities that are particular to these spaces. For organizations like Rape Relief that provide spaces exclusive to women, the transgendered challenge their ability to regulate these spaces, since it is only by distinguishing *what a woman is* that these organizations are able to make exclusions, and many of the transgendered insist on their inclusion as women.⁴⁴ As a result, many women-only organizations distinguish between their members and what they refer to as "self-defining women," or women who lack a particular kind of life-experience necessary to the organization in question.⁴⁵ By distinguishing between women in this manner, organizations like Rape Relief are then able to justify the exclusion of the transgendered, even in cases where the person has undergone a complete legal and medical transition.

⁴⁴ As indicated in a discussion paper published by NAWL, of particular concern to women-only organizations is "the question of whether self-identification can be definitive of gender identity, and whether, for example, women's groups, spaces and services should be fully accessible to anyone who identifies themselves as female; and more generally, when a change of gender must be legally recognized, and how that recognition should be sanctioned in law." See Denike, Margaret and Sal Renshaw. *Transgender and Women's Substantive Equality*. Feb. 2003. NAWL, the National Association of Women and the Law. 6 Nov. 2003 <<http://www.nawl.ca/lob-trans-dp.htm>>.

⁴⁵ findlay, barbara. *An Introduction to Transgender Women*, 13-14.

Those distinguished as transgendered therefore find themselves at the outer limits of conventional gender categories on which these spaces are based, even when efforts are made to situate themselves within these categories. Rape Relief is one example of how certain organizations operate through the binary divisions of male/female and man/woman – binaries that are often used interchangeably, and create considerable pressure for people to identify one way or another.⁴⁶ As Margaret Denike and Sal Renshaw indicate, those who evade conventional gender categories are subject to systemic discrimination, affecting their ability to access institutions, services, and protections against the various forms of physical, psychological and social violence they encounter.⁴⁷ Those who undergo a complete legal and medical transition are more likely to access protections through which it is possible to respond to discrimination; yet even here, a person who has undergone a complete transition is not guaranteed the recognition necessary to secure these

⁴⁶ It is important to acknowledge that there are, in definition, differences between sex and gender. Here the definitions provided by Diane Watson, a psychiatrist who testified in *Nixon* are typical: “[s]ex is the anatomy of whether one is male or female; gender refers to either gender identity or gender roles: maleness or femaleness.” However, as *Nixon* demonstrates, these terms are often conflated with one another, blurring the distinction between the one and the other. And as a result, sex and gender are in many instances used interchangeably. See *Nixon v. Vancouver Rape Relief Society*, 13; Ontario Human Rights Commission, 9.

⁴⁷ Of the major issues facing the transgendered, NAWL lists the following: access to social services such as homeless shelters, rape crisis centres, medical clinics; access to education, and to public and private health benefits; freedom from hate violence, including sexual assault; fear of repercussion or reprisal in retaliation for asserting one’s ordinary rights, such as speaking out in public; chronic unemployment and under-employment; abusive treatment by law enforcement personnel; public humiliation, derision, ridicule, marginalisation and exclusion; and denial of access to public accommodations such as shops, restaurants and public transportation. See Denike and Renshaw.

protections.⁴⁸ The transgendered therefore find themselves in a nearly impossible situation: either unwilling or unable to conform to conventional gender categories, the transgendered are then relegated to the margins of society with a limited capacity to respond.⁴⁹

As a result of these difficulties, efforts are being undertaken to establish a new ground for making discrimination claims that is sensitive to the unique experiences of those who evade conventional gender categories. The proposed ground, entitled gender identity, is an attempt to accommodate those whose experiences of gender are more complicated than existing grounds such as sex, sexual orientation and disability typically allow for – due to these grounds' reliance on legal and medical standards that assume the person in question has either undergone or plans to undergo a complete transition to a target gender.⁵⁰ Gender identity, as indicated by Denike and Renshaw, “is not over-determined by previous jurisprudence, as might be the case for sex, sexual orientation and disability, and it would potentially protect a greater range of gender variant people than do the existing categories.”⁵¹ Rather than requiring people to locate themselves within the gender binary, gender identity offers the possibility of legal protection for those

⁴⁸ findlay, barbara. *An Introduction to Transgender Women*, 7.

⁴⁹ Heyes, Cressida J. “Feminist Solidarity after Queer Theory: The Case of Transgender.” *Signs* 28.4 (Summer 2003), 1108; Namaste, Viviane K. *Invisible Lives: The Erasure of Transsexual and Transgendered People*. Chicago: University of Chicago Press, 2000, 52.

⁵⁰ It should also be noted that those who wish to undergo transition to a target gender must first be diagnosed as experiencing Gender Identity Disorder – a physical and psychological disorder that sex reassignment is intended to treat. See Denike and Renshaw.

⁵¹ Ibid.

whose experiences do not easily fit within the more conventional categories that dominate the socio-political landscape, often unwittingly punishing those who do not conform to the realities these categories promote and reproduce.⁵²

Gender identity therefore promises to alter the landscape in which discrimination claims are made, confirming the previously-mentioned anxieties of certain women-only organizations concerning the empowerment of transgendered persons. While acknowledging the challenges facing the transgendered, as well as the importance of accommodating them through the extension of legal protections, many women-only organizations are nonetheless concerned about the affects this will have on their operations, and most notably their ability to restrict access to their spaces. Of primary concern is the extent to which self-identification can be definitive of gender identity, recognized by law, and serving as a basis for inclusion in an organization such as Rape Relief.⁵³ While supporting the empowerment of transgendered persons in principle, women-only organizations pose the question of what form this empowerment should take, given the impact it will inevitably have on their operations. As Denike and Renshaw rightfully note: “The task for us is to identify if and when these differences matter and to develop contextual analysis that can grasp their implications in relation to varying social, political, and institutional settings.”⁵⁴

⁵² findlay, *An Introduction to Transgender Women*, 13.

⁵³ Denike and Renshaw.

⁵⁴ Ibid.

This, however, is a much more dynamic line of questioning than is currently possible under the existing grounds of sex, sexual orientation and disability, which in spite of their efficacy require the transgendered to affirm the conventional gender categories on which these grounds are based, and which they serve to reinforce.⁵⁵ Rather than limiting the discourse on discrimination to matters of inclusion and exclusion, which ultimately remain within the terms of these conventional gender categories, gender identity promises to establish a position from which the transgendered might better respond to the exclusionary practices through which they are distinguished as such. Organizations making exclusions of this kind would find themselves further responsible to those they exclude, on whom their activities and practices have potentially detrimental affects. And to therefore be identified as transgendered would no longer entail an unavoidably marginalized state of existence, but rather one in which it is possible to engage with a social order that privileges those who occupy the more conventional gender categories of men and women.

iii. Towards responsive encounters between women and the transgendered

Establishing gender identity as a ground for making discrimination claims is therefore an important step toward developing a social order that accommodates those who evade conventional categorizations, often at their own peril. It is important to emphasize that these efforts are not intended to eradicate conventional gender categories, in spite of their capacity to limit those they include and exclude.

⁵⁵ Ibid.

As the preceding discussion of women-only organizations indicates, distinguishing *what a woman is* not only enables these organizations to include and exclude persons from their spaces, but also to perform services and activities that undermine the conditions associated with this distinction, thereby empowering those identified as such. Gender identity would not prevent empowering women in this manner, but rather establish the conditions for discussing the affects of empowering women, and of gender more broadly, on those identified otherwise. And in those instances where the practices of men and women impinge on transgendered persons, such impingements would then occur in a manner that is responsive to the unique affects of these practices on those identified as transgendered, who find themselves distinguished from, yet no less implicated with, those identified as men or women.

This responsive encounter between the gendered and the transgendered, facilitated here by gender identity, is a subtle yet decisive shift in a legal discourse framed largely in terms of inclusion and exclusion from conventional gender categories. As evidenced by cases such as *Nixon*, as well as the broader contextual analysis provided here, these terms cannot account adequately for the dynamics that exist between women-only organizations and transgendered persons – each involved in practices and activities that challenge and transform this gendered social order, within which being identified as a woman or transgendered person entails distinctive forms of social disadvantage. The problem arises when these efforts to ameliorate disadvantage conflict with one another, placing organizations at odds with those excluded from their spaces. Here it is necessary for those involved in such disputes to acknowledge the ways in which they are implicated in, affected by and subject to

the practices and activities that serve to empower, and thereby distinguish women and the transgendered from one another. Acknowledging this shared involvement would then allow for a more responsive form of interaction between women-only organizations and transgendered persons, each inhabiting a social order that operates through conventional gender categories, for better or for worse.

III. Responsivity: Derrida, Foucault, Levinas

Having recognized the difficulties experienced by those inhabiting this gendered social order, the question is how this social order might be renegotiated in light of these difficulties, allowing for what is referred to in the previous chapter as a responsive encounter between women and the transgendered. As shown in the previous chapter, the legal framework through which discrimination claims are made is structured on the basis of conventional gender categories, and often at the expense of those who evade these conventional categorizations. Such a framework can only accommodate the complaints of the transgendered with great difficulty, and for this reason it is necessary to alter the framework through which discrimination claims are made in order to better account for those identified as transgendered. These efforts cannot, however, take place without acknowledging their affect on those who identify in terms of these conventional categorizations, and particularly women whose organizations operate on the basis of the terms contested here. Altering these conditions requires that women and the transgendered acknowledge their shared involvement in these conditions, and then engage with one another in a manner that is sensitive to the ways their lives are structured in terms of conventional gender categories.

This chapter provides a theoretical account of how this responsive form of interaction might occur, given the social, legal and institutional challenges identified here. For this purpose, select writings of Jacques Derrida, Michel Foucault and Emmanuel Levinas are employed to illustrate a manner of inhabiting limits that is

both critical of and sensitive to the affects of these limits for those subject to them. Each of these theorists provides unique yet complementary ways of thinking about limits and how they are contested and negotiated by and between those who are subject to them. Derrida and Foucault provide particularly valuable accounts of how social, legal and institutional limits are constituted by those inhabiting them, as well as potential strategies for interrogating and deconstructing these limits. Levinas then emphasizes the immense responsibility that accompanies strategies of this kind, due to their far-reaching affects for those inhabiting these limits and their associated social conditions. Here the critical strategies of Derrida and Foucault assist in locating and dislocating the often-oppressive limits that operate within a gendered social order; and it is with the responsibility of Levinas that these strategies might then provoke a sustained and sensitive form of interaction, here between women and the transgendered, in their ongoing interactions with one another.

i. Jacques Derrida: a decentered encounter

The initial challenge in facilitating responsive encounters between women and the transgendered is inciting a subtle shift in the legal discourse that grounds their interactions in terms of conventional gender categories. Again, the existing legal framework can only accommodate the complaints of the transgendered on the basis of conventional gender categories, incorporating the experiences of the transgendered with those of men and women. This poses considerable difficulties in those instances where the gendered are distinguished from the transgendered, thereby situating the transgendered at the limits of identities on which they still depend. Here the

possibilities for a responsive form of engagement between women and the transgendered is limited by the existing legal framework, which operates to ground discrimination claims in terms of conventional gender categories. And for this reason, facilitating responsive encounters between women and transgendered first requires identifying, and then deconstructing, the ways their encounters are limited through the existing legal framework – a starting point that Derrida provides in his account of differance.

Differance is undoubtedly a challenging place to begin this process; not simply a word or a concept, differance as described by Derrida marks the space of difference in which concepts, and moreover the conceptual orders in which they operate, are produced and displaced. Here concepts do not derive their meaning from within themselves, but rather in relation to others, where every concept “is necessarily and essentially inscribed in a chain or system, within which it refers to another and to other concepts, by the systematic play of differences.”⁵⁶ Differance marks a fundamental displacement of meaning that is inherent to concepts and conceptual orders, where meaning is produced and displaced in this play of differences. And understood here within the context of the existing legal framework, this play of differences shows that possibilities for responsive encounters exist within the very limits of a legal framework

⁵⁶ Derrida continues: “Such a play, then – differance – is no longer simply a concept, but the possibility of conceptuality, of the conceptual system and process in general. For the same reason, differance, which is not a concept, is not a mere word; that is, it is not what we represent to ourselves as the calm and present self-referential unity of a concept and sound.” See Derrida, Jacques. “Differance.” *Speech and Phenomena and Other Essays on Husserl’s Theory of Signs*. Evanston: Northwestern University Press, 1973, 140.

that nonetheless operates to ground interactions between women and the transgendered in terms of conventional gender categories.

Differance plays on the French verb “to differ” [différer], which in the words of Derrida, “seems to differ from itself. On the one hand, it indicates difference as distinction, inequality, or discernability; on the other, it expresses the interposition of delay, the interval of a *spacing* and *temporalizing* that puts off until “later” what is presently denied, the possible that is presently impossible.”⁵⁷ “To differ” thus refers at one and the same time to a *differing* and a *deferring* – an irreducible difference that underlies the singularity of the verb “to differ”. Differance expresses this double meaning of “to differ” – “this *sameness* which is not *identical*”⁵⁸ that is signified by the verb “to differ”. And according to Derrida, this double meaning, marked here by differance, captures a certain way of conceptualizing difference that is particular to Western thought, where differential terms, and particularly binary oppositions, find themselves subsumed within a movement that operates to assimilate the one to the other, however unsuccessfully.

Binary oppositions mark distinctive positions in a passage of deferral that attempts to resolve their irreducible difference as a *sameness* or full presence beyond the play of differences taking place between the one and the other. Presence is here indicative of simultaneity, where the division between the one and the other finds itself resolved in a full presence or *sameness*. Absence, on the other hand, is the deferral of this presence, and therefore considered secondary or provisional; “it is

⁵⁷ Ibid, 129.

⁵⁸ Ibid, 129.

second in order after an original and lost presence, a presence from which [this absence] would be derived. It is provisional with respect to this final and missing presence, in view of which [this absence] would serve as a movement of mediation.”⁵⁹ Absence is understood here in relation to presence as the promise of a resolution through which full presence or *sameness* is achieved. And in this respect, presence and absence, and indeed other such binary oppositions, occupy different positions within a passage that assimilates the one to the other, through which meaning then presents itself as a unity undivided in itself – a full presence or *sameness* beyond the play of differences.

This passage from the one to the other serves to ground the relationship between these differential terms, thereby limiting the dislocation of meaning that occurs through their encounters with one another. Absence undermines the self-certainty of presence, and indeed the conceptual order within which these terms operate, requiring the assimilation of the one to the other, which reinstates a unified and moreover centered structure of meaning. As Derrida writes in *Writing and Difference*: “The concept of a centered structure is in fact the concept of a play based on a fundamental ground, a play constituted on the basis of a fundamental immobility and a reassuring certitude, which is itself beyond the reach of play. And on the basis of this certitude anxiety can be mastered, for anxiety is invariably the result of a certain mode of being implicated in the game, of being caught in the game, of being as it were at stake in the game from the outset. And again on the basis of what we call the center (and which, because it can be either inside or

⁵⁹ Ibid, 138.

outside, can also indifferently be called the origin or end, *arche* or *telos*), repetitions, substitutions, transformations, and permutations are always *taken* from a history of meaning [*sens*] – that is, in a word, a history – whose origin might always be reawakened or whose end may always be anticipated in the form of presence.”⁶⁰

Consequently, this centered structure, operating here to ground interactions between the one and other, limits the possibilities for responsive encounters, since all that exceeds this structure is necessarily posed in terms of presence and absence, reinstating the centered structure of meaning that defines their relationship with one another. Here the play between the one and the other remains; however, it is a play marked by the subordination of absence to presence, and is by no means reciprocal. In this centered structure of meaning, absence can only be derivative of presence, confirming and conforming to its self-certainty, with little room for what does not reaffirm this centered structure of meaning. “Surprises emerge from the dialogue between the simultaneous and the nonsimultaneous,”⁶¹ not from the simultaneous in itself, which instead serves to satisfy its desire for closure. This desire requires the ceaseless confirmation of presence, as well as an accompanying domination of absence, in order to maintain closure, and for this reason cannot allow for any reciprocal exchange between the one and the other.

Centered structures therefore place significant limits on encounters of this kind, which encourage the play of differences centered structures operate to ground

⁶⁰ Derrida, Jacques. *Writing and Difference*. Chicago: University of Chicago Press, 1980, 292.

⁶¹ “How can simultaneity hold surprises in store? Rather, it neutralizes the surprises of nonsimultaneity. Surprises emerge from the dialogue between the simultaneous and the nonsimultaneous. Which suffices to say that structural simultaneity *itself* serves to reassure.” See *Ibid*, 24.

and constrain. In the case of disputes involving women and the transgendered, limited here in terms of conventional gender categories, both women and the transgendered are required to make their claims in a manner that constitutes, and indeed reconstitutes, a social order that requires people to identify as men or women. Under these conditions, the transgendered in particular are unable to pose a serious challenge to the social order in which they find themselves, since their claims are necessarily posed in terms constitutive of this social order, thereby neutralizing the challenges the transgendered pose to these terms and the social order they reinforce. This leaves the transgendered at the limits of conventional gender categories, unable to respond to the conditions in which they find themselves without first conforming to identities from which they are routinely excluded. And as a result, any encounter that occurs between women and the transgendered under these conditions first requires identifying in terms of these conventional categories in order to make any kind of legal claim.

Here responsive encounters between women and the transgendered cannot take place without decentering the legal framework that currently limits their encounters in terms of conventional gender categories. Again, centered structures cannot eliminate the play of differences that challenge their self-certainty, and indeed this play is essential to the centered structure identified here.⁶² However, within a

⁶² "Let us begin again. Differance is what makes the movement of signification possible only if each element that is said to be "present," appearing on the stage of presence, is related to something other than itself but retains the mark of a past element and already lets itself be hollowed out by the mark of its relation to a future element. This trace relates no less to what is called the future than to what is called the past, and it constitutes what is called the present by this very relation to what it is not, to what it absolutely is not; that is, not even to a past or future considered as a modified present. In order

centered structure, these challenges are necessarily posed in terms of the existing system, and reinstate the order that governs interactions between the one and the other. Under these conditions, disputes between women and the transgendered can only serve to rearticulate a system that cannot accommodate the claims of the transgendered beyond the terms of conventional gender categories. And it is only by decentering this centered structure, allowing for a reciprocal exchange between the one and the other, that responsive encounters will ever take place between women and the transgendered.

This decentering, however, is already at work within this centered structure, and for this reason a deconstruction of this structure would merely incite the play of differences already at work, yet nonetheless limited, within this very structure of meaning. Again, the trace of an encounter between women and the transgendered remains even within the most limiting of centered structures, which operate to ground their encounters in terms of conventional gender categories. Here the possibilities for responsive encounters exist within the very limits articulating these encounters – albeit recast in a manner that undermines the primacy these limits currently afford to conventional gender categories. To deconstruct these limits does not, therefore, entail negating the terms that currently articulate this encounter, but rather displacing them in a manner that incites encounters already taking place between women and the transgendered. Quoting Derrida: “Our discourse irreducibly

for it to be, an interval must separate it from what it is not; but the interval that constitutes it in the present must also, and by the same token, divide the present in itself, thus dividing, along with the present, everything that can be conceived on its basis, that is, every being – in particular, for our metaphysical language, the substance or subject.” See Derrida, “Differance,” 142-143.

belongs to the system of metaphysical oppositions. The break with this structure of belonging can be announced only through a *certain* organization, a certain *strategic* arrangement which, within the field of metaphysical opposition, uses the strengths of the field to turn its own stratagems against it, producing a force of dislocation that spreads itself throughout the entire system, fissuring it in every direction and thoroughly *delimiting* it.”⁶³

Deconstruction therefore amounts to operating within the space of an encounter, here between women and the transgendered, in a manner that refashions the relations that already exist between them, as well as the conditions that govern their interactions with one another. By decentering the existing legal framework, women and the transgendered would be able to renegotiate the limits of their interactions in a manner impossible within a centered structure, which instead minimizes the displacements that are intrinsic to their encounters with one another. Once decentered, the emphasis shifts from questions of inclusion and exclusion to those of implication, or more specifically how the practices of women and the transgendered come to bear on one another in the course of their interactions. Within these terms, the possibilities emerge for greater responsivity between women and the transgendered, each involved in the social, legal and institutional conditions identified here. And this undoubtedly leads beyond the writings of Derrida, whose account of *differance* nonetheless provides an opening for interrogating, and moreover deconstructing, the conditions under which women or transgendered engage with one another.

⁶³ Derrida, *Writing and Difference*, 20.

ii. Michel Foucault: an implicated way of life

This shift from inclusion/exclusion to implication alters encounters between women and the transgendered in significant ways; no longer simply a question of inclusion in or exclusion from conventional gender categories, distinguishing *what one is* then concerns the broader implications of inclusions and exclusions, both for those identified as women or transgendered. As the preceding chapter demonstrates, the affects of being identified as a woman or as transgendered reach far beyond those identified as such to those identified otherwise, who are also implicated in these forms of identification and the empowerments associated with them. Here the distinctions that differentiate the one from the other mark particular ways of being implicated in a broader social context, where varying practices and activities come to bear on one another in the space of an encounter. And as such, the discursive shift identified here provides an opening for renegotiating the ways that those identified as women or transgendered occupy this broader social context, within which they are distinguished from, yet nonetheless implicated with, one another.

This shift from inclusion/exclusion to implication therefore involves identifying how women and the transgendered inhabit the conditions that make them *what they are*, and then undertaking the subtle task of renegotiating these conditions – a critical yet sensitive manner of inhabiting *what one is*, understood here in terms of Foucault's notion of an ethos or a way of life. In his later writings, consisting largely of shorter texts and interviews, Foucault formulates a way of understanding how people occupy the processes that make them what they are, where what they

think, say and do constitute the limits of what can be experienced from one moment to the next. This manner of inhabiting *what one is* acknowledges the ways people implicate themselves in the processes through which they are subjected, and within which there exists an immanent potential for change. Here Foucault's notion of an ethos or way of life, appearing as it does in these later writings, allows for reflection on "the events that have led us to constitute ourselves and recognize ourselves as subjects of what we are thinking, doing, saying"⁶⁴. And through this reflection, it is then possible to undertake a sensitive interrogation of the ways women and the transgendered affect one another in their ongoing interactions.

Foucault's notion of an ethos is most clearly articulated in his essay "What is Enlightenment?" – an essay in which he links his later endeavors on sexuality to those preceding them, and also to the Enlightenment, in which Immanuel Kant's essay of the same name is considered exemplary. In Kant's text, Foucault finds a kind of attitude that he refers to as a "point of departure: the outline of what one may call the attitude of modernity."⁶⁵ In this text, Kant contemplates the place of his own project within the moment in which he is writing, and according to Foucault, this manner of situating oneself in the present – where how one thinks, feels, behaves, and acts is intimately related and belonging to this present moment – is indicative of a critical attitude that links his own inquiries with those of the Enlightenment.⁶⁶ Inhabiting the present in this way amounts to reflecting on the conditions in which

⁶⁴ Foucault, Michel. "What is Enlightenment?" *Ethics*. New York: The New Press, 315-316.

⁶⁵ *Ibid*, 309.

⁶⁶ *Ibid*, 309.

one finds oneself, and to then consider what difference this makes for the way one lives their life. And so it is in this notion of an ethos, as “a mode of relating to contemporary reality,” that Foucault locates himself and the project in which he is engaged.

In order to situate oneself within this contemporary reality, where people constitute and recognize themselves as subjects of what they are thinking, doing and saying, Foucault proposes a kind of historical investigation or “critical ontology of ourselves” through which one might then apprehend this moment’s specificity, and to this end employs the archaeological and genealogical tools developed in his earlier writings. On the one hand, the archaeological method ascertains the historicity of discourses that articulate what one thinks, says, and does; on the other, the genealogical method traces the contingency of what one is, and thus poses the possibility of being otherwise than one finds oneself.⁶⁷ What these different methods show is that, first of all, *what one is* is specific to a particular historical moment, where domains of knowledge and relations of power are unique to this moment, and, second, that the ground constitutive of this experience is indeed shifting, and therefore the inevitable source of new ways of life. This manner of historical investigation therefore provides a basis, albeit one that is highly contingent, for

⁶⁷ More specifically, Foucault describes this critical ontology as “genealogical in its design and archaeological in its method. Archaeological... in the sense that it will not seek to identify the universal structures of all knowledge [*connaissance*] or of all possible moral action, but will seek to treat the instances of discourse that articulate what we think, say, and do as so many historical events. And this critique will be genealogical in the sense that it will not deduce from the form of what we are what it is impossible for us to do and to know; but it will separate out, from the contingency that has made us what we are, the possibility of no longer being, doing, or thinking what we are, do, or think.” See *Ibid*, 315-316.

thinking about the present moment that one inhabits, and the operations through which it is constituted as such.

At this point in the investigation, Foucault's later emphasis on ethics assumes great importance, since if people are subjects of what they are thinking, saying and doing, ethics as Foucault understands it enables them to consider the manner in which they inhabit the processes through which they emerge as subjects. Archaeologies and genealogies identify the historicity and contingency of experience, and it is ethics that then enables one to consider how he or she occupies the operations through which people constitute themselves as subjects.⁶⁸ That people are incited to recognize themselves in particular ways is the result of historically specific domains of knowledge and relations of power that govern the social field, within which their senses of self emerge as such.⁶⁹ And that they are active in these constitutive processes means that it is from within these processes that they might begin to renegotiate the conditions that govern *what one is*. One is indeed rooted within the present moment, with all that this moment entails, and for this reason cannot separate oneself from the broader constitutive processes in which he or she is inextricably bound, but nonetheless capable of changing.

⁶⁸ Foucault, Michel. *The Use of Pleasure: The History of Sexuality, Volume 2*. New York: Vintage Books, 1990, 28.

⁶⁹ As James W. Bernauer and Michael Mahon indicate, "Foucault deprives the self of the illusion that it can separate itself from the world. Medical, economic, political, and erotic dimensions of life shape the moral experience of the self, as his last works show; thus, Foucault always presents his notion of self-formation as a struggle for freedom within the confines of a historical situation." See Bernauer, James W. and Michael Mahon. "The Ethics of Michel Foucault." *The Cambridge Companion to Foucault*. Ed. Gary Gutting. Cambridge: Cambridge University Press, 1994, 154.

Through situating oneself in the present moment, it is then possible to identify the processes that constitute the limits of *what one is*, and afterwards respond to these processes in a responsive manner, and in the words of Foucault, “give new impetus, as far and wide as possible, to the undefined work of freedom.”⁷⁰ That Foucault refers to freedom as work is significant, since he is not referring to a freedom that liberates one from the processes in which he or she is engaged, but rather freedom as an ongoing manner of engaging in these processes and the limits they produce. Here freedom entails defining “admissible and acceptable forms of existence or political society,”⁷¹ and for this reason the aim is not escape as much as altering or modifying the conditions that make one *what one is*. Once one situates oneself in the present moment, it is then possible to experiment with and test the limits of the present, since it is here at the limits where the undefined work of freedom takes place. As Foucault writes: “this work done at the limits of ourselves must, on the one hand, open up a realm of historical inquiry and, on the other, put itself to the test of reality, of contemporary reality, both to grasp the points where change is possible and desirable, and to determine the precise form this change should take.”⁷²

Understood in this manner, the question of *what one is* then assumes a far more critical currency, since here the question not only involves identifying the limits constitutive of *what one is*, but also how one is implicated in the production

⁷⁰ Ibid, 316.

⁷¹ Foucault, Michel. “Ethics of Concern for Self as a Practice of Freedom.” *Ethics*. New York: The New Press, 282-283.

⁷² Foucault, “What is Enlightenment?” 316.

and reproduction of these limits. If the question of *what one is* remains a question of identifying the limits that govern *what one is*, it only serves to affirm and reproduce these limits, along with the social, legal and institutional structures that accompany them. In contrast, if the question concerns the ways one implicates oneself in the ongoing constitution of these limits, it is possible to reconsider *how one is what one is* and recast the limits constitutive of this way of life. Whereas the first mode of questioning merely apprehends these limits, it is this second mode that allows for altering the conditions in which one finds oneself. And as such, the question of *what one is* serves as a basis for identifying *and* interrogating the social, legal and institutional world one inhabits where, in the words of Foucault, “the only relations possible are extremely few, extremely simplified, and extremely poor.”⁷³

To therefore ask the question of *what a woman is* in this manner entails considering the implications of being identified as a woman, not only for those identified as such, but also for the broader social field in which this identity, and indeed other identities emerge. As demonstrated through the preceding chapter, those identified as women or as transgendered inhabit a social order where laws and institutions facilitate practices and activities that distinguish women and the transgendered from one another, with varying consequences for both. Undoubtedly, the question of *what a woman is* serves to identify these conditions, and in doing so distinguish those identified as women from those identified otherwise. However, through identifying these limits and their ongoing constitution, the question then situates those identified as women or transgendered within these processes of

⁷³ Ibid, 158.

identification, along with the social, legal and institutional structures through which these processes transpire. Here it is possible to reconsider the implications of being identified as a woman or as transgendered, and for renegotiating the relational and institutional structures invested in these varying modes of identification. And consequently, to be identified as a woman or as transgendered would then serve as a basis for interrogating the conditions under which those identified as such are distinguished from and related to one another.

And so, operating here in the space of an encounter, the question of *what one is* becomes a question of the broader conditions that contextualize encounters between women and the transgendered, as well as the challenges associated with renegotiating these conditions. Again, the capacity of women and the transgendered to negotiate their disputes in a responsive manner is limited by the existing legal framework, which operates on the basis of conventional gender categories, and often at the expense of those who exceed these categories. Clearly, it is necessary to alter the legal framework in order to better accommodate those who do not easily conform to conventional gender categories. However, the question then arises as to what affect these changes might have for those identified as women, and particularly women-only organizations, which operate on the basis of the terms contested here. Inhabiting these conditions in the way Foucault proposes does not require negating these conditions, or for that matter the identities that distinguish women and the transgendered from one another. However, it does require that women and the transgendered acknowledge their shared implication in these conditions, not only

through the affirmation of these conditions, but also through their ongoing negotiation.

This implicated manner of inhabiting *what one is* therefore allows for a more responsive form of engagement between women and the transgendered, implicated as they are in this ongoing process of negotiation. Rather than emphasizing the divisions that exist between them, this implicated approach considers, and moreover interrogates, the ways women and the transgendered involve themselves in processes that distinguish the one from the other. Once situated in this manner, it is possible to identify the ways in which women and the transgendered affect one another through their varying interactions, as well as the laws and institutions that facilitate and direct these interactions and subsequent reflections. Here the question of *what one is* becomes a question of the relationships that exist between women and the transgendered, both inhabiting the social, legal and institutional world identified here. And the challenge in this instance is not merely to distinguish the one from the other, “not to discover in oneself the truth of one’s sex,” but to renegotiate the conditions under which women and the transgendered are distinguished from, yet nonetheless implicated with, one another in the space of an encounter.⁷⁴

⁷⁴ In the words of Foucault: “The problem is not to discover in oneself the truth of one’s sex, but, rather, to use one’s sexuality henceforth to arrive at a multiplicity of relationships. And, no doubt, that’s the real reason why [*what one is*] is not a form of desire but something desirable.” See Foucault, Michel. “Friendship as a Way of Life.” *Ethics*. New York: The New Press, 1997, 135-136.

iii. Emmanuel Levinas: a responsive relationship

Shifting from inclusion/exclusion to implication therefore provides a different way of inhabiting encounters between women and the transgendered – emphasizing relations between the one and the other rather than divisions. Certainly, women and the transgendered are distinguished from one another in this implicated sense, and so the question of inclusion/exclusion remains. However, the question is recast in significant ways; once decentered and implicated in the manner described by Derrida and Foucault, women and the transgendered might then renegotiate the social, legal and institutional limits of their relationships, as well as their respective identities, in a manner that is sensitive to the unique affects of their ongoing interactions with one another. Here distinguishing *what one is* not only concerns the limits that distinguish women and the transgendered from one another, but also the relations that exist between them in spite of, or perhaps due to, their differences. And consequently *what one is*, as it emerges in this decentered and implicated sense, is inherently relational, ethical, and indeed responsive to others in a manner impossible within the terms of inclusion/exclusion, fittingly referred to by Levinas as responsibility.

In an interview published under the title of *Ethics and Infinity*, Levinas speaks of responsibility “as the essential, primary and fundamental structure of subjectivity. For I describe subjectivity in ethical terms. Ethics, here, does not supplement a preceding existential base; the very node of the subjective is knotted in

ethics understood as responsibility.”⁷⁵ Responsibility, elsewhere referred to as the *one-for-the-other*, marks a certain way of understanding subjectivity that is characteristic of Levinas, where the one cannot be thought without others, and is for this reason irreducible to the one itself. Reflecting on responsibility as essential or primary therefore requires rethinking terms such as “essential” or “primary”, since here responsibility is premised on the impossibility of thinking solely in terms of essences or singularities. If responsibility is essential or primary in the work of Levinas, it is because *any one thing* is never as simple as or reducible to *any one thing*. And the richness of the work of Levinas lies in this irreducibility of the one to itself, whose singularity emerges not from within itself but through its relationships with others, with whom it is implicated and responsive in the space of an encounter.

Responsibility thus departs from a way of thinking based in the *one*, or more precisely in solitary essences or singularities, where the one and the other are not understood in this responsive sense but in relation to themselves, on the basis of a process that either isolates the one from the other or assembles them together as a unified structure of meaning. As shown earlier in this chapter, thinking solely in terms of the *one* requires bringing together disparate elements as a single entity or configuration of entities, which then “emerge thematized and are identified in the synchronism of denomination (or in the unity of a tale which cannot be out of phase).”⁷⁶ Here essence entails gathering these disparate elements together, conjoined as a single entity and re-presentable in the simultaneity of a unified

⁷⁵ Levinas, Emmanuel. *Ethics and Infinity: Conversations with Phillippe Nemo*. Pittsburgh: Dusquesne University Press, 1985, 95.

⁷⁶ Levinas, *Otherwise than Being or Beyond Essence*, 42.

presence. Essence brings order to disorder, and as a result, *what one is*, conceptualized in terms of the *one*, is then subsumed within the work of essence “so as to *possess itself* by showing itself, proposing itself as a theme, exposing itself in truth.”⁷⁷

The truth of *what one is*, exposed here through the work of essence, is one that emanates from within itself, present to itself and re-presentable on the basis of what Levinas refers to as intentionality. If the work of essence consists of joining together disparate elements, “the concrete situation of assembling into a system”⁷⁸, it requires one to carry out this work and thus assume responsibility for it. This responsibility, based here in essence, is traceable to a single point or subject, separate from the others from which it is distinguished; “[h]ere the subject is origin, initiative, freedom, present. To move oneself or have self-consciousness is in effect to refer oneself to oneself, to be an origin.”⁷⁹ Understood in this manner, *what one is* is essentially self-referential and self-producing, unresponsive to others it encounters without including or excluding them in reference to oneself and the truth that governs them.⁸⁰ The truth of *what one is* as it emerges here is one of solitude, based

⁷⁷ Ibid, 99.

⁷⁸ Ibid, 78.

⁷⁹ Ibid, 78.

⁸⁰ “Without proximity of the other in his face everything is absorbed, sunken into, walled in being, goes to the same side, forms a whole, absorbing the very subject to which it is disclosed. Essence, the being of entities, weaves between the incomparables, between me and the others, a unity, a community (if only the unity of analogy), and drags us off and assembles us on the same side, chaining us to one another like galley slaves, emptying proximity of its meaning. Every attempt to disjoin the conjunction and the conjuncture would be only clashing of the chains.” See Ibid, 182.

not in relation to others but on the basis of an essence that originates within the one itself, for which one can then assume responsibility.

However, that one is responsible for *what one is* suggests that others are in fact far more involved in *what one is* than the seemingly-solitary one is prepared to admit. Again, the *one* is posed and reposed through an ongoing process of self-referral and self-production, understood here as the work of essence. Yet this ongoing process of self-referral and self-production does not occur in isolation but rather in proximity to others, from whom one is distinguished and for whom one is called to account for *what one is*. In proximity to others, the one finds itself in the accusative, “as it were ordered from the outside, traumatically commanded, without interiorizing by representation and concepts the authority that commands [it].”⁸¹ Rather than emerging on the basis of its own initiative, the one is incited and disquieted in the face of others, “affected in spite of itself”⁸², and assumes the work of essence in order to affirm and confirm itself in the face of others, to whom it is nonetheless responsible for what distinguishes it from those identified otherwise.

In this respect, then, the one cannot be understood solely in relation to itself or on the basis of origin or intent, since here *what one is* emerges in relation to, and moreover in response to others with whom one is engaged, in a preoriginary relationship that Levinas refers to as the *one-for-the-other*. Whereas the seemingly-solitary *one* refers back to itself in order to affirm itself *for-itself*, the *one-for-the-other* acknowledges an essential vulnerability, “a preoriginary vulnerability or being-

⁸¹ Ibid, 87.

⁸² Ibid, 102.

seized, a passivity prior to all receptivity” that lies at the heart of *what one is* and one’s relationships with others.⁸³ One does not choose to be *what one is*, inasmuch as choice here implies an initiative undertaken in isolation from those with whom one is engaged and from whom one is distinguished. Here the differences that distinguish the one from the other, marking them in their singularity, emerge through their shared implication with one another, and accordingly their shared vulnerability. One is subject to and through others, and is for this reason *for-the-other* – “its identity is formed by way of the impossibility of fleeing in the wake of this responsibility.”⁸⁴

Understood in terms of responsibility as the *one-for-the-other*, *what one is* assumes an ethical character no longer wholly invested in itself, but rather in the relational circumstances through which this sense of self emerges. *What one is* undoubtedly remains a question, and indeed an important question, concerning the responsibility of the one in the face of others. Yet this is not a question that invests responsibility in the one apart from others; on the contrary, the one in question is wholly invested in others, with all of the responsibility that being identified as such entails. “In the exposure to wounds and outrages, in the feeling proper to responsibility, the oneself is provoked as irreplaceable, as devoted to the others, without being able to resign, and thus as incarnated in order to offer itself, to suffer and give.” Responsibility entails this inescapable exposure to others from whom one is distinguished, and for whom one is responsible for *what one is*. *What one is*,

⁸³ Levinas, Emmanuel. *God, Death, and Time*. Ed. Jacques Rolland. Stanford: Stanford University Press, 2000, 177.

⁸⁴ *Ibid*, 157-158.

emerging in and through responsibility, “is thus one and unique, in passivity from the start, having nothing at its disposal that would enable it to not yield to provocation.”⁸⁵

And so applied here in the interactions between women and the transgendered, the question of *what one is* not only concerns what distinguishes women and the transgendered from one another, but also the immense responsibility that is intrinsic to being distinguished in this manner. Determining *what one is* not only serves to distinguish women and the transgendered from one another, but also enable practices and activities that shape the broader social conditions within which these identities emerge. Given the far-reaching affects of *what one is*, it is impossible to consider the implications of these distinctions in isolation from one another. To be distinguished as a woman or as transgendered does not place those identified as such beyond the reach of one another, since here the differences that distinguish women from the transgendered mark particular ways of being implicated with one another, in spite of these differences. And for this reason, distinguishing *what one is* requires an ethical stance of responsibility that acknowledges the broader affects of being identified as a woman or transgendered, due to the ways those identified as such are implicated with one another at the core of *what they are*.

This ethical stance does not resolve the challenges associated with being implicated in this manner, and it is important to emphasize that any efforts to foster responsibility between women and the transgendered would not have a determined resolution as their objective. Certainly this responsive form of interaction cannot

⁸⁵ Levinas, *Otherwise than Being or Beyond Essence*, 105.

take place without altering the conditions that currently govern relations between women and the transgendered, and especially the legal framework that limits their encounters in terms of conventional gender categories. Here it is necessary to alter these conditions in a manner that allows the transgendered to respond *as* transgendered, distinguished from those who occupy these conventional categorizations. However, these efforts would not resolve encounters between women and the transgendered in the security of stable relations and identifications, but rather promote further encounters with all of the accompanying disturbances and dislocations. Set apart from one another in response to one another, indeed as *one-for-the-other*, women and the transgendered would not have the capacity to detach themselves from their ongoing interactions with one another. Yet the possibilities would then exist for renegotiating their relationships in a manner that is sensitive to the implications of being related, implicated, and indeed responsive to one another in the space of an encounter.

IV. Between women and the transgendered

Having reflected on the writings of Derrida, Foucault and Levinas, it is now possible to see how responsivity might recast the discussion taking place in *Nixon*, and indeed other cases involving women and the transgendered. Again, disputes involving women-only organizations and transgendered persons currently revolve around the question of *what a woman is*, requiring those involved in these disputes to identify as such in order to make their claims for inclusion or exclusion. Under these conditions, courts cannot account for the experiences of the transgendered, and as a result the transgendered are often unable to respond to the conditions in which they find themselves identified as such. Here it is necessary to alter the legal framework in a manner that allows the transgendered to make their claims *as* transgendered, distinguished from men and women, and for this reason in need of their own unique consideration in cases such as *Nixon*. In doing so, the possibilities would emerge for a different kind of discussion that better appreciates the distinctive positions of women-only organizations and transgendered persons in cases such as this. And as the preceding chapter suggests, this would allow for a more sensitive, responsive form of interaction between women and the transgendered than is possible within the terms of the existing legal framework.

This chapter therefore returns to *Nixon* in order to consider how this responsive form of interaction might affect cases such as this, and moreover reshape the broader social field in which disputes between women-only organizations and transgendered persons take place. Altering the legal framework in a manner that

allows those identified as transgendered to make their claims *as* transgendered would transform the discussions taking place in cases such as *Nixon*, allowing the transgendered to identify outside conventional gender categories without the accompanying disadvantage. This would not prevent disputes such as those taking place in cases such as *Nixon*, where women-only organizations and transgendered persons conflict over access to gendered space; however, it would recast these disputes in a manner that allows women and the transgendered to meet on the ground of their differences, and then undertake the difficult task of negotiating between their respective positions. Here in the space between women and the transgendered it would be possible to undertake a more responsive form of engagement than is currently possible within the terms of the existing legal framework. And so it is to *Nixon* that this study now turns in order to consider how responsivity might affect encounters between women and the transgendered, and the spaces in which encounters of this kind transpire.

i. Recasting encounters between women and the transgendered

Returning to the *Nixon* case, it is now possible to see how the significance of this case, as well as the contrasting decisions it has generated, is not limited to these decisions, or for that matter the more recent decision of the BC Court of Appeal. Certainly, the question of *what a woman is* as it emerges in this case has significant implications for organizations such as Rape Relief and transgendered persons such as *Nixon*, and in this respect the decisions arrived at by the BC Human Rights Tribunal and the BC Supreme Court carry an importance of their own that demands further

attention. However, that *what a woman is* has these implications for women-only organizations *and* transgendered persons suggests that attention cannot be limited to these decisions or the particular rationales of which they are indicative. Both decisions demonstrate that conflicts between women-only organizations and transgendered persons currently are resolved by determining whether or not a person can identify as a woman, included in or excluded from the organization in question. And in consequence, the decisions of the Tribunal and the Supreme Court reflect the limits that currently govern disputes between women and the transgendered, particularly in a legal case such as this, operating within the confines of conventional gender categories.

Nixon's significance does not, therefore, lie solely in the decisions of the Tribunal and the Supreme Court, but also in the question of *what a woman is* and the implications of this question for women-only organizations and transgendered persons. Organizations such as Rape Relief operate on the basis of *what a woman is* and the legal supports associated with this distinction, and for this reason determining *what a woman is* has great implications for the work done by and through these organizations. For people like Nixon, however, who are excluded from these organizations, their capacity to respond is severely limited, since the grounds available for responding are associated with conventional gender categories from which they are routinely excluded. Both women and the transgendered are required to identify in terms of these categories in order to make their respective claims for inclusion or exclusion. And in cases such as *Nixon*, it is then necessary

for the courts to determine the conditions under which it is possible to identify as a woman, included in or excluded from the spaces that are marked as such.

Nixon thus exposes a fundamental limit that forecloses the possibilities for identification and contestation in cases such as this involving women-only organizations and transgendered persons, and both decisions of the Tribunal and the Supreme Court are representative of this limit. Again, in cases where women and the transgendered conflict over matters of inclusion and exclusion, it is necessary for them to assert their claim to *what a woman is* in order to argue for inclusion or exclusion. Clearly this poses great difficulties for the transgendered, who find themselves situated at the limits of *what a woman is*, and are for this reason often incapable of challenging the exclusionary practices to which they are subjected. The transgendered are only able to contest women-only organizations, and indeed other gender-based organizations, on the basis of identities from which they are oftentimes excluded. And whether or not the courts rule in favor of the transgendered in cases such as *Nixon*, they nonetheless require the transgendered to affirm identities that limit their capacity to respond to the conditions in which they find themselves identified as transgendered.

That the transgendered are unable to respond to these conditions *as* transgendered suggests the possibilities for accommodating their claims within the existing legal framework, while by no means exhausted, are undoubtedly limited. Certainly, the transgendered play an important role in rearticulating the terms of the existing framework, and given the current circumstances, this remains a vital task

both for women and the transgendered.⁸⁶ However, the existing framework does not allow the transgendered to make their claims *as* transgendered, distinguished from men and women, and subject to unique forms of social disadvantage. If, as Christine Boyle suggests, “it is distinctive to the experience of being transgendered that there is an on-going debate about the most appropriate approach to eradicating disadvantage,”⁸⁷ it is doubtful that the existing legal framework is capable of acknowledging this distinctive experience beyond the terms of conventional gender categories. And until the transgendered are able to respond from their distinctive experiences *as* transgendered, their claims will at best rearticulate identities that nonetheless evade them in cases such as *Nixon*.

Here the importance of gender identity as a ground for making discrimination claims lies in its capacity to provide a position for the transgendered to respond in instances where they are distinguished *as* transgendered. If there is distinctiveness to being transgendered, the discussions taking place in cases such as *Nixon* must account for this distinctiveness and how those identified otherwise contribute to the unique experiences of the transgendered. In cases such as *Nixon* that involve the exclusion of the transgendered from gendered spaces, it is insufficient to limit the discussion to whether or not a person qualifies as a man or a woman, since here it is equally important to determine whether these distinctions are necessary to the space in question. Here the transgendered do not necessarily seek inclusion as men or women, but often question the apparent need to identify as such in order to access

⁸⁶ Ontario Human Rights Commission, 24.

⁸⁷ Boyle, 43.

the spaces, services and opportunities denied them as transgendered. Gender identity would expand the possibilities for challenging exclusionary practices beyond the terms of the existing legal framework, and in doing so acknowledge the experiences of those who find themselves situated at the limits of the conventional gender categories on which the existing framework, and moreover the broader social field, are based.⁸⁸

In this respect, the importance of gender identity does not lie solely in the ground itself, but much more in the dynamics that this ground would foster in cases such as *Nixon*. Again, as *Nixon* demonstrates, a discussion that is limited to *what a woman is* can only address certain kinds of questions, and in *Nixon* these questions revolve around whether or not a person like Nixon can identify as a woman, and thereby demand inclusion in an organization such as Rape Relief.⁸⁹ This, of course, remains an important line of questioning, and gender identity would not prevent it from being taken. However, questioning *what a woman is* cannot address the equally pressing matter of how someone like Nixon might then lay claim to an organization such as Rape Relief in terms other than those that justify Rape Relief's exclusionary practices as a women-only organization. Matters such as this require a different set of questions that account for Nixon's exclusion *as* transgendered, set apart from men and women, and here gender identity assumes this difference as a

⁸⁸ Namaste, 9.

⁸⁹ To reiterate: "What [Nixon and Rape Relief] do not agree upon is what the law provides to resolve their conflicting views of which characteristics identify a person as female for purposes of obtaining the services of, or employment with, Rape Relief." See *Vancouver Rape Relief Society v. Nixon*, 27.

starting point for reflecting on exclusionary practices and the implications they have, in this instance for women and the transgendered.

Gender identity would therefore recast the discussions taking place in cases such as *Nixon*, allowing the transgendered to make their claims *as* transgendered, and requiring organizations to account for the affects of their practices on those identified *as* transgendered. Rather than requiring those involved in these disputes to share a common identity as *Nixon* does, gender identity would allow them to engage with one another on the basis of their differences, acknowledging that differences do exist between the gendered and the transgendered, and that in these instances differences form the basis of their interactions with one another.⁹⁰ Currently the courts can only account for those identified as men or women, requiring the transgendered to either identify as such or accept their exclusions as a necessary result of being otherwise.⁹¹ Gender identity would not reverse these circumstances in favor of the transgendered; however it would compel the courts to account for those on both sides of the dispute, and thereby provide a ground for dialogue

⁹⁰ As Jennifer Nedelsky writes: “[t]he question of equality... is the meaning of equal moral worth *given* the reality that in almost every conceivable concrete way we are not equal, but vastly different, and vastly unequal in our needs and abilities. The object is not to make these differences disappear when we talk about equal rights, but to ask how we can structure relations of equality among people with many different concrete inequalities.” See Nedelsky, Jennifer. “Reconceiving Rights as Relationship.” *Review of Constitutional Studies* 1.1 (1993), 20-21.

⁹¹ findlay refers to this in terms of punishment: “discrimination against people on the basis of their gender identity typically involves punishment for being the “wrong” gender, and this punishment is extended to anyone that the perceiver understands to be “wrong” – whether as the individual identifies for example as a butch lesbian or as a transgendered FtM”. See findlay, *An Introduction to Transgendered Women*, 12-13.

between the gendered and the transgendered that is sorely lacking within the terms of the existing legal framework.

ii. The broader social significance of gender identity

Clearly, the affects of gender identity would not be limited to cases such as *Nixon* involving women-only organizations, and would in fact extend to other instances where the transgendered are distinguished *as* transgendered, and are for this reason subject to differential treatment. By allowing the transgendered to make their claims *as* transgendered, gender identity would enable the transgendered to contest a wide range of gendering practices in addition to those performed by women-only organizations, and in this respect gender identity has a significance that reaches far beyond cases such as *Nixon*. The affects of gender are not limited to the practices of women-only organizations, and come to bear on a variety of issues, including access to social services and facilities, medical procedures, insurance coverage, employment, marriage and child custody, among others.⁹² In each of these instances, gender identity would allow the courts to reflect on the particular circumstances in which the transgendered are set apart from men and women, subject to the unique implications of being distinguished as such. And while this would not

⁹² A more extensive list would include: public and professional education; gender declaration on application forms, identity cards and government forms; access to insurance coverage for sex-reassignment surgery; access to sex-segregated services and facilities such as washrooms, change rooms, sports and community facilities, correctional facilities, hospitals and women's shelters; employment, housing and accommodation, services generally, and entering into contracts; recognition of marriage and parenthood, as well as child custody and access. See Ontario Human Rights Commission, 25-38.

rule out the exclusion of the transgendered from gendered spaces, services and programs, it would ensure that these exclusions were made in consideration of their affects on the transgendered.⁹³

Gender identity therefore offers possibilities for the responsive form of interaction described in the previous chapter, where those involved in cases such as *Nixon* might negotiate between their respective positions in consideration of the implications this has for the gendered and the transgendered. In contrast to the discussions currently taking place in *Nixon* and other cases of this kind, which remain within the terms of conventional gender categories, gender identity would allow for a discussion that acknowledges those who fall outside these terms, and then require their own consideration in the courts. By reframing the discussion in this manner, the claims of Nixon and of Rape Relief would assume importance on their own terms – not merely on the basis of *what a woman is*, but rather on the basis of their divergence, which in this instance motivates the dispute taking place in *Nixon*. Here the claims of Nixon and of Rape Relief could be made from their distinctive positions within the space of this dispute, which does not mean that their positions are unrelated. On the contrary, and as the preceding pages demonstrate, it is through their distinctiveness that these positions are come to bear on one another. And furthermore, it is by acknowledging these distinctive positions that the courts might then reflect on their unique implications in cases such as *Nixon*, where the gendered and the transgendered confront one another across the space that not only separates, but also implicates, the one and the other.

⁹³ “We might still decide to maintain that right of exclusion, but the decision would be made in full consciousness of the pattern of relationships it helps to shape.” See Nedelsky, 17.

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