
Review: The “Granular and Quotidian, Dispersed and Tentacular”: Critical Reflections on *Canadian Journal of Law and Society* (2020) 35(2) Special Issue – On the Margins of Trans Legal Change

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Introduction: Transparency

*Toutefois, en réduisant l'existence trans à cette expérience de harcèlement, de discrimination et de violence et en reliant la transitivité à un processus identitaire plutôt que matériel, ce modèle fixe le sujet trans dans sa marginalité et fait obstacle à son émancipation.*¹

*By reducing trans existence to such experience of harassment, discrimination and violence and by linking transitivity to an identitarian process instead of a material one, the model affixes the trans subject to its marginality and raises barriers to its emancipation.*²

This volume³ arrives at a moment where issues facing transgender peoples in Canada, and in many ways globally, are more visible in the public realm than at other moments in recent history. Some of this is positive – shifts in human rights laws⁴ and in other formal legal venues,⁵

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¹ Florence Ashley, “L’In/visibilité constitutive du sujet trans : l’exemple du droit Québécois” (2020) 35(2) *Canadian Journal of Law and Society* 317-340 at 338 [Ashley].

² Florence Ashley, “The Constitutive In/visibility of the Trans Legal Subject: A Case Study” (2021) 28(1) *UCLA Women’s L.J.* forthcoming at 36 (draft on file with author). See also Vivian Namaste, *Sex Change, Social Change: Reflections on Identity, Institutions and Imperialism*, 2nd ed. (Toronto: Women’s Press, 2011) at 15-41 and Dean Spade, *Normal Life* (Brooklyn: South End Press, 2011) [Spade].

³ The complete volume is available online: <https://www.cambridge.org/core/journals/canadian-journal-of-law-and-society-la-revue-canadienne-droit-et-societe/issue/04C432962B4FC19D091F7DC3548D1794>.

⁴ See for example, *An Act to Amend the Canadian Human Rights Act and the Criminal Code*, SC 2017, c. 13 [Bill C-16] and *Affirming Sexual Orientation and Gender Identity Act*, SO 2015, c. 18 [Bill 77].

⁵ In December 2020 the BC Provincial and Supreme Courts gave notice to the profession of a change in forms of address for parties and lawyers in court, asking people to state their name, title and pronouns to be used in the proceedings. See: <https://www.provincialcourt.bc.ca/enews/enews-16-12-2020> and https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions/civil/PD-59_Forms_of_Address_for_Parties_and_Counsel_in_Proceedings.pdf.

recognitions in popular culture,⁶ and increased scholarship⁷ – and some of it is breathtakingly difficult – rise in violence⁸ and in particular violence experienced by Black, Indigenous and peoples of colour (BIPOC) communities,⁹ debates on social media,¹⁰ divides in feminist communities,¹¹ and regressive policy rollback in the UK and elsewhere.¹² And, as are many others, transgender people are negotiating the impact of a global pandemic with its isolation and its severe economic consequences.

Canadians, in particular, sit at a unique historical legal moment that for the most part is wrapped in formal equality. In June 2017 Bill C-16 added “gender expression” and “gender identity” to the list of prohibited grounds of discrimination in the Canadian Human Rights Act, formalizing the parameters of anti-discrimination law at the federal level, and bringing the national legislative regime in line with what had already happened in all the provincial and territorial human rights regimes.¹³ Hard fought for, this change is the starting point for many of the papers

⁶ Recent stories in North American pop culture include actor Elliot Page coming out as trans and non-binary: https://www.instagram.com/p/CIQ1QFBhNFg/?utm_source=ig_web_copy_link; the career of Laverne Cox: <https://time.com/magazine/us/135460/june-9th-2014-vol-183-no-22-u-s/>; and the high profile transition of Caitlyn Jenner: <https://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz>.

⁷ See for example the work of the Chair in Transgender Studies at the University of Victoria: <https://www.uvic.ca/research/transchair/about/index.php>; and recent dedicated volumes in the UK context on Trans Temporalities: <https://www.eupublishing.com/toc/soma/7/1> and on gender decertification: <https://journals.kent.ac.uk/index.php/feministsatlaw/issue/view/45>.

⁸ See for example, Erin Donaghue, “‘Horrific spike’ in fatal violence against transgender community” (July 2020), CBS News: <https://www.cbsnews.com/news/transgender-community-fatal-violence-spike/>.

⁹ See for example, Human Rights Campaign, “Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2020” (2020): <https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020>.

¹⁰ Jackson Bird, “Harry Potter Helped Me Come Out as Trans, But J.K. Rowling Disappointed Me” (December 2019), *The New York Times*: <https://www.nytimes.com/2019/12/21/opinion/jk-rowling-twitter-trans.html>.

¹¹ See for example, <https://www.insidehighered.com/news/2019/07/19/divide-over-scholarly-debate-over-gender-identity-rages> on the derogatorily entitled “TERF” debates; and similar long-standing debates in Canada: <https://www.theglobeandmail.com/opinion/article-the-targeting-of-other-women-shows-meghan-murphy-is-no-feminist/>. See also this interview with Judith Butler for a critique of the equation of “TERFS” and mainstream feminists: <https://www.newstatesman.com/international/2020/09/judith-butler-culture-wars-jk-rowling-and-living-anti-intellectual-times>.

¹² For a discussion of non-action as a “missed opportunity” in the UK see Simon Murphy and Libby Brooks, “UK government drops gender self-identification plan for trans people” (September 2020), *The Guardian*: <https://www.theguardian.com/society/2020/sep/22/uk-government-drops-gender-self-identification-plan-for-trans-people>.

¹³ Bill C-16, *supra* note 4. Bill C-16 also amended the Criminal Code of Canada to add provisions dealing with hate propaganda, incitement to genocide and aggravating factors in sentencing. The amendments were necessary to provide explicit protection for transgender and gender-diverse people and to do so in clear language that would articulate in federal law that “transgender and other gender-diverse persons have a right to live free from discrimination, hate propaganda, and hate crime”: <https://www.justice.gc.ca/eng/csj-sjc/pl/identity-identite/faq.html>.

in this volume, a recognition that ensuring protections for Canadians facing discrimination for the ways that they self-identify or live their gendered lives, is positive indeed. And, at the same time, the volume also launches off this moment with forward looking critiques of litigating through human rights regimes, demonstrating the limits of rights-based claims,¹⁴ particularly for lives lived at the margins.¹⁵

It is a slightly unusual scholarly endeavour – the review of a journal volume. I leap into this review, however, with anticipation and determination. It is a moment to hold up the work of these diverse emerging and prominent scholars, some of it autoethnographic, and to interrogate the themes and tensions that arise in their work. Transgender and non-binary communities are facing shifting challenges on many fronts, including from feminist communities, and that was captured at the conference from which this collection springs. Having this work in one collection, and with the articles sitting next to each other in conversation, as they are, creates another opportunity, which is to examine their contributions to the broader question of the connections and dissonances between trans legal studies and other areas of critical legal inquiry.

For scholars who are looking to do research on any particular legal issue affecting trans and non-binary folk, there are a range of subjects covered here: activism,¹⁶ institutional memory,¹⁷

¹⁴ See for example, William Hébert, “Trans Rights as Risks: On the Ambivalent Implementation of Canada’s Groundbreaking Trans Prison Reform” (2020) 35(2) *Canadian Journal of Law and Society* 221-244 [Hébert]. See also, Sharon Cowan “Sex/Gender Equality: Taking a Break from the Legal to Transform the Social” in D. Cowan and D. Wincott (eds), *Exploring the ‘Legal’ in Socio-Legal Studies* (London: Palgrave Macmillan, 2016) 115-134.

¹⁵ See Samuel Singer and Ido Katri, “Foreword” (2020) 35(2) *Canadian Journal of Law and Society* 147-151 [Singer and Katri]. For an argument on how change and progress are not linear for queer folk, notwithstanding strong policy initiatives, see Matson Lawrence and Yvette Taylor, “The UK Government LGBT Action Plan: Discourses of Progress, Enduring Stasis, and LGBTQI+ Lives ‘Getting Better’” (2020) 40(4) *Critical Social Policy* 586-607 at 589. Thank you to Sharon Cowan for this reference. See also Spade, *supra* note 2.

¹⁶ Becki Ross, “Obituary for Jamie Lee Hamilton” (2020) 35(2) *Canadian Journal of Law and Society*, 157 [Ross].

¹⁷ Viviane Namaste and Dalia Tourki, “Trans Justice and the Law: From Then to Now, From There to Here: A Conversation between Dr. Viviane Namaste and Dalia Tourki” (2020) 35(2) *Canadian Journal of Law and Society* 159-196 [Namaste and Tourki].

employment law,¹⁸ prison reform,¹⁹ school board regulation,²⁰ accommodations at Universities and colleges,²¹ family law,²² identity documents,²³ social benefit law,²⁴ conversion therapies,²⁵ and end-of-life care,²⁶ to name but a few. And for scholars interested in thinking carefully about the transgender legal subject, there are some attempts to connect the themes across these contributions²⁷ as well as focused deep dives into the question.²⁸ It is a rich resource, a diverse yet euphonious set of voices. But most importantly, it is a volume dedicated to interrogating the power that law holds to exclude in ways that “go far beyond the scope of gender identities and experiences.”²⁹ The complexity of issues taken up in this volume are in no way, shape or form, homogenous; what may be colloquially seen as the “trans legal movement” is explored as a diverse set of movements with issues that cut across all areas of legal practice, study and experience. As Cossman and Leckey say in their introduction, the volume collectively offers themes that are, “granular and quotidian, dispersed and tentacular;”³⁰ and it is the uniqueness of these themes that I aim here to explore.

My aim, in this review, is to take up the challenge posed by Singer and Katri in their foreword – to turn a critical, legal and emotional gaze towards trans people at the margins,³¹ and tease out of these articles, diverse as they are, some common threads and themes. I take as the starting point,

¹⁸ Dan Irving and Nathan Hoo, “Doing Trans-Economic Justice: A Critique of Anti-Discrimination Laws and Inclusive Employment Policies” (2020) 35(2) *Canadian Journal of Law and Society* 197-220 [Irving and Hoo].

¹⁹ Hébert, *supra* note 14.

²⁰ Kyle Kirkup, Lee Airton, Allison McMillan and Jacob DesRochers, “The Aftermath of Human Rights Protections: Gender Identity, Gender Expression, and the Socio-Legal Regulation of School Boards” (2020) 35(2) *Canadian Journal of Law and Society* 245-268 [Kirkup et al].

²¹ Leon Laidlaw, “Trans University Students’ Access to Facilities: The Limits of Accommodation” (2020) 35(2) *Canadian Journal of Law and Society* 269-291 [Laidlaw].

²² Samuel Singer, “Trans Rights Are Not Just Human Rights: Legal Strategies for Trans Justice” (2020) 35(2) *Canadian Journal of Law and Society* 293-315 [Singer].

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Jake Pyne, “‘Building a Person’: Legal and Clinical Personhood for Autistic and Trans Children in Ontario” (2020) 35(2) *Canadian Journal of Law and Society* 341-365 [Pyne].

²⁶ Alexandre Baril, Marjorie Silverman, Marie-Claire Gauthier, and Maude Lévesque, “Forgotten Wishes: End-of-Life Documents for Trans People with Dementia at the Margins of Legal Change” (2020) 35(2) *Canadian Journal of Law and Society* 367-390 [Baril et al].

²⁷ Singer and Katri, *supra* note 15; Brenda Cossman and Robert Leckey, “Introduction” (2020) 35(2) *Canadian Journal of Law and Society* 153-156 [Cossman and Leckey].

²⁸ Ashley, *supra* note 1.

²⁹ Singer and Katri, *supra* note 15 at 151.

³⁰ Cossman and Leckey, *supra* note 27 at 155.

³¹ Singer and Katri, *supra* note 15 at 149.

as most of the authors do, that it is a common good that the law has changed in Canada, to include trans and non-binary peoples in its articulation of who is worthy of human rights protection. And I follow them, as they invite all readers to do as well, to see how this protection is limited and formal, and how the important material and affective changes that should flow, in many spaces and places, are slow to happen.³²

I have divided the review into four sections: the granular, the quotidian, the dispersed and the tentacular. And I look at the contributions these 22 scholars make in mapping out the contours of the trans legal imaginary, as they were asked to do in the three day symposium in May 2019, when they were able to, and did, gather. The themes, questions and tensions that animate their works are extensive. My aim here is to tease out some of the connecting threads in a way that will bring readers into the volume for a deeper discovery of its richness for trans legal studies and beyond.

The Granular: The Grainy and the Gritty

As Libby Adler argues, a focus on distributive justice shifts our “gaze away from grand aspiration and principled vindication and redirect[s] it downward, toward the gritty, low-profile rules, doctrines, and practices that condition daily life on the margins.”³³

At the heart of any discipline or area of law are its most important aspects or practical details, what is both essential and basic. In this sense, the volume offers two such themes, cross-cutting offerings that permeate all of the articles with a contiguous thread. The first, is the definitional strides this volume as a whole takes to lay out the fluid boundaries of a trans legal studies movement. It shows what the discipline of trans legal studies can and could be. The second, is how, in that work to map the terrain of the field, each contribution shows what differentiates trans legal studies from its most frequent comparator and ally, queer legal studies, and from a sole focus on human rights law. There are many areas of similarity in the work, and the lives, of trans and queer scholar, many places for allies, and many intersecting peoples and questions.

³² Cossman and Leckey, *supra* note 27 at 153.

³³ Singer, *supra* note 22 at 314 citing Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Durham: Duke University Press, 2018) at 15.

But quite profoundly, this volume demonstrates the insights to be drawn from trans legal studies for people living at the margins. And in doing the work, it also shows the significance and granularity of lived experience as essential methodology.³⁴

In the transcript of the keynote to the May 2019 conference, Viviane Namaste and Dalia Tourki are in conversation about the current challenges faced by trans legal scholars, activists and people, setting it against the history of the movement for trans legal recognition. They look to the civil rights movement, more that the gay liberation movement for parallels,³⁵ and offer that at the heart of the “gay movement” was a “fight to love freely.”³⁶ In their view and experience, the heart of the trans movement has been the “right to be loved.”³⁷ And while the movements share roots in questions of liberation, where there is divergence is in the move for state recognition, from about the 1990s on. In their view, equality before the law is absolutely essential, but the question of who remains left out, or othered, is the more critical and fundamental question.³⁸

This notion – that the trans legal movement is at its heart a movement demanding attention to the margins -- connects all the contributions in this volume. As Samuel Singer argues, human rights law is important, but not sufficient for trans justice, broadly cast;³⁹ and there is an “agility and creativity” needed to do legal advocacy on the margins.⁴⁰ This is similarly the starting place for Dan Irving and Nathan Hoo in their examination of the un- and underemployment of trans peoples, and the limits of human rights laws to address unspoken and unconscious discrimination. They argue that while formal legal recognition remains important, “how can scholars, trans legal advocates, and employment policy advocates account for the disparities between anti-discrimination and employment laws recognizing gender identity and gender expression as protected grounds and trans people’s lived experiences of being marginalized

³⁴ Singer and Katri, *supra* note 15 at 149.

³⁵ Namaste and Tourki situate their arguments in relation to the broader issues of the Civil Rights Movement, as an influence on marginalized communities, and subsequent actions for recognition and redistribution, *supra* note 17 at 163.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.* at 164.

³⁹ Singer, *supra* note 22 at 293.

⁴⁰ *Ibid.*

within, or barred from the workplace?”⁴¹ And, they continue, this is particularly so for trans women and BIPOC.

These two intersecting and foundational themes, that of the limits of human rights law and the significance of lives lived at the margins to trans legal studies as a discipline, are woven through all of the articles. Kyle Kirkup, Lee Airton, Allison McMillan and Jacob DesRochers, for example, examine how meaning-making – particularly with respect to the generally undefined legal terms of “gender expression” and “gender identity” – happens outside of formal court and tribunal settings. In the context of their work, such meanings are produced within school board policies in Ontario. While continuing to ask questions about the margins and the marginalized, they assert that human rights law also has an educative function, signalling to trans peoples that there are avenues for legal recourse in the context of discrimination.⁴² They do this, however, while making visible that human rights law, amongst other drawbacks, still obscures the complexity of the systemic, and is more easily accessed by those with economic and other forms of privilege.⁴³

This latter critique, that of the limits of rights-based instruments to address structural oppression, is taken up by Leon Laidlaw in his⁴⁴ investigation into the institutional cisgenderism in public institutions, in this case, Universities. His study of the inclusivity of washrooms, changing rooms and on-campus housing offers three models of accommodation: binary inclusion, alternative accommodation and degendering.⁴⁵ In weighing the perils and possibilities of each solution he argues that notwithstanding efforts at the University level to be rights-compliant, it is

⁴¹ Irving and Hoo, *supra* note 18 at 198. Questions of how marginalization in workplaces may differ on the basis of gender for trans folk is investigated by Kristen Schilt and Matthew Wiswall in their 2008 study, “Before and After: Gender Transitions, Human Capital, and Workplace Experiences” (2008) 8(1) *The B.E. Journal of Economic Analysis & Policy* 1-26 at 18-19. They argue that male privilege in respect of earnings does not carry over post-transition for the workers in their study.

⁴² Kirkup et al., *supra* note 20 at 250.

⁴³ *Ibid* at 252.

⁴⁴ For the first time I have turned my mind to how I use the pronouns of the authors that I cite in an academic work. For the authors in the volume I draw on the information that was provided at the Conference, in their bios and on their websites for their pronouns. Thank you to Samuel Singer who gracefully provided me with links and other information that I had not found. For all others I have done my best to access current information, while recognizing the importance of this ongoing citational practice.

⁴⁵ Laidlaw, *supra* note 21 at 273.

evident that “dominant relations of power” continue to condition the lived realities of trans and non-binary students.⁴⁶ More reimagining and redesigning will be necessary to address the roots of structural oppression and violence, and to resolve the intersectional barriers to inclusion in university environments.⁴⁷

All the authors use as a touchstone that the inclusion of the lived experience of trans people within a human rights context is essential. There is no question that trans rights are human rights.⁴⁸ But, each of the authors also critiques and moves beyond the human rights framework, to cast their arguments in regimes beyond human rights law, and in contexts in which the issue is not so much about recognition as it is about survival. Samuel Singer asserts:

there is much more work to do to identify legal priorities that centre distributive justice and trans survival. Trans jurisprudence and trans legal needs assessments provide us with starting points. Trans justice is guided by the pressing needs of marginalized trans people. It goes beyond legal recognition through explicit human rights grounds and turns to the substantive work of helping marginalized trans people survive—by increasing access to low-cost housing and social benefits, decriminalizing sex work and drug use, fighting against racial profiling, supporting trans parents and trans youth, and through other projects that increase trans people’s life chances.⁴⁹

The tension that is manifested in these narratives is one between trailblazing and survival.⁵⁰ There is evocative work here, both in trans communities by those advocating for material changes in their lives, and in this volume – by scholars and activists working to support those

⁴⁶ *Ibid* at 287. The argument here is that heteronormativity and cisgenderism runs deep in the University context.

⁴⁷ *Ibid* at 286. Contextually, many questions about inclusion in the university context have arisen around bathrooms; and here meaningful inclusion requires attention to nuanced understandings of the needs of genderqueer students, alongside survivors of violence, students of faith, and others. Laidlaw calls for attention to what is often cast as rights in conflict, that the sexism of our society be addressed in tandem with degendering facilities and to distinguish claims that arise from discriminatory stereotypes.

⁴⁸ As a hashtag, meme or gif, this adage has become so common as to perhaps lose its meaning. It is also challenging that this historical moment necessitates stating what to this author is obvious, that the pursuit of inclusion for trans people necessitates a reminder of their humanity. In a legal context, the question of trans rights as human rights also requires a careful interrogation of human rights legislation and the structures of anti-discrimination provisions, many of which do not explicitly include gender identity or expression. For a good discussion of this phraseology see: <https://www.openglobalrights.org/the-limits-and-the-promise-of-trans-rights-as-human-rights-claims/>.

⁴⁹ Singer, *supra* note 22 at 315.

⁵⁰ Singer and Katri, *supra* note 15 at 149.

very calls for change.⁵¹ And there is at the same time a recognition that “declaring marginalized people equal under the law does little to improve their daily lives.”⁵²

The Quotidian: The Ordinary and the Every Day

*A mentor and mama to generations of queer, Two Spirit, trans, and Indigenous youth, Jamie Lee [Hamilton] was respected for her kindness, mentorship, tenacity, and generosity of spirit. Her appetite for MAC cosmetics, Chinese cuisine, fish & chips, glamorous fashion, community building, and radical social justice was epic.*⁵³

The scholarship in this volume, while addressing the fundamental issues of human rights, of lives lived on the margins, of recognition and survival, also addresses the ordinary, the achingly human, and the every day.⁵⁴ And while that might not sound like the subject of exhilarating and compelling scholarship, what this volume points to are the places where trans lives matter. Things that might ordinarily be taken for granted, like a safe place to change before going swimming with your family, or having your gender identity recognized in dorm room assignments, can look very different through a trans and non-binary lens. In other words, it is important to acknowledge that, as in critical disability studies, difference is not deficit,⁵⁵ at the same time there is an inherent violence in cisnormativity⁵⁶ that is often invisible within that which is otherwise taken for granted.

First and foremost, there is a compelling sense, throughout the volume, of the lives of trans people as dignified and worthy of respect. Notwithstanding that trans lives tend to have more justiciable legal problems than those of other Canadians⁵⁷ there is underlying all this “brave and

⁵¹ The work of this volume stands on some important shoulders. See for example, Spade, *supra* note 2.

⁵² Singer and Katri, *supra* note 15 at 149. See also Sharon Cowan, “The Best Place on the Planet to be Trans? Transgender Equality and Legal Consciousness in Scotland” in S. Raj and P. Dunne (eds), *The Queer Outside in Law: Recognising LGBTIQ People in the United Kingdom* (London: Palgrave Macmillan, 2021) 187-232 at 190.

⁵³ Ross, *supra* note 16 at 257.

⁵⁴ I have taken this definition of “quotidian” from an online source: <https://www.lexico.com/definition/quotidian>.

⁵⁵ Pyne, *supra* note 25 at 345.

⁵⁶ Cisnormativity is the assumption that having a gender identity that aligns with your sex assigned at birth is the norm and is rightfully privileged over other forms of gender identity. See for example: <https://www.lgbtqprimaryhub.com/heteronormativity-cisnormativity>.

⁵⁷ Baril et al., *supra* note 26 at 370.

brilliant”⁵⁸ scholarship, a call for people to be able to just be who they are. Becki Ross’ brief obituary of Jamie Lee Hamilton captures these tensions fully – Trans, Two-Spirit, Metis and Cree, Hamilton is remembered for dedicating her life to advocating for Indigenous peoples, sex workers, LGBTQ+ and low income folk in Vancouver’s poorest neighbourhood, the downtown eastside.⁵⁹ Hamilton was also celebrated in the keynote for, amongst other things, an action she staged in 1998, leaving 67 pairs of stilettos on the steps of Vancouver City Hall, in an attempt to bring attention to missing Indigenous women and sex workers, to an apathetic city.⁶⁰ Her later testimony in front of the Inquiry into Murdered and Missing Indigenous Women and Girls in 2018, showed how the diverse communities of her neighbourhood were seen as disposable; and at the same time “how solidarities between communities happen and how expansive and intersectional activism and advocacy can be.”⁶¹ The work of Jamie Lee Hamilton is an important reminder of the ways that feminist activism is enhanced by trans-inclusive practice.

Captured best, at this moment in the Canadian legal landscape, in the theme of “Access to Justice,” this volume is also very effective in setting out numerous legal strategies, ideas, and innovations, to address trans and non-binary peoples as a population in Canada that experiences systemic barriers to obtaining legal advice and representation.⁶² And, in particular, attention is given to communities seeking access to justice even further at the margins – stories of trans and non-binary peoples in prison,⁶³ trans elders living with dementia,⁶⁴ and trans youth subjected to conversion therapies.⁶⁵ For example. William Hébert’s contribution looks carefully at policies put in place in federal prisons in Canada in response to Bill C-16, progressive initiatives aimed at assessing trans prisoners’ accommodation through the development of individualized protocols.⁶⁶ His examination makes evident that the new policy did not radically change the fact

⁵⁸ Cossman and Leckey, *supra* note 27 at 156.

⁵⁹ Ross, *supra* note 16 at 157.

⁶⁰ Namaste and Tourki, *supra* note 17 at 160.

⁶¹ *Ibid* at 162.

⁶² There is a good discussion of what we mean when we talk about “Access to Justice” in these 2018 remarks given by the Right Honourable Richard Wagner PC, Chief Justice of the Supreme Court of Canada: <https://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx?pedisable=true>.

⁶³ Hébert, *supra* note 14.

⁶⁴ Baril et al., *supra* note 26.

⁶⁵ Pyne, *supra* note 25.

⁶⁶ Hébert, *supra* note 14 at 228.

that prisons are fundamentally not safe places for trans prisoners, nor indeed anyone.⁶⁷ The twin driving principles of the new policies included a commitment to ensuring a safe, inclusive and respectful environment with the duty to accommodate on the basis of gender expression and gender identity.⁶⁸ The outcome however was that the rights ideal sat quite uncomfortably for administrators, staff and prisoners, in a gendered context of risks. Hébert argues that in “everyday encounters, the truth of people’s sex is not determined by their genitalia, but through a process of intersubjective social recognition contingent upon their capacity to achieve the normative look expected for their identity – a look that requires a harmonious alignment between physical appearance and embodied gendered performance.”⁶⁹ The special treatment of the post-Bill C-16 policies had the unintended consequence, according to trans interviewees and staff, of bringing with it more intensive scrutiny and surveillance, situations of attenuated risk.⁷⁰

Similarly, attention to accommodating the needs of trans people living with dementia (TPLWD) can also lead to unanticipated consequences. In the Baril, Silverman, Gauthier and Lévesque study, the issue of TPLWD losing their capacity to instruct their chosen, substitute decision-maker about their end-of-life care was guided by two unproblematized assumptions, that gender expression and gender identity are stable concepts; and that the self pre-dementia is better suited to making decisions than the self experiencing dementia.⁷¹ Yet, by paying attention to the harms of cisnormativity and cognonormativity⁷² the authors are able to make visible the potential violence of leaving the assumptions unchallenged. Freezing the gender of a person at the moment of dementia risks also freezing the notion that people adhere to a stable gender identity throughout their life.⁷³ And coming to the conclusion that people with cognitive disabilities are

⁶⁷ *Ibid* at 236.

⁶⁸ *Ibid* at 227.

⁶⁹ *Ibid* at 238.

⁷⁰ *Ibid.* at 239.

⁷¹ Baril et al., *supra* note 26 at 370.

⁷² Andrew King coined the term “cognonormativity” to problematize the norms regarding cognitive abilities in societies that marginalize people with intellectual disabilities, including people living with dementia: “Queer(y)ing Dementia – Bringing Queer Theory and Studies of Dementia into Dialogue” in S. Westwood and E. Price (eds), *Lesbian, Gay, Bisexual, and Trans Individuals Living with Dementia. Concepts, Practice and Rights* (Abingdon: Routledge, 2016) 51-64 at 59.

⁷³ Baril et al., *supra* note 26 at 377.

unable to make choices, devalues all people living with dementia.⁷⁴ In quite a subversive and supportive argument, the authors are able to centre trans people with dementia and their voices, ensuring an environment where all sorts of gender expression are valued, and that pays attention to the multiplicity of ways that people with cognitive disabilities might express their choices for their care.⁷⁵

There is poignancy in sitting with the trans legal narrative of an elder with dementia, who forgets every now and then that they transitioned 40 years earlier. We readers are asked by these authors to pause and understand in an unsettling way what normativity in these every day moments demands. Is the violence in being denied chosen pronoun use on those days of fluctuating cognition, or is the violence in not respecting the stable gender identity lived before dementia?

This same argument, that “people with disabilities of all ages have a history of being pathologized and denied voice and choice when it comes to decisions regarding health, housing, sexuality and so forth”⁷⁶ holds true for both trans people living with dementia, and trans youth who were subject to a Lovaas study at UCLA in the 1960s and 1970s.⁷⁷ In June of 2015 Ontario passed Bill 77, designed to ensure the protection and rights of Ontario’s lesbian, gay, bisexual and transgender communities by banning conversion therapy.⁷⁸ This trans depathologization⁷⁹ is without question, an important and necessary good, but what it opens up for interrogation is how, as Jake Pyne argues, “the affirmation of personhood for some can rely on the disaffirmation of others.”⁸⁰ The protections from harm in this Bill, designed to protect trans youth, do not extend to autistic trans youth, prompting questions on both the role that ableism plays in trans identity and personhood claims, and at whose expense a “right-bearing trans person has been built.”⁸¹

⁷⁴ *Ibid* at 378.

⁷⁵ *Ibid* at 382.

⁷⁶ *Ibid* at 381, citing Eli Clare, *Exile & Pride: Disability, Queerness and Liberation*, 2nd ed. (New York: South End Press, 2009).

⁷⁷ Pyne, *supra* note 25 at 341.

⁷⁸ Bill 77, *supra* note 4.

⁷⁹ For a discussion of the depathologization movement, and a reimagining of the human rights framework within the work of vulnerability, see Chris Dietz and Ruth Pearce, “Depathologising Gender: Vulnerability in Trans Health Law” in C. Dietz, M. Travis and M. Thomson (eds), *A Jurisprudence of the Body* (London: Palgrave Macmillan, 2020), 179-203.

⁸⁰ Pyne, *supra* note 25 at 343.

⁸¹ *Ibid*.

While conversion therapy for trans youth is banned, what Pyne argues is a similar therapy of dehumanizing behaviour modification, in this case applied behavioural analysis or ABA for autistic youth, is not only government funded, but in many places legally mandated as a treatment for autism.⁸² Interrogating the changes embedded in Bill 77 for trans youth, opens up a way to see the ableism embedded in what is otherwise an unqualified good, particularly when situated against a view of ABA as a form of cultural annihilation.⁸³ This offers us a powerful way into the juxtaposition of difference and deficit.

The Dispersed: Different Directions, Different Understandings

Just as queer theory took longer to insinuate itself into legal scholarship than it did in the humanities, trans studies have perhaps moved further in other areas than in the legal academy. Its arrival in law is kinetic and transformational. Trans legal studies may be informed by the insights of critical legal movements that have gone ahead, but it is asking new sets of questions, unearthing long naturalized assumptions, and demanding that we look at law anew.⁸⁴

The third modality I have chosen to explore is dispersion – the way that trans legal narrators take the systemic and the everyday in different directions and to different destinations.⁸⁵ One of the main contributions of this volume beyond its rigour, is the treasure trove of unsettling surprises. This collection is a model for what careful legal analysis can offer, particularly to those whose lives and experiences often sit outside the normative legal gaze. This is most evident in the many unsettling assumptions these authors unearth. Problematizing what may otherwise be unquestioned is a model for those working within the fields here – those of employment, prisons, social benefit delivery, for example – but also for areas of law and practice beyond these fields. As such, these articles are not just of value to those working to understand the trans legal subject, but to those seeking to question the embedded assumptions within law that give it the power to exclude, across disciplines, jurisdictions, and imaginaries.

⁸² *Ibid.* at 342.

⁸³ *Ibid.* at 358.

⁸⁴ Cossman and Leckey, *supra* note 27 at 155.

⁸⁵ I have taken this definition of dispersed from an online source: <https://www.vocabulary.com/dictionary/disperse>.

I explore four assumptions highlighted by the contributors here: the first, that human rights law offers the trans legal subject an unquestioned good; the second, that discrimination law is appropriately focused on the experience of the marginalized; the third, that the gender binary is an unquestioned core of human existence; and finally, that the issues of trans youth are at the heart of this new and emerging area of study.

One benign assumption is that employment law would be an area of law most positively impacted by Bill C-16, and in particular, the notion that discrimination on the basis of gender expression is expressly prohibited would benefit trans people in addressing unemployment or underemployment concerns. What Irving and Hoo demonstrate, however, is that prohibitions against direct discrimination were already a core component of employment law in Canada; and in fact the all too frequent indirect, adverse, and the systemic forms of discrimination are much harder claims to prove, even with the change in the law.⁸⁶ But more importantly their study shows that the “existing sex/gender binary system shapes dominant approaches to employability”⁸⁷ and as a result, human rights law cannot in and of itself correct the inequities of *underemployment* flowing from unconscious demands for fit, for bodies that produce affective labour, and for the sensate experiences of marginalization and exclusion that workplace denials incur.⁸⁸ The study of trans un- and underemployability makes visible that changes in human rights law cannot rectify the unspoken demand for certain bodies in the workplace.⁸⁹

The authors do, however, point to numerous places where the change in human rights law has been significant, for symbolic, educative and operational reasons. In their study of the places and spaces where the concepts of “gender expression” and “gender identity” are inscribed with meaning, Kirkup, et al. quote Patricia Williams on the promise of human rights protections, particularly for people of colour. She argues, “for the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity: rights imply a respect which places one within the referential range of self and others, which elevates one’s status from human body

⁸⁶ Irving and Hoo, *supra* note 18 at 204.

⁸⁷ *Ibid* at 211.

⁸⁸ *Ibid* at 209.

⁸⁹ *Ibid* at 219.

to social being.”⁹⁰ The signal of naming gender expression and gender identity in Canadian human rights law should not be underestimated or downplayed.

Kirkup et al., are also effective in showing that sometimes it is necessary to move outside of the formal spaces of law, courts and tribunals, for example, to understand the way that meaning is constructed in these terms. In their study of school board policies, for example, they are able to show that “gender identity” and “gender expression” are given more expansive and inclusive meanings in school board contexts, definitions that allow people to do gender in a broader variety of ways.⁹¹ Importantly they point to several policy definitions with an explicit commitment to “gender expression” and “gender identity” as universalizing constructs “applying to all members of the school community, regardless of whether or not they identify as transgender and/or non-binary.”⁹² Drawing on the work of Florence Ashley, Kirkup et al. argue that looking outside of courts and tribunals for an understanding of the ways to delineate understandings of gender, particularly in an education setting, enables more plural and contradictory understandings of these terms.⁹³

The question of the gender binary, and the tension that exists within trans legal studies between those who have fought hard for a gendered position within the gender binary and those who see gender as fluid or position themselves outside the binary, are also explored in this volume with care and with rigour.⁹⁴ In Laidlaw’s analysis of differing accommodation models for trans students at university seeking housing, even the most progressive attempts to seek inclusive

⁹⁰ Kirkup et al., *supra* note 20 at 250, citing Patricia J. Williams, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights” (1987) 22 *Harv. Civ. Rts. Civ. Liberties L. Rev.* 401 [Williams].

⁹¹ For ways in which forms of government regulation can be harmful in this context, see: <https://www.theguardian.com/education/2020/sep/25/government-issues-gender-identity-guidance-for-teachers-in-england>.

⁹² For example, the Greater Essex County District School Board’s 2016 Supporting Gender Identity policy defines “gender expression” as “The various ways that we communicate our gender identity to others, for example, social roles, clothing, body language, hair styles, speech patterns, and voice pitch, given name, etcetera. Often this communication is ascribed to us at a young age and imposed on us through social norms and values.” Kirkup et al., *supra* note 20 at 264-265.

⁹³ *Ibid* at 266.

⁹⁴ Namaste and Tourki, *supra* note 17 at 166-167.

solutions risk non-inclusion of those whose gender is fluid, and for whom the increased cost and isolation of rooming alone is problematic too.⁹⁵

Florence Ashley shines a direct spotlight on the gender binary in their autoethnographic examination of the trans legal subject, situating their analysis in both the law and the language of Quebec. Ashley takes a careful look at two models for inclusion – medical and minoritizing models – and shows that both render the trans body invisible, by creating bodies in need of correction against a cisgender ideal on the one hand, and by creating quintessentially marginalized subjects on the other.⁹⁶ In their view we readers should replace the concept of gender identity with “gender modality” within anti-discrimination law, to fight the myth that gender identity is the province of trans people, and simultaneously remove “sex” as a juridical and administrative category.⁹⁷

And finally here, the volume looks at issues of trans people across ages from the important work of banning conversion therapy for youth, through the issues faced by trans people living with dementia facing end of life questions about care and identity. In the keynote, however, Namaste and Tourki raise the issue of the focus on trans youth. They assert:

Unfortunately, it’s only when trans youth are in the picture that people tend to become invested in a debate or a conversation about trans people. In that debate, on the one hand, you have trans people and allies who fervently advocate for ‘saving the child’ by supporting and affirming trans youth’s identities and journeys. On the other hand, you have anti-trans people who also want to ‘save the child,’ but to save them from trans people and from the so-called ‘trans agenda.’ What the two sides agree on is that the child needs to be saved. The questions that I ask are: where were all the supporters and the allies when the child was out of the picture? Where were that allyship and solidarity before trans youth became the face of the trans movement? Trans history tells us that there have been—and still are—other faces to trans existence. For a long time, trans sex workers were the face of the movement. Other times, although stereotypically and in an effort by the media to ridicule trans women, trans women who don’t pass have been the

⁹⁵ Laidlaw, *supra* note 211 at 279, 282.

⁹⁶ Ashley, *supra* note 1 at 333, 335.

⁹⁷ *Ibid* at 339. See the discussion of the UK Future of Legal Gender project (the FLaG project), exploring the consequences for us all if the state steps back from recording, confirming, recognizing or standing behind sex or gender as formally attributed aspects of personhood: Davina Cooper, Emily Grabham, and Flora Renz, “Introduction to the Special Issue on the Future of Legal Gender: Exploring the Feminist Politics of Decertification” (2020) 10(2) *feminists@law*: <https://journals.kent.ac.uk/index.php/feministsatlaw/article/download/937/1797?inline=1>.

face of the trans existence. However, it seems to me that allyship and solidarity from cis people did not happen until— unless?—trans youth became centred.⁹⁸

The question that Namaste and Tourki pose is a good one, notwithstanding that the issues of trans youth, and in particular racialized, Indigenous, immigrant and poor trans youth, are important areas of study. They query what it could look like if researchers were to “zoom out” and consider “trans issues that don’t begin with [youth] as an object of study. What might that produce?”⁹⁹ In so many ways, that is what the authors of this volume do, even in the context of the one article more focused on the issues of youth, Jake Pyne’s study, complicating what it means to look at trans youth without focused attention on ableism and the pathologizing of disability.

The Tentacular: Far-reaching and (In)dependent

Speaking from experience, a lot of people will come to the organization where I work seeking legal help, but unfortunately, the law, even though it protects our communities, is still not accessible. We need to ask, to whom is it accessible? Who can actually get a lawyer and who actually has the strength and the endurance to go to court and stand up for their rights? That, too, needs to be thought about, especially with the increasing number of trans people who go to community organizations trying to find that legal help and who, unfortunately, can’t respond or fight back—sometimes because of a lack of expertise and sometimes due to a lack of capacity. A big question to tackle is how to make the law accessible to people and not only on a theoretical level but also in daily life experiences.¹⁰⁰

My final turn in this review is to the tentacular, the far-reaching and the (in)dependent. To the ways that these articles are both dependent and independent, and as is often the case with the tentacular, those long autonomous threads are difficult to manage, difficult to understand and on occasion difficult to bring together.¹⁰¹ To conclude I offer a few questions, with an eye to future work, and study, and to the ways that this volume can be of critical use across diverse disciplines and modes of study. And, as I started, I want to offer a counter-narrative to some of the downsides of this political moment, where the understanding of what it means to be a trans

⁹⁸ Namaste and Tourki, *supra* note 1717 at 168.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid* at 175.

¹⁰¹ This is my own definition of what tentacular means.

person in the world is homogenized, and where the risks of isolation and violence are both great and downplayed.

And it is here that I start with a call for ensuring that alongside issues of gender diversity, the questions of trans peoples are situated firmly within other dimensions of diversity, inclusion, anti-racism and anti-colonialism. The articles in this volume, without exception, situate their subject matters with respect to marginalization, and the analysis deepens as a result. The volume begins with the life story of Jamie Lee Hamilton, a trans woman whose life embodied the very issues to which she dedicated her energies and activism.¹⁰² Irving and Hoo also take a very focused look at the role that whiteness plays for trans people seeking employment. But in places issues of race, and in particular of what it means to be Indigenous and trans in Canada today, are only minimally taken up and considered. The boundaries of privilege and what it means in a context where the demands of affective labour are subliminal, is an apposite set of questions across areas of law.¹⁰³ How is the trans legal subject understood beyond the issues of gender identity and gender expression?

In addition, the volume is rigorous and the quality of scholarship, study and innovation is excellent. But in places it is inaccessible, particularly in the use of deeply theoretical nomenclature and terminology. Heuristics and normativity, epistemologies and cisgenderism, are all critical concepts for scholars working carefully to advance this area of study. But it does mean that for many working on the day-to-day aspects of these very issues, on the ground, in offices and at the dinner table, some of these arguments operate using language that could make them less likely to be consumed, debated and understood. This is the lived experience of praxis: ensuring rigorous and innovative scholarship in a field of study inhabited by marginalized peoples for whom systemic change is elusive, and material change is life-threatening.

There is also an important critique in the keynote, raised by Namaste and Tourki, that there is an imbalance that they see in the work on trans issues in recent years, across a variety of settings,

¹⁰² Ross, *supra* note 16; Namaste and Tourki, *supra* note 17.

¹⁰³ Irving and Hoo, *supra* note 18 at 215.

cultural production, policy and scholarship. In their view, the vast majority of it is enacted by trans men.¹⁰⁴ They query whether that is also the case in academia, and if so, what might be done to intervene. And my reflection here is that this seems to be reflected even within the published authors in this volume. And it takes me back, in some ways, to where this review started, that this moment is rife with binaries and with dissension. Understanding those disagreements matters, but so also does holding up exceptional work, and doing the kind of collaborative, collective, inspiring that this volume asks of its subjects, its readers and each other.

Conclusion: Transformational

*Telling some of trans people's legal stories also helps render visible the trans legal subject, which, albeit constituted within the narrative constraints of the legal system, brings us closer to centring trans people as legal actors.*¹⁰⁵

The aim of this review is embodied by Singer's words, to effect transformation in the societal view of the issues faced by trans and non-binary peoples as exclusively an issue of recognition; to challenge the reader to deepen their understanding by entering this volume and its collected works. At the same time, it is my hope that encouraging readers to read this volume will play a role in countering the narrative, held by some, that feminist and trans legal activism sit in inexorable tension to each other.

The articles here all demonstrate carefully and critically that the issues faced by trans and non-binary legal actors cross legal barriers, jurisdictions, theoretical constructs and imaginaries. And while none of them make the primary focus of their analysis the current political positioning of people who advocate anti-trans ideologies under the banner of feminism, all of them are situated in a world in which the lives of trans and non-binaries peoples are facing extensive and continued marginalization.

At the end of the day, the ostracization of people who have historically faced discrimination on the basis of gender is what makes this special volume of the *Canadian Journal of Law and*

¹⁰⁴ Namaste and Tourki, *supra* note 17 at 172.

¹⁰⁵ Singer, *supra* note 22 at 302.

*Society*¹⁰⁶ of importance to everyone working in law today, and in particular to people with a deep commitment to feminism. The volume pauses, amidst the whirlwind that we find ourselves in at this moment,¹⁰⁷ and pays attention to the diverse stories of trans and non-binary peoples, many of whom are living in the margins of Canadian society, to shine an inclusive light on the plurality of their issues, stories, and lived experiences. Collectively, this work offers up tensions as a means to revitalize advocacy, to offer more ways into understanding, alliance and change.¹⁰⁸ The volume is a powerful contribution to deepen necessary conversations on one of the most important sets of questions of our time.

¹⁰⁶ For another review of this excellent volume see Kim Brooks, “A Lively Conversation on Trans Legal Change”, *JOTWELL* (January 25, 2021): <https://equality.jotwell.com/a-lively-conversation-on-trans-legal-change/>.

¹⁰⁷ This phraseology is drawn from the work of Elizabeth F. Emens, looking at a similar debate with respect to monogamy, polyamory and polygamy: “Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence” (2004) 29 *N.Y.U. Rev. of Law and Social Change* 277-376 at 278.

¹⁰⁸ For a similar reframing, see Cowan, *supra* note 52 at 188.
