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Taxonomies of Inequality: Lawyers, Maps and the Challenges of Hybridity

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Abstract: Intersectional discrimination challenges not only the structure of equality law, but also the techniques that lawyers employ in assessing and arguing discrimination cases. Client forms, akin to questionnaires, assist lawyers in obtaining a full picture of the client's circumstances and in avoiding the omission of any potential legal remedies. Chronologies of events assist lawyers in mapping discriminatory events and establishing that the client is within the time limit for submitting a claim to the Employment Tribunal. These techniques reflect discrimination law's defensiveness against lived complexities, which in itself restricts possible intersectional analyses. For example, through chronologies, each discriminatory event is defined by reference to only one 'ground'. Discrimination law therefore links the passing of time itself to the categories it has produced. In this context, Homi Bhabha's concept of hybridity provides a useful way of describing how intersectional subjects relate to their categorization through law. It shows how legal subjects simultaneously adopt and resist the grounds that lawyers use to describe their experiences. If discrimination law is based on enabling legal subjects to speak for themselves, then we should investigate these possibilities for resistance.

Keywords: categories; discrimination; grounds; hybridity; intersectionality; lawyers; mapping

Scientific maps could not be fetishes; fetishes are only for perverts and primitives. Scientific people are committed to clarity; they are not fetishists mired in error. My gene map is a non-tropic representation of reality, that is, of genes themselves. (Haraway, 1997: 137)

I would call it 'disauthentication' through authenticating yourself as an individual and as a representative of a minority community. Becoming a subject – gaining subjectivity through the legal process is a process of personal disauthentication but generalising about community, stating not only for this purpose 'I am this perfectly ordinary woman' but so is every other trans woman. (Interview with M, 2004: 2)

Introduction

IT HAS long been recognized that the current structure of equality law in the United Kingdom, the United States, the European Union and Canada cannot readily accommodate claims, and policies, that engage more than one 'ground' of discrimination (Crenshaw, 1989; Duclos, 1993; Fredman, 2001; Hannett, 2003). Scholars have highlighted the ways in which groups who are defined by reference to more than one characteristic, such as Black women, fall between the grounds. For example, Kimberlé Crenshaw's (1989) work on essentialism within US discrimination law highlighted the techniques used by US courts to exclude Black women from the ambit of race and sex discrimination laws. Crenshaw used the term 'intersectionality' to describe forms of prejudice and disadvantage that result from complex positionings. Intersectionality moves beyond the concept of 'multiple discrimination', and its reliance on a notion of cumulative inequalities, to describe instead new and perhaps unpredictable specificities of experience. To the

extent that ‘intersectionality’, as a term, reflects people’s inherently varied and unique experiences of inequality, it is more of a flexible and conceptually productive term than ‘multiple discrimination’.

There are a number of different ways in which UK and European Union law in effect strangles potential intersectional claims.¹ Analysis by Sandra Fredman (2001) indicates that divergences in the scope of the protection afforded to the different grounds are instrumental in preventing the development of an intersectional approach. Intersectional issues cannot be argued if one or more of their constituent elements is not currently addressed by legislation. For example, any case involving an element of sexual orientation discrimination occurring before the UK legislation on this issue came into force would not be able to engage sexual orientation as a ground.² But even if it could, sexual orientation discrimination is not proscribed in all spheres under UK law. So, unlike the situation with race and ethnicity discrimination, which is outlawed in the spheres of employment, social security, housing and the provision of goods and services, sexual orientation discrimination is only currently outlawed in relation to employment and vocational training. This means that people experiencing intersectional discrimination on the grounds of ethnicity and sexual orientation in the provision of housing, for example, would have to argue their cases on ethnicity alone.

The law therefore contains structural deficits that prevent an intersectional account of inequalities. However, as well as addressing these deficits, it is also important to consider how lawyers and clients find themselves implicated in essentializing processes that ‘lose’ the complexities of lived experiences.³ In this sense I am interested in the broader questions of what intersectionality can say about the relationship between clients and the law, and what it is about legal practice itself that assists in the organization of lived experience into distinct legal categories. My analysis takes place against the background of my own experiences in practice, as a Lesbian Caseworker at Lesbian and Gay Employment Rights (LAGER).⁴ One of my aims is to consider two theoretical accounts of complex discrimination and complex identification as explanations for intersectionality. The result of this analysis is a picture of the temporal fluidity of intersectionality, which challenges not only the overarching structure of equality law, but also the way in which lawyers construct discrimination cases on behalf of their clients. Using Donna Haraway’s work on gene fetishism, I develop an account of the way in which lawyers use cartographic methods, such as chronologies and further and better particulars, to map, and reduce, their clients’ experiences onto intelligible legal frameworks. These frameworks require and embed processes of categorization that leave clients with a sense that they have been ‘disauthenticated’ through their interaction with the law. Such a sense of ‘disauthentication’ goes to the heart of what intersectionality can say about how we relate to the law: it represents the way in which we are always more than what the law will say about us. To that extent, it finds useful expression through Bhabha’s concept of hybridity, and this is examined in the final section of the article.

M’S CASE: TEMPORAL ASPECTS OF INTERSECTIONALITY

M is an out lesbian, identified as white British, who has a management position in a large organization in the United Kingdom. A couple of weeks prior to consulting LAGER for advice, she was subjected to a barrage of verbal abuse in public by a colleague, who used phrases that referred to her trans status. She attempted to resolve the situation internally, but was effectively ignored by her line manager. This was the most recent incident in a history of demeaning comments about M’s gender and trans status from different senior managers over the past eight years, which she had attempted, unsuccessfully, to address without formal action. It also happened against the background of ongoing problems with promotion. M had applied for a promotion in status within the organization to match both

her skills and her pay grade of the past seven years. After a year's deliberation, the promotions committee sent a one-paragraph letter to M, informing her that she had been unsuccessful in her application. When she asked for reasons, the reply came that the committee did not give reasons for its decisions. There was enough documentary evidence to consider taking legal action in M's case on the intersectional grounds of sex, gender, and sexual orientation.

M's identity is clearly intricately bound up with her ethnicity. In the aftermath of one of the transphobic harassment incidents, M eventually made an internal complaint against C, the colleague concerned. C responded by making an internal complaint of racism against her. This indicates that ethnicity impacted on dynamics of gender and sexual orientation in the way that C and M related to each other, and it should not therefore be ignored. However, there is an assumption within discrimination law that claims should only deal with the apparently 'non-privileged' aspects of a claimant's identity. The real problem with this assumption, as Nitya Duclos (1993) has pointed out, is that it ignores the relationships out of which discriminatory situations arise: 'The most fundamental error in current antidiscrimination doctrine lies in its location of difference in the individual complainant rather than in his or her *relationship* with others' (p. 47, emphasis in the original).

Duclos suggests three bases on which discrimination should be assessed: (1) how the people involved identify; (2) their relationship; and (3) the social context in which they are located (p. 48). It is difficult to structure cases with this degree of context from the outset in UK discrimination law. Ethnicity did impact on relationships central to M's case, but as she was not making a claim of race discrimination, then any mention of ethnicity would be considered as an evidential point only, and as merely supplemental to what were considered to be the 'main' issues of sex, gender and sexual orientation discrimination.

At this point, I would like to move beyond describing M's experiences merely as 'intersectional' discrimination to examining how exactly the discriminatory anxieties displayed by M's colleagues related to each other in producing the specific situations and ongoing atmosphere that she encountered. Certainly, the overt and non-overt discrimination she experienced in the form of comments and freezing out of promotion consisted of complex reactions to those features of her identity that went on to structure her claim: her trans status, sexual orientation and gender. M's situation is not unique: similar situations were recently described in a discussion paper produced by the (Canadian) National Association of Women and the Law:

While transgenderism and sexual orientation cannot be conflated with each other, it may well be the case that the expression of fear and hatred against a trans person is at once the expression of homophobia, just as it may be of sexism. Not uncommon are stereotypical assumptions, for instance, that those who are gender variant in appearance or manner, and/or those who don't conform to patriarchally conscripted heterosexual and reproductive roles are 'really gay'. (Denike and Renshaw, 2003: 11)

It may well be that the particular way M manifested her gender compounded anxieties relating to her sexual orientation and her trans status. M was out to many of her colleagues as a lesbian, and out to some colleagues as trans. Some comments she experienced could be interpreted as specifically transphobic. Other comments betrayed a patronizing attitude to M's gender: on more than one occasion M was referred to as a 'girl' in formal situations. M did not report any comments specifically relating to her sexual orientation, but this is not to say that her sexual orientation was not implicated in the way that others perceived her gender.

The question remains how anxieties around her gender could also signal discomfort with M's trans status and/or sexual orientation. The work of

Judith Butler and Sara Ahmed is very useful in this regard. Briefly put, Butler views dynamics of oppression as occurring through and against each other, so that one 'type' of discrimination acts as the background for another. Taking it a little further, Ahmed has developed an account of passing through and across identity, without inhabiting any one identity at any one time. Ahmed's work may be used, in the reverse sense, to explain how the perceptions of M's colleagues traversed sexualized and gendered tropes in accounting for her 'troubling' identity. What both theorists have in common is their eschewal of 'multiple oppression' discourse in favour of an account of identity, and perceptions around identity, being constituted by virtue of their movement across space and time.

Butler explained her views on intersectionality in an interview with Vikki Bell, published in 1999. Bell asked: 'You want to distance yourself from the idea of "double oppression" and that way of thinking about racism and sexism as structures that confer oppression. How then do you see those processes interacting or working together?' (p. 167). As stated above, Butler's response aimed to clarify how unvoiced dynamics can provide the conditions through which others are made apparent:

I think I'm less interested in theories of intersectionality, or in versions of multiculturalism that try to keep processes of gendering and racing radically distinct. I'm much more interested in how one becomes the condition of the other, or how one might become the unmarked background for the action of the other. (p. 168)

Perhaps a clearer explanation of Butler's position in this regard can be found in her essay 'Passing, Queering: Nella Larsen's Psychoanalytic Challenge', published in *Bodies That Matter* (1993). Butler begins by challenging Luce Irigaray's claim that the question of sexual difference is *the* question for our time. In Butler's opinion, this claim does not allow for sexual difference to be articulated through other vectors of power (p. 167). Drawing on the work of Norma Alarcón, she frames her alternative approach as follows:

If, as Norma Alarcón has insisted, women of color are 'multiply interpellated', called by many names, constituted in and by that multiple calling, then this implies that the symbolic domain, the domain of socially instituted norms, is composed of racialising norms, and that they exist not merely alongside gender norms, but are articulated through one another. (p. 182)

The apparent foregrounding of gender in Butler's theory, therefore, gives way to an attempt to account for the moment at which 'race', 'sexuality' and 'sexual difference', in her words, 'cannot be constituted save through the other' (p. 168). Crucially, this focus does not involve a qualitative convergence between types of oppression.⁵

Sara Ahmed's work on passing 'through and across' identity can be used to push this account one step further. According to Ahmed (1999), passing through identity not only disrupts apparent boundaries of experience, but it also suggests that people who pass experience their identity in a fundamentally fluid way:

Passing as the literal act of moving through space (in which there is no moment of departure or arrival), can be linked with passing as a set of cultural and embodied practices (passing for the other). In the act of passing through a given place one does not come to a halt and inhabit that place. Likewise, in the act of passing for an-other, or passing through the image of an-other, one does not come to inhabit the image in which 'one' moves (away from oneself). (p. 94)

Passing provides a lens through which to view constantly changing identities. Furthermore, by seeing discrimination as a response that itself passes through and across different features of both the person discriminating and her object, it is also possible to develop a less static view of intersectionality. The change in focus in Ahmed's account from event to movement challenges

any temporal limits to each discriminatory act. A picture emerges in which discrimination relating to sexual orientation, for example, can also traverse ethnicity and gender.

Such an analysis could be applied to M's situation. At one point, X, a straight, white male senior colleague told M: 'it's your big hands and feet that give you away'. The remark can be seen to have frozen complex reactions to M's sex, as her senior perceived it, as well as her gender identity and her sexuality. And M took it as such: 'I remember what I thought about that comment was that it was so gross, it offended so many things in one easy go' (interview with M, 2004: 5).

There was enough acceptance of M's female gender to display an element of sexism in the way her senior treated her during the conversation: the gender dynamic was not as it would be between two men. Nevertheless, X appeared to implicate himself in the uncovering of the 'truth', and in that sense he must have considered himself, on some level, to be speaking man to man. The interpellation did more than hail M's gender reassignment. It crystallized 'not woman' with 'imposter'. It was a complex interpellation, in which anxieties around M's sex and gender, while not being strictly parallel, still did not operate as if on separate axes. One linking factor appears to have been M's physique. X's concern with the perceived size of M's hands and feet displayed a preoccupation with notions of proper, gendered physicality. As M put it: 'As far as the gender thing went – it showed that he thought of women as smaller than men. Women were weaker, frailer, smaller. That extends into his feelings about himself; he is physically a small man' (p. 5). It is apparent that the interpellation of M as 'gender reassigned' did not merely coincide with anxieties around M's gender and sexuality. Rather, those anxieties became the condition of the transphobia that was voiced. Using Butler's account, the transphobia itself could not be constituted save through sexism and perceptions around M's sexual orientation. However, with a more temporally fluid analysis, it could be said that the dynamics underpinning X's comment passed *through* sex, gender and sexual orientation. Not only that, but those complex forms of discrimination were either explicitly or implicitly present in the whole series of events and omissions that M encountered, whether it was the failure to promote, or whether it was personal comments like the example above. As will be seen later, this interpretation of discrimination provides a challenge to the techniques that lawyers use prior to, and during, litigation.

ENCOUNTERING THE LEGAL PROFESSION

The aim of this section is to consider the extent to which personal interactions between lawyer and client can affect the manner in which a case is framed. The section focuses on two particular scenarios. First, the personal inexperience of the lawyer in a particular type of claim may lead to an emphasis on that issue, which does not fit with the client's own perception. And, second, the fact that a client is raising a novel legal point may serve to make the client feel that she can only put forward one aspect of her identity and her experiences to her lawyers. In both scenarios, interpersonal dynamics can potentially impede an intersectional analysis of the client's situation. An example of the first type of scenario happened in M's case during our initial telephone conversation when I asked her whether she was a 'male to female transsexual'. This question led M to be concerned about the extent to which her case would be framed by reference to what she feels is the 'last fundamental part' of her identity:

The first thing I thought was – terminology. She's not experienced in this area. And I said something like, I remember 'we'd say a trans-woman'. And I checked for the response. And you said something along the lines of – oh, of course, sorry about that. And I thought – well, she's willing to learn. She hasn't got that much experience. And then there was the other emotional thing – oh God, here we are again,

lumped with a political identity that's not a felt identity. I know some people who absolutely identify as trans – 'trans-tribe'. But this is the last fundamental part of my identity. I've had to be bloody careful about it – it's the last thing I feel . . . I was thinking, 'hey ho, here we go'. And I'm working out how far I need to support the people I am working with. (Interview with M, 2004: 4)

In this case, M brought herself to LAGER emphasizing no one element of her identity and found, at least in one instance, that her political, and not 'felt', identity was coming to the fore through my apparent lack of experience in trans issues. That is to say, she experienced a sense of dislocation between the person she felt herself to be, and the identity she was required to invoke, or explain, to me, as her legal advisor. This sense of dislocation is relevant in many different scenarios connected with obtaining legal redress, as will become apparent.

Another way in which some grounds can be emphasized over others is when a client brings to her lawyer a novel legal point, such as a 'new' type of discrimination. In these circumstances, the way that clients frame their experiences when talking to lawyers has more than usual influence in the way that the case is subsequently argued. As such, clients' interactions with, and expectations of, their lawyers can contribute to processes of 'fixing' that may already be underway in discrimination cases. For example, M already had experience of litigation from a time when the issue of transphobia was relatively new to the legal establishment. As a result, the transphobia came to define that case, leaving no space for the discussion of inequalities based on gender or sexual orientation. This was partly down to M's own approach to her legal advisors. She felt that in order to convince her lawyers and the court of the discrimination itself, she had to present an impression of womanhood that the lawyers and judges would understand on their own terms:

The way I approach it is to make the simplest case for who you are on their terms. Here is an otherwise perfectly ordinary middle-aged woman, highly qualified, who you might find yourself at dinner with, who doesn't get angry or stropky or upset. The person you have to be wears middle-class clothes, has her hair cut in a middle-class way – she's indistinguishable from your wife's friends. She could be a woman solicitor or a woman GP. (p. 1)

Specifically, raising the 'new' issue of transphobia meant that she felt unable to present herself to her lawyers, and to the court, as anything but trans. In this sense, M was careful not to introduce any factors that might complicate her identity in the eyes of her legal advisors:

In the [previous] case, it was impossible to go down the route of showing more than one aspect of myself – not just because of the law, but also because it was not socially acceptable to the people I was working with and the people in court. For the lawyers, gender, sex and sexuality were all combined into one – into the trans issue. (p. 1)

Therefore, the main focus for M in this context was making her identity as simple and as intelligible as possible for those who were representing her. This entailed being normal in every way but one, and it led to a slippage between how M perceived herself and how she knew she appeared to members of the legal profession:

You have to present yourself as one thing. You have to be unremarkable in every aspect except one thing. 'This is an accident of birth. It's unfair for that to be held against her.'

I would call it 'disauthentication' through authenticating yourself as an individual and as a representative of a minority community. Becoming a subject – gaining subjectivity through the legal process is a process of personal disauthentication but generalising about community, stating not only for this purpose 'I am this perfectly ordinary woman' but so is every other trans woman. (pp. 1–2)

M was attempting to manage the difficult task of simultaneously educating her legal advisors about the ‘new’ issue of transphobic discrimination in the workplace, and therefore conveying aspects of her own experience, while also presenting herself in such a way that they would be able to empathize with her. Her approach was clearly framed by the constraints of the legal structure, which requires adherence to a ‘norm’ before recognizing any discrimination.

6 Legal action in the previous case made M visible, gave her a voice, and gave recognition to her experiences. However, the price for such recognition, according to M, was a feeling that the person she was presenting to the legal establishment was not ‘her’.

MAPPING: CARTOGRAPHIES OF INEQUALITY

Clients’ and lawyers’ expectations can therefore influence the way that discrimination cases are framed. However, the techniques lawyers employ in ‘mapping’ clients’ lived experience for the purposes of advice and litigation have just as much of an effect in categorizing cases as these personal interactions and the structure of equality law itself. Even at the initial stage of the legal relationship, lawyers locate their clients within a web of possible legal scenarios or remedies, within an already constructed legal space. They use techniques ranging from particular methods of questioning in initial client interviews, to summarizing a client’s legal options with reference to determinants such as length of employment or employment status, to arranging a client’s experiences into chronological order in preparation for litigation. Such processes arguably have the potential to outlive any structural changes in the law. And while many of these techniques can be seen as the result of what equality law requires in terms of entitlement and evidence, they nevertheless contribute to lawyers becoming thoroughly embedded in the processes of categorization that close down potentially intersectional cases.

Donna Haraway’s work on gene fetishism provides insight into lawyers’ use of categorizing techniques. Here my aim is not to make a direct analogy between gene fetishism and legal categorization, but to draw out some similarities in both processes. Haraway (1997) uses concepts of mapping, modelling and cartography to critique the reification of genes in scientific discourse. She focuses on the methods by which scientists imbue genes with autotelic significance, so that they appear to be ‘things-in-themselves’ (p. 136). Her thesis is that scientists literalize genes and locate them within seemingly objective, representational, maps of life (p. 137). The real damage of this short-circuited discourse is its ignorance of the messiness of lived experiences. As Haraway puts it, gene mapping ‘transmutes material, contingent, human and nonhuman liveliness into maps of life itself and then mistakes the map and its reified entities for the bumptious, nonliteral world’ (p. 135).

Haraway’s analysis relies on a specifically feminist reinterpretation of Freud’s theory of the fetish. As Haraway recalls, the Freudian account presents the fetish as a defence for the male child, who sees that his mother has no penis and cannot face the possibility of castration. In such circumstances, the child has the choice either to become homosexual, by having nothing to do with castrated beings (i.e. women), or to develop along Oedipal lines, or to come up with a substitute for libidinal satisfaction (p. 144). In Haraway’s feminist account, however, women are whole and ‘uncastrated’ (p. 145). The implication of this is that the fetish cannot be a defence against lack; instead it is a defence against the presence of complexity. For Haraway, DNA within scientific discourse is the phallus-substitute for ‘life itself’:

Only half-jokingly, I see the molecular biological fetishist to be enthralled by a phallus-substitute, a mere ‘penis’ called the gene, which defends the cowardly subject from the too scary sight of the relentless material-semiotic articulations of biological reality, not to mention sight of the wider horizons leading to the real in technoscience. (p. 146)

Haraway's account of gene fetishism provides a useful way of describing the significance of grounds within legal anti-discrimination discourse. If it were really the case that clients could present their experiences to the law unmediated by potentially problematic interactions with their lawyers and without having to submit to coercive processes of categorization, then grounds could be interpreted solely as important indicators of social disadvantage. As it is, lawyers use various techniques such as information forms, chronologies, and further and better particulars to literalize grounds and locate them within apparently representational legal maps of life. In this sense, grounds, as they are currently deployed through law, have become more of an advance defence against the relentlessness of lived complexities than an articulation of social and political context.

The first example of this advance defence in M's case happened during our initial telephone conversation. Throughout the call, I collected information for the standard advice sheet, which required me to record M's name, address, occupation and employment status, length of employment, salary, age, gender identity, ethnicity, sexual orientation, disability status, whether she was a member of a trade union, and if so, the name of her representative. The purpose of the form was to act as a record of the conversation and to prompt the advisor on legal remedies that s/he may otherwise overlook. In this way, each option or box had potential legal implications. Responding to the questions on the form, M told me that she had over one year's employment, she was female, and that she identified as white British, as a lesbian, and as trans. As a result of the first conversation, I was considering M's legal options to include claims for unfair dismissal (if necessary), sex and sexual orientation discrimination, and discrimination on the ground of gender reassignment. In this way, even from the outset the advice sheet was prompting me to pin M's identity and experiences onto a pre-existing map.

Understandably, M herself could not identify one sole 'discriminatory ground' that accounted for the way she had been treated overall. During our first face-to-face interview, she told me that she was acutely aware of the way that her colleagues were reacting to her status as a woman, a lesbian, and a transgender woman, and in her eyes one could not be separated from the other. Nor could any of those characteristics be separated from her ethnicity. However, M could not see how this could be conveyed to the tribunal. I had to proceed within the confines of the law as it stood at that point. The only option that appeared to be available was to present the claim to the tribunal on all three 'non-privileged' grounds and then, if the case were to progress, we would consider how best to establish the links between the apparently 'different' types of discrimination.

M agreed that I should assist her with formal internal action while submitting a claim to the Employment Tribunal in order to protect her position with respect to litigation time limits. We submitted M's claim on the three grounds of sex, gender reassignment and sexual orientation. The sex and gender reassignment parts of the claim were covered by the Sex Discrimination Act 1975. At that time, the Employment Equality (Sexual Orientation) Regulations 2003 had not yet come into force. This meant that there was no legislation addressing sexual orientation discrimination in the workplace. Our argument was that following the Human Rights Act, the definition of 'sex' in the Sex Discrimination Act should be interpreted to include sexual orientation in order to give effect to M's Convention rights to private and family life, freedom of expression, and non-discrimination.⁷ In their judgment of June 2003 in the joined cases of *Pearce* and *MacDonald*, the House of Lords struck down that argument.⁸ M's case had been on hold with the Employment Tribunal pending the outcome of the *Pearce* case. On the basis of the House of Lords' decision, we had no option but to remove the sexual orientation aspect of M's claim.

As the case proceeded, we faced the exchange of 'further and better particulars'. Requests for further and better particulars are questions that one side can send to the other to clarify the legal and factual arguments. The

request we received from the respondent’s solicitor, which had been endorsed by the tribunal, included a question along the following lines: ‘Please specify the ground of discrimination on which the applicant states each of the alleged acts took place’.

Having consulted with the barrister in this case, I responded to the request by stating that each of the alleged acts took place on ‘one or more of the following grounds: sex, sexual orientation and/or gender reassignment’. We did this for two main reasons, both of which were connected with the question’s implicit reliance on a legal chronology of events.⁹ The first reason was our attempt to prove a ‘continuing act’ of discrimination. The time limit for presenting a discrimination claim to a tribunal is three months from the date of the last ‘act’ of discrimination.¹⁰ When discrimination has happened over a period of time, the last act will be taken to have occurred at the end of that period as long as the course of events can be classified as a ‘continuing act’.¹¹ The fact that we were attempting to proceed on the basis of more than one ground made it potentially more difficult to fulfil such an evidential burden. We did not want to risk breaking any chains by specifying the ‘wrong’ ground at any point.

The second reason was that we did not want to assist the categorizing function by defining each act as a manifestation of only one type of discrimination. Legal procedures requiring adherence to deadlines, and bolstered by chronologies and statements, produce a picture of discrimination occurring through a series of one-dimensional acts. Chronologies inevitably assist the categorizing function by requiring each event to be succinctly defined and placed on a ladder of experiences. However, in order to be based on only one type of discrimination, these acts must also be clearly restricted to an identifiable period of time, or specific date (see below). The response to the request for further and better particulars in M’s case, for example, might have appeared as in Table 1.

Discrimination law therefore links the passing of time itself to the categories it has produced. By contrast, dynamics that pass through sex, ethnicity, gender and sexuality, never fully inhabiting one or the other, challenge these temporal limits. These intersectional dynamics are irreducible to one ‘ground’ and happen at the same time, and/or within indeterminate periods of time. They cannot be reproduced in tabular form.

Due to LAGER’s closure, my involvement on M’s case ended shortly after the exchange of further and better particulars, so it is therefore impossible to discuss whether an intersectional analysis was developed at a later stage. However, even the initial stages provide a good example of the way in which structural legal distinctions are reinforced through the proliferation of legal techniques. From her very first encounter with LAGER, M’s story was reified through my adherence to physical maps, such as the client form, and to non-physical maps in terms of legal remedies and the requirement to show

TABLE 1

<i>Date</i>	<i>Response to the Request for Further Particulars</i>	
	<i>Act</i>	<i>Relevant to which ground of discrimination?</i>
29 September 1998	M makes first application for promotion	Sex
5 October 1998	X makes comment about M’s ‘big hands and feet’	Trans status
3 March 1999	Verbal assault by C in the corridor	Trans status
2 April 1999	M makes enquiry about progress of application	Sex

consistent development of discrimination on each ground through time. I did not have the option, in M’s case, or in any other, to avoid categorizing her experiences by reference to her legal options or to introduce any element of temporal complexity. To that extent, our efforts at the stage of further and better particulars to avoid definitively categorizing M’s case were likely to prove futile. What this analysis indicates is that legal grounds of discrimination are supported by nets of time-limits, evidential burdens, and chronologies. This means that changing the overall structure of discrimination

law to challenge the divisive deployment of grounds will not be enough. Rather, the challenge that intersectionality poses to future reform is whether it will be possible to change the cartographic methods that lawyers employ in order to capture the temporal fluidities of discrimination.

HYBRIDITY

As a description of the fluid movement between and across categories, intersectionality clearly challenges definitional and temporal boundaries. The purpose of this next section is to consider the extent to which it may be useful to theorize intersectionality in terms of hybridity, not least because hybridity has been presented by some theorists as a challenge to the essentializing tendencies of ‘boundary fetishism’ (Bhabha, 1994: 115; Pieterse, 2001: 220). Despite the potential uses of hybridity as an analogous concept to intersectionality, however, its real value lies in its ability to explain what legal subjects lose when they encounter discrimination law, and how they react to this loss.¹² More specifically, my argument is that Homi Bhabha’s account of hybridity resonates powerfully with the feelings of ‘disauthentication’ that M described as she faced the categorizing impulse of both the law and her lawyers. In this sense, what hybridity brings to the study of intersectionality is an understanding of its political location in relation to legal fetishism. Hybrid/intersectional subjects do not fully submit to their narrow representations in discrimination law; rather, they retain a sense of themselves as more than the sum of their legal parts even as they assume a legally intelligible, and one-dimensional identity.

Hybridity is generally accepted to have conceptual roots in botany and in anthropology. In the context of botany, hybridity describes the result of mixing between different species of plant. In anthropology, where the focus of attention during the 19th and 20th centuries was overridingly with questions of racial classification, the use of the term has been more charged. ‘Hybridity’ along with ‘miscegenation’ and ‘amalgamation’, broadly denoted the mixing and merging of types. However, important distinctions between the meanings of each word tracked the main concern of 19th-century anthropologists, which was to determine whether human beings comprised more than one species, and whether the hybrid offspring of two species would be fertile (Young, 1995). ‘Miscegenation’ superseded ‘amalgamation’ in describing the fusion of races, which implied that different races of people belonged to the same species (p. 9). On the other hand, the term ‘hybridity’ implied that different races were different species. Such ‘taxonomies of race’, as Coombes and Brah (2000) have put it, drove administrative attempts by colonial powers in the 19th century to regulate the degree and type of sexual interaction between European men and women, on the one hand, and on the other, those men and women who were subject to imperial authority, whether they were North African, Javanese, or Indonesian, for example (see also Stoler, 1997). Scholars working over the past two decades on colonialism, racial purity and *métissage* have traced the violence inflicted as a result of these taxonomies (see, for example, Bhabha, 1994; Young, 1995, 2001; Stoler, 1997, 2000).

Robert Young (1995) is explicit about the genealogy of hybridity when he states that ‘in reinventing this concept, we are utilizing the vocabulary of the Victorian extreme right as much as the notion of an organic process of the grafting of diversity into singularity’ (p. 10). Nevertheless, hybridity has been of central importance to more contemporary analyses of identity, ethnicity, nation and diaspora emerging in the field of cultural studies (Ahmed, 1999; Luke, 2003). For some cultural theorists, it represents a constant process of translation and interpenetration between cultures and identities (Anthias, 2001: 625). For others, it represents more than that; it signifies the inherently transgressive potential of the colonial subject in the face of the expression of colonial power.

In this context, Homi Bhabha has developed a theory of hybridity that

foregrounds its subversive function in the context of English colonial culture in 19th-century India. For Bhabha (1998), hybridity takes place in conditions of inequality, during the attempted imposition of culturally hegemonic practices. Hybridity happens at the point at which colonial authority fails to fix the colonial subject in its gaze. It denotes the equivocal space that the colonial subject occupies; a space neither of assimilation nor of collaboration. As Bhabha (1994) puts it, hybridity ‘unsettles the mimetic or narcissistic demands of colonial power but reimplicates its identifications in strategies of subversion that turn the gaze of the discriminated back upon the eye of power’ (p. 112). Hybridity is transgressive when it signifies the failure of colonial authority to reproduce itself, and when it can be seen to provide an opportunity for resistance.¹³

Any deployment of hybridity, however, has to take account of its potential shortcomings. A line of critique is emerging that hybridity, as an account of the interaction of cultures, ethnicities, and languages, is not sufficiently rooted in an analysis of power relations, material conditions of inequality, and exclusion. In particular, it has been suggested that hybridity is disembodied from its potential social and political applications; that it is ‘stuck in culture’ (Coombes and Brah, 2000; Anthias, 2001). Pieterse (2001) refers to this as the ‘multiculturalism lite’ argument, which is linked with a view of the concept’s inauthenticity, or purely aesthetic appeal (p. 220; Coombes and Brah, 2000: 2).

Against the charge that Bhabha’s theory of hybridity lacks historical and material grounding, Young (2001) has argued that his work should be read in the context of Indian politics and society, as a challenge to the ‘Indocentrism of Indian intellectual life’, which was itself the result of British imperialism (pp. 350–1). For his part, Pieterse (2001: 221) emphasizes the ordinariness of hybridity, its rootedness in history and its potential to change our views of historical events. As Floya Anthias (2001: 622) points out, this rootedness can also be located in the way in which, logically, hybridity needs to retain an account of the ‘old’ part of cultural heritage that exists to merge with the ‘new’ to form the new, hybrid whole. However, this in itself raises further problems. Hybridity is located between two paradoxes. The first paradox is that it is dependent on the assumption of categories and difference (p. 625; Pieterse, 2001: 226): no categories, no hybridity. The second paradox is that if all cultures are hybrid, then there is no need for the concept. One way of negotiating a path through these paradoxes is to recall that boundaries do exist, and if they did not exist, then there would be no need to question them (Pieterse, 2001: 226). Furthermore, hybridity is a useful analytical tool when deployed strategically, not universally, and it does appear to be used differently by different writers (Anthias, 2001: 625).

I would like to argue that hybridity is an extremely productive concept when used to explain the way in which legal subjects relate to the coercive power of discrimination law. Against the charge that hybridity lacks ‘roots’, or social and political applications, my contention is that it provides a unique theoretical, and practical, account of what people feel about being intersectional subjects interacting with a legal regime that categorizes both them and their experiences. In the context of the reification of genes, Haraway (1997) speaks of ‘[t]he odd balancing act of belief and knowledge that is diagnostic of fetishism’ (p. 145). In a similar manner, when law, or lawyers, perceive the complexity of discrimination, their defence is to reify the categories. As previously argued, legal categories act as an ‘advance defence’ against the messiness of real inequalities. The current structure, and practice, of discrimination law therefore balance belief in categories, on the one hand, with knowledge of contingencies, on the other. If this is the case, then intersectionality represents the return of contingency into categories.

This return echoes the ambivalent space created in Bhabha’s theory of hybridity, where the colonial subject retains an element of the colonial culture that is imposed upon her, but also revalues it and thereby achieves a unique sort of transgression. And if intersectionality is synonymous with

hybridity, then Bhabha's account explains how intersectionality comes to occupy a politically transgressive space in relation to the law. With logic reminiscent of Haraway's belief/knowledge nexus, Bhabha (1994) sees hybridity and fetishism occurring at different moments in time:

There is an important difference between fetishism and hybridity. The fetish reacts to the change in the value of the phallus by fixing on an object *prior to the perception of difference*, an object that can metaphorically substitute for its presence while registering the difference . . . The hybrid object, on the other hand retains the actual semblance of the authoritative symbol but revalues its presence by resisting it as the signifier of *Entstellung* – *after the intervention of difference*. (p. 115, emphasis in the original)

Applying Bhabha's concept of hybridity to discrimination law, it could be said that intersectionality (as hybridity) signifies the failure of legal authority to reproduce itself through categorization. Intersectionality acts at a different point in time to the defensive function of legal categorization (in this story, fetishism), which occurs prior to the perception of difference. Assuming one or more 'grounds' of identity within the confines of legal discourse, intersectionality approximates the authoritative symbol, but it revalues its presence through resistance.

On a more concrete, personal level, hybridity also describes how intersectional legal subjects respond to the categorizing impulse of the law, and of lawyers. M's experiences provide one example of this process, and, as set out above, she describes her interaction with law and lawyers in terms of 'disauthentication'. When the law needs to see a woman, or a trans-woman, M responds strategically with a 'perfectly ordinary woman', and a 'political identity that's not a felt identity' (Interview with M, 2004: 2, 4). She does not recognize as herself this person who has become visible through the legal process. She feels dislocated from her legal persona at the very moment that she is pushing for recognition. But it is paradoxically through this very dislocation that she retains a sense of there being more to herself than meets the legal eye. In this way, Bhabha's concept of hybridity provides a useful description of the resistance and re-evaluation strategies that M employs when she brings her complex 'felt' political identity to the law.

CONCLUSION

It is not sufficient to focus entirely on the structure of equality law when considering how to promote intersectional analysis. In addition, lawyers and critics need to go one step back and look at all the legal techniques that have come about as a result of that structure, and which appear to have taken on a life of their own. Many of these techniques restrict possible intersectional arguments. For example, the work of Butler and Ahmed can be used to show how the way we identify ourselves, and the way we relate to others, traverse dynamics of gender, ethnicity, and sexuality without ever inhabiting each one. Yet time limits on presenting claims to the tribunal lead to 'continuing act' arguments, which require lawyers to allocate one ground to each 'act' of discrimination, for fear of breaking evidential chains. In this way, the proliferation of techniques based on a teleological concept of legal time strangles temporally fluid intersectional claims. Changing the law without changing the techniques will impede the development of a more fluid and responsive approach to discrimination.

The main reason for being so concerned about these techniques is that

they perpetuate the tendency of discrimination law to act as a defence against complexities. Defensiveness against messy realities inheres in the techniques lawyers use to define and present their cases, but it also leads clients to be wary about how they present their 'new' experiences to their legal advisors. When the law progresses through litigation challenges, one ground at a time, the very newness of each ground prevents intersectional analysis because, as M puts it, clients have to present themselves as 'one thing'. Discrimination law therefore employs grounds not in the sense that

we hope they are being used – as reminders of the structural inequalities that mark our world – but instead as defences against the complexities inherent in how those structural inequalities are played out at an interpersonal level. We need to retain an account of difference or of systemic inequalities.

However, using grounds as the first port of call in an analysis of workplace discrimination immediately triggers time limits, evidential burdens and chronologies that should not be underestimated, and which steam-roller any nuanced analysis of the relationships involved.

Intersectionality/hybridity simultaneously approximates and resists the authoritative symbol of discrimination law, with its insistence on separate grounds. At an individual level, hybridity helps to explain the political location of legal subjects in relation to the way that discrimination law represents them. It resonates with what M expresses as her sense of ‘disauthentication’ through engaging with a process that would ultimately reduce and essentialize her identity. When the law employs categories to defend against the onslaught of complexity, legal subjects adopt, and resist, those categories. If we accept that we have a responsibility as lawyers to bring about a situation in which legal subjects can ‘speak’ through the law, then the next challenge is to investigate, and work with this resistance.

NOTES

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1. See Hannett (2003) and Bell and Waddington (2003).
2. The UK legislation – the Employment Equality (Sexual Orientation) Regulations 2003 – came into force in December 2003.
3. To this extent, while drawing on a substantive concept of equality, this article aims to consider how intersectional discrimination is played out on an interpersonal or institutional level, and does not tackle the broader question of how to apply an intersectional analysis to indirect discrimination.
4. LAGER was a small voluntary-sector organization providing legal advice and representation to lesbians, gay men and bisexual people on employment issues. Like many voluntary sector organizations, LAGER struggled for funding, and in April 2004 it closed after 20 years.
5. Butler has responded to any potential theory of qualitative convergence by stating her wariness of theories that attempt to define gender by analogy with race, for example, or that compartmentalize them (Bell, 1999: 168).
6. See, for example, Fredman (1997: 234).
7. Article 8 European Convention on Human Rights – right to private and family life; Article 10 – freedom of expression and Article 14 – non-discrimination.
8. *MacDonald v Advocate General for Scotland*, *Pearce v Governing Body of Mayfield School* (2003).
9. Many practitioners use a chronology in the initial stages of working on a case in order to develop a clearer idea about how the events related to each other. In this way, chronologies are used as informal tools. However, they are also used as the backbone for the initial claim; many originating applications are drafted in chronological order.
10. See, for example, section 76(1) Sex Discrimination Act 1975.
11. See, for example, *Hendricks v Commissioner of Police for the Metropolis* (2003) and section 76(6)(b) Sex Discrimination Act 1975.
12. I would like to thank Didi Herman for asking me how hybridity can take the analysis of intersectionality any further.
13. However, see Ahmed (1999) for a critique of hybridity’s subversive potential.

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