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## Trans Politics on a Neoliberal Landscape

Dean Spade

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## KEYNOTE ADDRESS: TRANS LAW & POLITICS ON A NEOLIBERAL LANDSCAPE

by DEAN SPADE\*

Over the last couple years, I have been thinking about how issues of administrative governance relate to the obstacles in trans people's lives. I have been particularly interested in putting the administrative barriers in trans lives in the context of other areas of administrative governance that are important right now. For example, I have examined the barriers trans people face in identity verification systems in relation to the drastic changes in administrative policy undertaken as part of the "War on Terror." These policy changes primarily target immigrants but have altered systems that impact the entire U.S. population, such as drivers' licensing and other identity documentation and government data collection systems.<sup>1</sup> I have also looked at the administrative elements of our massive and monstrous criminal punishment system. The U.S. now imprisons one in a hundred people, and even though we comprise only five percent of the world's population, we imprison twenty-four percent of the world's prisoners.<sup>2</sup> The administration of criminal punishment, its use of gender as an administrative category, and its racialized targeting are especially relevant to trans people. I have been thinking about administrative systems and modes of governance as central to what defines key disparities in this political moment and viewing the struggles of trans people to survive through that lens.

I am interested, in part, in moving away from some of the more common modes and objects of analysis used to examine trans people's gender identities and the law. One such focus is the analysis of judicial opinions regarding determinations of gender where judges use various criteria to determine the gender of a litigant. Judicial decisions determining trans people's gender invoke anything from God and nature<sup>3</sup> to capacity for heterosexual intercourse<sup>4</sup> to various medical criteria.<sup>5</sup> Some legal scholarship has addressed why these judges are wrong to

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\* Assistant Professor of Law, Seattle University School of Law. This piece is an adapted version of the Keynote Address given at *Temple Political & Civil Rights Law Review's* 2008 Symposium: Intersections of Transgender Lives and the Law.

1. See generally David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359 (discussing the ways in which administrative systems have been transformed into national security apparatuses).

2. PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008), available at [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf).

3. *Littleton v. Prange*, 9 S.W.3d 223, 224, 231 (Tex. App. 1999).

4. *M.T. v. J.T.*, 355 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976).

5. *Kantaras v. Kantaras*, No. 98-5375CA (Fla. Cir. Ct. Feb. 13, 2003), *rev'd*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

invoke particular limited criteria, and why they should decide these types of cases in a different way.<sup>6</sup> Another focal point is protections for trans people under Title VII and under disability discrimination statutes.<sup>7</sup> Scholars often discuss the ways in which discrimination frameworks can benefit trans people, and how we might go about arguing for coverage of trans claims under different anti-discrimination regimes. Within that discussion there is an assumption that coverage by anti-discrimination laws would produce some kind of equality for trans people. It is my belief that this scholarship frequently proposes interventions that invest in the universalizing liberal rights discourses that are common for thinking about discrimination and that somewhat misunderstand the nature of power. These analyses are part of a larger trend of the mobilization of trans politics toward neoliberal goals of inclusion and incorporation. I am interested in thinking about the limitations of those goals and the law reforms they are associated with, particularly their limited capacity to improve the life chances of trans people. I further propose that understanding the role of administrative law and governance in the lives of people, including trans people, whose lives become disposable and precarious in a neoliberal order may help us re-conceptualize how law reform strategies relate to trans politics.

As the concept of “trans rights” has gained more currency in the last two decades, a seeming consensus has emerged about what law reforms should be sought to better the lives of trans people. Advocates of trans equality have primarily pursued two law reform interventions: anti-discrimination laws that list gender identity and/or expression as a protected category and hate crimes laws that include crimes motivated by the gender identity and/or expression of the victim as triggering the application of a jurisdiction’s hate crimes statute. National

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6. See, e.g., Aeyal Gross, *Gender Outlaws Before the Law: The Courts of the Borderland*, 32 HARV. J.L. & GENDER 165 (2009) (analyzing an Israeli district court’s determination that the law requires people to reveal “the ‘truth’ about their genitalia” to their sexual partners); Alice Newlin, *Should a Trip from Illinois to Tennessee Change a Woman into a Man: Proposal for a Uniform Interstate Sex Reassignment Recognition Act*, 17 COLUM. J. GENDER & L. 461, 468-75, 497-98 (2008) (discussing courts’ diverse approaches to determining legal sex and proposing a statutory solution that “incorporates the medical model of sex, including physical characteristics, but also provides an alternative path modeled on the self-determinative approach attempted by New York City and realized by the United Kingdom”); Samuel E. Bartos, Note, *Letting “Privates” be Private: Toward A Right of Gender Self-Determination*, 15 CARDOZO J.L. & GENDER 67, 68 (2008) (discussing court decisions that determine gender based on assigned sex and suggesting a self-identity test for future determinations); Franklin H. Romeo, Note, *Beyond A Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 730-38 (2005) (discussing the limits of courts’ reliance on the medical model of gender recognition).

7. See, e.g., Jennifer L. Levi, *Misapplying Equality Theories: Dress Codes at Work*, 19 YALE J.L. & FEMINISM 353 (2008); Iona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561 (2007); Amanda S. Eno, Comment, *The Misconception of “Sex” in Title VII: Federal Courts Reevaluate Transsexual Employment Discrimination Claims*, 43 TULSA L. REV. 765 (2008); Brian P. McCarthy, Note, *Trans Employees and Personal Appearance Standards Under Title VII*, 50 ARIZ. L. REV. 939 (2008); Shannon H. Tan, Comment, *When Steve Is Fired for Becoming Susan: Why Courts and Legislators Need to Protect Transgender Employees from Discrimination*, 37 STETSON L. REV. 579 (2008).

organizations like National Gay & Lesbian Task Force (NGLTF) have supported state and local organizations in legislative campaigns to pass such laws.

Currently, thirteen states have statewide laws that include gender identity and/or expression as a category of anti-discrimination and 108 counties and cities have such laws.<sup>8</sup> NGLTF estimates that thirty-nine percent of people in the U.S. live in a jurisdiction where such laws are on the books.<sup>9</sup> Several states now have hate crimes laws that include gender identity and/or expression.<sup>10</sup> These law reforms are also being advocated on the federal level. A federal bill that would add gender identity and/or expression to the Federal Hate Crimes Statute is actively advocated for by the National Center for Transgender Equality and other organizations.<sup>11</sup> An ongoing battle regarding the inclusion of gender identity and/or expression in the Employment Non-Discrimination Act, a proposed federal law that would prohibit discrimination on the basis of sexual orientation, continues to be fought between the more conservative national gay and lesbian organization, the Human Rights Campaign, and a variety of organizations and activists who seek to push an inclusive bill through Congress.<sup>12</sup> These legal reforms—anti-discrimination bills and hate crimes laws—have come to define the idea of “trans rights” in the U.S. and to be the most visible efforts by non-profits and activists working under this rubric.

The logic behind this law reform strategy is not mysterious. Proponents argue that passing these laws does a number of important things. First, passing anti-discrimination laws creates a basis for claims against discriminating employers, housing providers, restaurants, hotels, stores, and the like. Trans people’s legal claims have often failed in the past, with courts ruling that exclusion because the person is trans is a legitimate preference on the part of the employer, landlord, or business owner.<sup>13</sup> Laws making gender identity/expression-based exclusion illegal have the potential to influence courts to punish discriminators and provide certain remedies (back pay, damages) to injured trans people. There is also a hope that such laws and their enforcement by courts send a preventative message to potential

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8. NATIONAL GAY & LESBIAN TASK FORCE, JURISDICTIONS WITH EXPLICITLY TRANSGENDER-INCLUSIVE NONDISCRIMINATION LAWS (2008), available at [http://www.thetaskforce.org/downloads/reports/fact\\_sheets/all\\_jurisdictions\\_w\\_pop\\_8\\_08.pdf](http://www.thetaskforce.org/downloads/reports/fact_sheets/all_jurisdictions_w_pop_8_08.pdf).

9. Press Release, Nat’l Gay & Lesbian Task Force, Task Force Action Fund Applauds New York Assembly for Historic Vote on Transgender Rights (June 3, 2008), available at [http://www.thetaskforce.org/press/releases/pr\\_060308](http://www.thetaskforce.org/press/releases/pr_060308).

10. Nat’l Ctr. for Transgender Equality, Hate Crimes, [http://nctequality.org/Issues/Hate\\_Crimes.html](http://nctequality.org/Issues/Hate_Crimes.html).

11. See Local Law Enforcement Hate Crimes Prevent Act of 2009, H.R. 1913, 111th Cong. (2009).

12. See generally United ENDA, <http://www.equalityfederation.org/enda> (providing information about efforts to pass a trans-inclusive ENDA).

13. See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084-85, 1087 (7th Cir. 1984) (holding that the plain meaning of “sex,” the lack of relevant legislative history, and the inclusion of sex as an attempt to stop the passage of Title VII meant that the Act did not extend to include transsexual plaintiff); *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at \*6 (E.D. La. Sept. 16, 2002) (following *Ulane* and holding that Title VII did not extend to a plaintiff who cross dressed outside of work, reasoning that Congress has had numerous opportunities to include sexual identity and sexual preference and has chosen not to extend the Act).

discriminators, letting them know that such exclusions will not be tolerated, and increasing access for trans people to jobs, housing, and public accommodations.

Hate crimes laws are promoted under a related logic. Proponents point out that trans people are murdered at high rates and are subject to a great deal of violence. In many instances, trans people's lives are so devalued by police and prosecutors that murders of trans people are not investigated, or trans people's murderers are given extremely light punishment. Many people believe that hate crimes laws could intervene in this situation, making state actors take violence against trans people seriously. There is also a symbolic element to the passage of these laws, a statement that trans lives are meaningful, often described by proponents as an assertion of trans people's humanity. Additionally, proponents of both anti-discrimination and hate crimes laws argue that the processes of advocating for the passage of such laws, including media advocacy representing the lives and concerns of trans people and meeting with legislators to tell them about trans people's lives, increases positive trans visibility and forwards the struggle for trans equality. The data-collection element of hate crimes statutes, where the government keeps count of crimes that fall into this category, is touted by proponents as a chance to make trans people's struggles visible.

The logic of visibility and inclusion surrounding anti-discrimination and hate crimes laws campaigns is very popular; yet there are many troubling limitations to the idea that these two reforms compose a proper approach to problems trans people face in both criminal and civil law contexts. One concern is whether these laws actually improve the life chances of those who are purportedly protected by them. Looking at other groups who have been included in these kinds of laws over the last several decades raises the question of whether these kinds of reforms have eliminated bias, exclusion, and marginalization. Discrimination, violence, and exclusion against people of color have persisted, despite law changes that declared discrimination illegal.<sup>14</sup> The persistent and growing racial wealth divide in the U.S. suggests that these law changes have not had their promised effects, or that something about the structures of racism is not addressed by the work of these laws.<sup>15</sup> Similarly, the eighteen-year history of the Americans with Disabilities Act demonstrates disappointing results. Courts have limited the enforcement potential of this law with narrow interpretations of its impact,<sup>16</sup> and people with disabilities remain economically and politically marginalized by systemic ableism. Similar arguments might be made about the persistence of national origin discrimination, sex discrimination, and other forms of oppression despite decades of government

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14. See generally Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539 (2006) (arguing that suburbanization defeated the post-*Brown v. Board of Education* goal of full racial integration).

15. *Id.*; see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (holding that racial balancing was not a compelling state interest for use of racial tiebreakers in elementary school placement); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (holding that racial imbalance alone does not establish a prima facie case of employment discrimination under Title VII); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding that use of racial quotas in college admissions decisions was unconstitutional).

16. Recent amendments to the ADA address the courts' narrowing of the scope of the Act.

prohibitions on certain discriminatory behaviors. The persistence of wage gaps, illegal terminations, hostile work environments, and hiring disparities in all the groups whose struggles have supposedly been addressed by anti-discrimination and hate crimes laws invites caution when assuming the effectiveness of these measures.

Hate crimes laws, specifically, have never been argued to have a deterrent effect. They focus on punishment and have not been shown to actually prevent bias-motivated violence. In addition to their failure to prevent harm, many questions about enforcement and the problems of our legal systems exist. Hate crimes laws strengthen and legitimize the criminal punishment system, a system that targets the very people that these laws are supposedly passed to protect. The criminal punishment system has the same biases (racism, sexism, homophobia, transphobia, ableism, xenophobia) that advocates of these laws want to eliminate.<sup>17</sup> This is no small point, given the rapid growth of the U.S. criminal system in the last few decades and the gender, race, and ability disparities in criminal enforcement. Imprisonment in the U.S. has quadrupled since 1980 and continues to increase despite the fact that violent crime and property crime have declined since the 1990s.<sup>18</sup> The U.S. has the highest documented rate of imprisonment per capita of any country.<sup>19</sup> Significant racial, gender, ability, and national origin disparities exist in this imprisonment. One in nine black men between the ages of twenty and thirty-four are imprisoned.<sup>20</sup> While men still vastly outnumber women in prisons, the rate of imprisonment for women is growing far faster, and many suggest that sentencing changes created as part of the "War on Drugs" are to blame. An estimated twenty-seven percent of federal prisoners are non-citizens.<sup>21</sup> While accurate estimates of rates of imprisonment for people with disabilities are hard to find, it is clear that the deinstitutionalization of people with psychiatric disabilities without the provision of adequate community services, and the role of drug use in self-medicating disability account for a high and growing rate.<sup>22</sup>

In the context of mass imprisonment and rapid prison growth targeting traditionally oppressed groups, what does it mean to use criminal punishment-enhancing laws to purportedly address oppression? This point has been made especially forcefully by critics who note the origins of the contemporary gay and

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17. See Andrea Ritchie, *Law Enforcement Violence Against Women of Color*, in *COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* 140 (2006) (discussing biases of law enforcement officials).

18. See U.S. Dep't of Justice, Bureau of Justice Statistics: Property Crime Trends, <http://www.ojp.usdoj.gov/bjs/glance/house2.htm> (last visited May 7, 2009); U.S. Dep't of Justice, Bureau of Justice Statistics: Violent Crime Rate Trends, <http://www.ojp.usdoj.gov/bjs/glance/viort.htm> (last visited May 7, 2009).

19. ROY WALMSLEY, INT'L CENTRE FOR PRISON STUDIES, *WORLD PRISON POPULATION LIST 1* (6th ed. 2007), available at <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-population-list-2005.pdf>.

20. *Id.*

21. U.S. Gov't Accountability Office, *Information on Criminal Aliens Incarcerated in Federal and State Prisons and Local Jails 2* (Mar. 29, 2005), available at <http://www.gao.gov/new.items/d05337r.pdf>.

22. LAURA MAGNANI & HARMON L. WRAY, *BEYOND PRISONS: A NEW INTERFAITH PARADIGM FOR OUR FAILED PRISON SYSTEM* (2006).

lesbian rights formation in anti-police activism of the 1960s and 70s and question how we came to be aligned with a “law and order” approach.<sup>23</sup> Could the veterans of the Stonewall and Compton’s Cafeteria riots against police violence have guessed that a few decades later LGBT law reformers would be pushing forward the Matthew Shepard Law Enforcement Enhancement Act to give \$10 million to enhance police and prosecutorial resources?

These concerns are particularly relevant for trans people given our ongoing struggles with police profiling, harassment, and violence, and high rates of both youth and adult imprisonment. Trans people are disproportionately poor because of employment discrimination, family rejection, troubles accessing school, medical care, and social services. These factors increase our rates of participation in criminalized work to survive, and that, combined with the profiling engaged in by police, produces high levels of criminalization.<sup>24</sup> Once imprisoned, trans people face high levels of harassment and violence in both men’s and women’s facilities. Violence against trans women in men’s prisons is consistently reported by prisoners themselves as well as researchers.<sup>25</sup> Court cases and stories from advocates and former prisoners reveal trends of forced prostitution, sexual slavery, sexual assault, and other violence against transgender women in men’s prisons.<sup>26</sup> Trans people in women’s prisons are also targets of gender-based violence, including sexual assault, most frequently at the hands of correctional staff. Having masculine characteristics can make prisoners in women’s facilities targets of homophobic slurs, punishment for alleged violations of rules against homosexual contact, and sexual harassment and assault motivated by a reaction to gender nonconformity.<sup>27</sup>

If the criminal punishment system itself is a rampant source of gendered violence, and there is no evidence that increasing its resources and punishment

23. Anna M. Agathangelou, M. Daniel Bassichis & Tamara L. Spira, *Intimate Investments: Homonormativity, Global Lockdown, and the Seductions of Empire*, 100 RADICAL HIST. REV. 120, (2008); Morgan Bassichis, Alex Lee & Dean Spade, *Untitled*, forthcoming in *CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX* (Eric Stanley & Nat Smith eds.) (forthcoming 2010); Kay Whitlock, Former Nat’l Representative for LGBT Programs, Am. Friends Serv. Comm., AFSC’s Position on LLEEA (June 7, 2002), <http://www.afsc.org/lgbt/ht/d/ContentDetails/i/3462>.

24. D. MORGAN BASSICHIS, SYLVIA RIVERA LAW PROJECT, “IT’S WAR IN HERE”: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS 15-16 (Dean Spade ed., 2007), available at <http://srlp.org/files/warinhere.pdf>.

25. BASSICHIS, *supra* note 24; ALEX COOLMAN ET AL., STOP PRISONER RAPE & THE NAT’L PRISON PROJECT, ACLU, STILL IN DANGER: THE ONGOING THREAT OF SEXUAL VIOLENCE AGAINST TRANSGENDER PRISONERS (2005), available at [www.justdetention.org/pdf/stillindanger.pdf](http://www.justdetention.org/pdf/stillindanger.pdf); Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference,”* 92 J. CRIM. L. & CRIMINOLOGY 127 (2001); Alexander L. Lee, *Gendered Crime & Punishment: Strategies to Protect Transgender, Gender Variant & Intersex People in America’s Prisons* (2004) (unpublished comment, University of California, Berkeley Boalt Hall School of Law) (on file with author); CRUEL AND UNUSUAL (American Film Institute 2006), available at <http://www.cruelandunusualmovie.com>.

26. See generally BASSICHIS, *supra* note 24 (discussing the violence experienced by transgender, intersex, and gender nonconforming people held in men’s prisons in New York State).

27. *Id.* at 32-33.

capacity will reduce violence against trans people, the hate crimes law strategy begins to appear far less attractive. By naming that system as the answer to the significant problem of violence against trans people, we participate in the logic that the criminal punishment system produces safety despite the fact that the evidence suggests that it primarily produces violence. Further, by articulating it as the place we turn to stop transphobia, we obscure the fact that the criminal punishment system is probably the most significant perpetrator of violence against trans people. Many commentators have cited this as an example of neoliberal cooptation, where the struggles of oppressed people come to be used to prop up the very arrangements that are harming those people.<sup>28</sup> A new mandate to punish transphobes is added to the arsenal of justifications for a system that primarily locks up and destroys the lives of poor people, people of color, people with disabilities, and immigrants, and that uses gender-based sexual violence as one of its daily tools of discipline.<sup>29</sup>

The effectiveness of enforcement of anti-discrimination laws also raises questions about their value in improving trans lives. Most people who experience discrimination cannot afford to access legal help, so their experiences never make it to court. Additionally, the Supreme Court has narrowed the enforceability of these laws severely over the last thirty years, making it extremely difficult to prove discrimination short of a signed letter from a boss or landlord saying "I am taking this negative action against you because of your [insert prohibited characteristic]." Proving discriminatory intent has become central, making it almost impossible to win these cases. These laws also have such narrow scopes that they often do not include action taken by some of the most common discriminators against marginalized people: state actors such as prison guards, welfare workers, welfare supervisors, immigration officers, child welfare workers, and others who have significant control over the lives of marginalized people in the U.S. in an era of cyclical abandonment and detention.

In addition to these general problems with law reforms that add gender identity/expression to the list of prohibited characteristics, trans litigants have run into specific problems when seeking redress for discrimination under these laws. Even in jurisdictions where these laws have been put in place, trans litigants have lost cases when the way they experience discrimination is by being denied access to a sex-segregated facility.<sup>30</sup> In the employment context, this often means that even when a worker is living in a jurisdiction where discriminating against trans people is supposedly illegal, denying a trans person access to a bathroom that comports with their gender identity is not interpreted as a violation of the law.<sup>31</sup> Because trans people frequently face violence and discrimination in the context of sex-

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28. Aganangelou, Bassichis & Spira, *supra* note 23; Bassichis, Spade & Lee, *supra* note 23; Dan Irving, *Normalized Transgressions: Legitimizing the Transsexual Body as Productive*, 100 RADICAL HIST. REV. 38 (2008).

29. Aganangelou, Bassichis & Spira, *supra* note 23; Bassichis, Lee & Spade, *supra* note 23.

30. *See, e.g.*, *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001) (holding that an employer could require a trans woman to use the men's restroom at work); *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43 (N.Y. App. Div. 2005) (holding that a landlord could refuse to renew a non-profit's lease because the non-profit's transgender clients used the restrooms in the building).

31. *See Goins*, 635 N.W.2d at 725.



segregated spaces like shelters, prisons, and group homes, and because bathroom access is often the most contentious issue between trans workers and their employers, this interpretation takes the teeth out of trans-inclusive laws and is an example of the limitations of seeking equality through courts and legislatures.

Instead of thinking of hate crimes laws and anti-discrimination laws as the primary trans law reform interventions, I would like to turn our attention to the administrative realm. My interest in administrative systems stems from my experience as a poverty lawyer where I witnessed the ways that administrative systems create truly violent and deadly situations for poor people every day. Anyone who has experienced the welfare, foster care, or homeless shelter systems is likely to understand this violence. In recent years I have examined the administrative policies governing gender reclassification.<sup>32</sup> I am interested in analyzing how administrative systems distribute life chances and using this analysis to improve understanding of oppression, rather than focusing solely on oppression as manifested by individual perpetrators who discriminate. There are a few concepts that I have found particularly helpful for thinking about these issues.

Alan Freeman's description of the perpetrator perspective is one.<sup>33</sup> Freeman argues that discrimination law misunderstands how oppression works which causes it to fail in addressing oppression effectively.<sup>34</sup> Discrimination law primarily conceptualizes the harm of oppression through the victim-perpetrator dyad, imagining that the fundamental scene is that of a perpetrator who irrationally hates people on the basis of their race and fires or denies service to or beats or kills the victim based on that hatred. For several reasons, the law's adoption of this conception of oppression makes it ineffective at eradicating oppression. First, it individualizes oppression. It says that oppression is about individual bad actors with bad intentions who make bad choices and who must be punished. In this understanding, systemic oppression becomes invisible. The law can only attend to disparities that are rooted in a perpetrator who intentionally considered the category that must not be considered (race, gender, disability, etc.) in the decision he or she was making (hiring, firing, admission, expulsion, etc.). Oppressive conditions, like living in a district with underfunded schools that "happens to be" ninety-six percent students of color,<sup>35</sup> or being denied a job because the industry standard is unaccented English,<sup>36</sup> or having to take an admissions test that has been proven to predict race better than academic success,<sup>37</sup> or any of a number of disparities in life

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32. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731 (2008).

33. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978).

34. *Id.*

35. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 11-12 (1973) (describing the student population of the underfunded district as ninety percent Mexican American and over six percent African American).

36. *See Mejia v. N.Y. Sheraton Hotel*, 459 F. Supp. 375, 377 (S.D.N.Y. 1978) (holding that plaintiff's difficulty with English language was a legitimate, non-discriminatory reason for the hotel-employer to take adverse action against the plaintiff).

37. SUSAN P. DALESSANDRO, LAURA A. MARCUS & LYNDA M. REESE, LAW SCHOOL ADMISSION COUNCIL, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 1999-2000 THROUGH 2005-2006 TESTING YEARS 14 (2006), available at <http://lsacnet.lsac.org/research/>

conditions (access to adequate food, healthcare, employment, housing, clean air and water, etc.) that we know reflect long-term patterns of exclusion and exploitation cannot be understood as “violations” under the discrimination principle and remedy through the law cannot be demanded. This narrow reading of what constitutes a violation, of what can be recognized as oppression, serves to naturalize and affirm the neutrality of the status quo. Anti-discrimination law focuses solely, then, on seeking out individual aberrant actors with overtly biased intentions.<sup>38</sup> Meanwhile, all the daily disparities in life chances that shape our world along lines of race, class, disability, national origin, sex, and gender remain untouchable and affirmed as non-discriminatory or fair.

The perpetrator perspective also obscures the historical context of oppression. Discrimination is understood as the act of taking into account the forbidden category when making a decision, but such an act is defined as discrimination without regard to whether the decision-maker was favoring or harming a traditionally excluded or exploited group. This use of the discrimination principle has eviscerated affirmative action and desegregation programs.<sup>39</sup> This “colorblind” conception undermines the possibility of remedying the severe racial disparities in the U.S. that are rooted in slavery, genocide, land theft, internment, and immigrant exclusion, as well as racially explicit policies that excluded people of color from the benefits of wealth-building programs for U.S. citizens like Social Security, land grants, credit, and other homeownership support.<sup>40</sup> The historical conditions that created such immense disparities are made invisible by the perpetrator perspective’s insistence that any consideration of the prohibited category is equally damaging. It pretends that the playing field is equal, so any loss or gain in opportunity based on the category is harmful and creates inequality, again serving to declare that the racial status quo is neutral. This logic gives rise to the myth of “reverse racism,” a concept that misunderstands racial oppression to suggest parallel meanings between when white people lose opportunities or access based on race and when people of color do.

Discrimination law’s reliance on the perpetrator perspective also has the impact of declaring that the previously excluded or oppressed group is now equal, that fairness has been imposed and the legitimacy of the distribution of life chances restored. This declaration of equality and fairness papers over the inequalities and disparities that constitute business as usual and allows them to continue. Narrowing the political strategy of oppressed groups to inclusion in discrimination

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LSAT-Performance-Regional-Gender-Racial-Ethnic-Breakdowns-1999-00-2005-06.pdf; Claude M. Steele, *Expert Report of Claude M. Steele*, 5 MICH. J. RACE & L. 439 (1999) (expert testimony in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

38. Freeman, *supra* note 33, at 1054.

39. See, e.g., *Parents Involved*, 551 U.S. at 754 (holding that school district failed to show that consideration of race in elementary and secondary school assignments was narrowly tailored to achieve a compelling state interest); *Gratz*, 539 U.S. at 246 (holding that undergraduate admissions scheme designed to increase opportunities for people of color was unconstitutional because it relied heavily on race).

40. See generally United for a Fair Economy, *Racial Wealth Divide*, [http://www.faireconomy.org/issues/racial\\_wealth\\_divide](http://www.faireconomy.org/issues/racial_wealth_divide) (last visited May 7, 2009) (addressing “historical and contemporary barriers to wealth creation among communities of color”).

law emphasizes this assumption—getting included in this way will equalize our life chances and allow us to compete in the (purportedly fair) system. This often constitutes a forfeiture of other critiques, as if the economic system is fair *but for* the fact that bad discriminators are sometimes allowed to fire trans people for being trans. Constituting the problem of oppression so narrowly that an anti-discrimination law could solve it erases the complexity and breadth of the problem. It is not surprising, then, that it generates inadequate solutions.

Also concerning is the fact that the rhetoric accompanying these quests for inclusion often focus on deserving workers, often people whose other characteristics (race, ability, education, class) would have entitled them to a good chance in the workforce were it not for the allegedly illegitimate exclusion that happened.<sup>41</sup> Using such people as examples is necessary if the issue is being described so narrowly that a person facing many vectors of marginalization or exploitation would inevitably experience more flaws in the distribution of life chances than are addressed by the discrimination principle. This framing allows quests for inclusion in the discrimination regime to rely on rhetoric that affirms the legitimacy and fairness of the status quo. The inclusion focus of these campaigns relies on a strategy of simile in arguing “we are just like you; we do not deserve this different treatment because of this one characteristic.” To make that argument, advocates cling to the imagined norms of the U.S. social body and choose poster people who are symbolic of American standards of normalcy, whose lives are easily framed by sound bites that resound in shared notions of injustice.<sup>42</sup> Laws created from such strategies, not surprisingly, routinely fail to protect people with more complicated relationships to marginality.<sup>43</sup>

Another tool I have found useful for this analysis is Angela Harris’s discussion of how the law engages in ““preservation-through-transformation.””<sup>44</sup> This concept recognizes that when oppressed groups resist domination, and laws are changed to address their complaints, the law does not actually resolve the oppression; instead, it changes the system just enough to justify and preserve the

41. Several significant famous trans discrimination cases follow this pattern, with both media and advocates portraying the assimilability of the trans person in order to emphasize their deserving nature. See, e.g., *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Kantaras*, 884 So. 2d 155. The same has been pointed out about which queer and trans murder victims become icons in the battle for hate crimes laws. White victims tend to have their names remembered (Harvey Milk, Brandon Teena, Matthew Shepard), their lives memorialized in films and movies (*Milk*, *Boys Don’t Cry*, *Larabee*), and laws named after them (Matthew Shepard Law Enforcement Enhancement Act), while victims of color lose their lives at higher rates and with less fanfare (Sanesha Stewart, Amanda Milan, Marsha P. Johnson, Nizah Morris, and Ruby Rodriguez, to name just a few).

42. The plaintiff in *Schroer*, for example, held two master’s degrees and had a successful twenty-five-year career in the Army with Top Secret security clearance and expertise in international terrorism. *Schroer*, 577 F. Supp. 2d at 295.

43. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245-50 (discussing how domestic violence intervention strategies often fail women of color who experience intersectional subordination); Kim Crenshaw et al., INTRODUCTION TO CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al. eds., 1995).

44. Harris, *supra* note 14, at 1540 (quoting Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997)).

status quo.<sup>45</sup> In her article, Harris uses the *Brown v. Board of Education* decision to discuss how it became politically unviable to maintain certain race-conscious policies, but declaring those race-conscious policies illegal did not eliminate structural racism and race segregation.<sup>46</sup> Instead, those policies were replaced with a set of policies and practices ranging from home lending practices to public school financing that maintained the status quo of racial disparity and segregation.<sup>47</sup> Harris's analysis is helpful for thinking about the dangers of certain kinds of liberal legal reforms that may help maintain systems of oppression rather than undermine them while putting a veneer of equality over the situation.<sup>48</sup>

I have also found Ruth Wilson Gilmore's definition of racism useful here. She defines racism as "the state sanctioned or extralegal production and exploitation of group differentiated vulnerability to premature death."<sup>49</sup> I like that this definition focuses our attention on conditions. It allows us to examine disparity and to resist individualization and intentionality as the key elements of identifying oppression. It helps us get away from the idea that our analysis of oppression should focus on what individuals are consciously thinking or that our interventions should center around changing "hearts and minds," and it allows us to see oppressive conditions and investigate what interventions would change them.

Gilmore's definition of racism gets us away from the presumption that if we could just change how elites think about oppressed people, we would have equality. We know that elites can mobilize "diversity" rhetoric while making policies that shorten the life spans of people of color. That history is well articulated. Gilmore's definition helps us regroup and look at conditions rather than taking up an "I can find those people who are bad discriminators or violent haters and sue them or put them in prison" focus. That focus has proven to be an ineffective method of eliminating the severe race, class, gender, ability, and citizenship-based disparities in life chances that result from oppression. Gilmore's definition calls our attention to the distribution of life chances rather than mobilizing us toward individual punishment or symbolic law change.

The final tool I will mention that has been of use in this investigation is the work of Bowker and Star, two scholars who study classification systems.<sup>50</sup> They argue that classifications systems control conditions of being while appearing neutral and disguising the moral choices that underlie them.<sup>51</sup> Their work allows an analysis of how systems that are taken for granted—that are so common that they shape our understandings of the world—actually perform deadly violence against

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45. *Id.* at 1540-41.

46. *Id.*

47. *Id.* at 1547-54.

48. See generally *id.* (discussing how legal reforms only purport to achieve equality for oppressed groups).

49. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 28 (Earl Lewis et al. eds., 2007).

50. See generally GEOFFREY C. BOWKER & SUSAN LEIGH STAR, *SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES* (1999) (examining the role of classification systems in shaping human interactions).

51. *Id.*

those people whose lives and identities become misclassified or unclassifiable in administrative systems.

These conceptual tools have helped me understand why questions of administrative governance have such significance for trans survival and how I might begin to analyze the tangle of administrative policies that govern gender reclassification. I have looked at three types of gender reclassification policies that are particularly important for trans people. First, I looked at the state, federal, and local policies that determine when you can change the gender marker on your identity documents.<sup>52</sup> Second, I looked at the policies that determine when sex-segregated institutions, like prisons, shelters, and foster group homes will place trans people in the proper facility for them given their gender.<sup>53</sup> Finally, I examined the extent to which public healthcare programs, including Medicaid, healthcare programs for foster youth, and healthcare programs for prisoners, provide coverage for gender reclassification-related healthcare.<sup>54</sup> In examining these three types of gender reclassification policies, I discovered a wide range of practices within each type of policy.<sup>55</sup>

The wide range of gender marker change policies among and within states is particularly compelling. The rules of gender reclassification differ across jurisdictions and among “expert” agencies responsible for creating and enforcing these policies, thereby producing bureaucratic confusion and serious consequences for those directly regulated. My research found a range of policies that exist on a broad continuum of points at which a given agency or institution will allow a person to be recognized in a gender different than the one assigned at birth. On the extreme right side of that continuum are policies that refuse reclassification, explicitly indicating that for the purposes of the agency or institution, gender may never be changed. In the middle are a variety of policies that use medical authority to assess reclassification. These policies vary extensively regarding the type of medical intervention considered sufficient to grant reclassification. On the far left reside policies that allow recognition of the new gender based solely on self-identification of the applicant, requiring no medical evidence.

Two examples where gender can never be changed from birth-assigned gender are Tennessee’s birth certificate policy and prison placement policies across the United States. Tennessee has a statute explicitly forbidding the changing of gender markers on birth certificates, so that transgender people born in that state can never obtain a certificate indicating a gender other than that assigned at birth.<sup>56</sup> Similarly, placement policies in prisons across the United States generally use a “never” rule.<sup>57</sup> Transgender women are placed in men’s prisons, and transgender men are placed in women’s prisons. Of the nine jurisdictions that have written policies

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52. Spade, *supra* note 32, at 759-75.

53. *Id.* at 775-82.

54. *Id.* at 782-801.

55. A portion of the text that follows is excerpted from *Documenting Gender*. Spade, *supra* note 32.

56. TENN. CODE ANN. § 68-3-203(d) (2006). Tennessee is the only state that has a statute explicitly forbidding recognition of gender reclassification on birth certificates, though it is not the only state that denies reclassification.

57. Spade, *supra* note 32, at 782.

regarding treatment of transgender prisoners, none allow placement of transgender prisoners according to current gender identity.<sup>58</sup>

In contrast to those policies, a large subset of gender reclassification policies requires medical intervention for reclassification.<sup>59</sup> The type of medical intervention required, however, differs significantly from policy to policy. Three different birth certificate policies can be used as examples to show a range of requirements. California's birth certificate gender change policy requires the applicant show that he or she has undergone any of a variety of gender confirmation surgeries, which could include chest surgery (breast enhancement for transwomen, or mastectomy and reconstruction for trans men), tracheal shave ("Adam's Apple" reduction), penectomy (removal of the penis), orchiectomy (removal of the testicles), vaginoplasty (creation of a vagina), phalloplasty (creation of a penis), hysterectomy (removal of internal pelvic organs), or any one of a range of other gender-related surgeries.<sup>60</sup> New York City and New York State, however, each require genital surgery, and, interestingly, have differing requirements.<sup>61</sup> People born in New York City are required to provide evidence that they have undergone phalloplasty or vaginoplasty, while people born elsewhere in New York State must provide evidence that they have undergone penectomy or hysterectomy and mastectomy.<sup>62</sup> The fact that two jurisdictions issuing birth certificates in the same state have come up with entirely different requirements for recognition of gender change, alone, attests to the inconsistency in this area.

The Massachusetts DMV gender reclassification policy requires that an applicant prove that he or she has undergone some kind of surgery, which is not specified, as well as provide a birth certificate that indicates the new gender.<sup>63</sup> The SSA's policy requires sex reassignment surgery but is non-specific as to which surgeries will be accepted.<sup>64</sup> Some DMV gender reclassification policies, such as those of Colorado, New York, and the District of Columbia do not require evidence of surgery, but still require medical documentation in the form of a doctor's letter attesting that the person is transgender and is living in the new gender.<sup>65</sup> Still other policies do not require medical evidence at all. The homeless shelter placement policies of Boston, San Francisco, and New York City are examples of policies that

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58. Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 177, 197-209 (2006).

59. Spade, *supra* note 32, at 736.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* This policy was changed in the time between the Symposium and the publication of these remarks. A corrected birth certificate is no longer required. Letter from Rachel Kaprielian, Registry of Motor Vehicles, Executive Office of Transportation, Commonwealth of Massachusetts, to Marc Solomon, MassEquality, Jan. 21, 2009, available at <http://www.glad.org/uploads/docs/advocacy/rmv-letter-1-09.pdf>. However, many similar policies exist tying various documents to other jurisdictions' documents for purposes of sex designation change. See Spade, *supra* note 32.

64. Spade, *supra* note 32, at 762 n.141.

65. See *id.* at 770-74 and accompanying notes (describing state DMV gender reclassification policies).

allow individuals to be recognized according to their current gender identity based solely on self-identity.<sup>66</sup> These policies require that homeless transgender people be placed in the shelter associated with their gender identity without being required to provide any medical documentation or ID as verification of that identity.<sup>67</sup>

So, the types of gender reclassification policies range widely, and the conclusion we can draw is that these agencies have no agreement on what constitutes maleness or femaleness. While it is interesting to find that the incoherence of gender as a category of identity verification is proven by the law itself in these policies, the unfortunate truth is that the result of this policy matrix for trans people is deadly. People cannot get the identity documents they need to obtain employment, and they cannot access basic necessities. In the realm of sex-segregated facilities like prisons, the danger is extremely severe. The placement of trans women in men's prisons all over the country results in life-threatening violence.

Also, the consequences of having access to healthcare denied are very severe for trans people. The trend in some of the Medicaid regimes around the country is to eliminate coverage for trans healthcare. Washington State recently eliminated much of its trans healthcare coverage.<sup>68</sup> Minnesota has steadily reduced its coverage of trans healthcare.<sup>69</sup> Due to the general anti-poor climate, trans healthcare coverage has been targeted by the media with a hysteria created around the idea of taxpayer money supporting trans needs.<sup>70</sup> Foster youth, youth in the juvenile punishment system, prisoners, and Medicaid recipients all face these exclusions in most jurisdictions. These trends are all part of the disproportionate poverty and downward mobility of trans communities that affects our ability to survive.

Of course, the double binds of these administrative systems are obvious to us, but they are the kind of contradictions that really do not matter to policy makers. Many states have different policies about what constitutes maleness or femaleness for purposes of gender reclassification amongst their different agencies. On one hand, New York City and New York State's birth certificate policies tell trans people that "if you do not have surgery, then we do not consider you really male or female," and so this is the care that matters, this is the real healthcare that proves somebody's gender is different. On the other hand, the same state's Medicaid policy says: "No, that's not real healthcare. That's just cosmetic."<sup>71</sup> These kinds of internal contradictions, that operate to the detriment of trans people on both sides, are common within jurisdictions.

These administrative conflicts and double binds have gotten even more dangerous since the advent of the War on Terror because of new administrative

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66. *Id.* at 778.

67. *Id.*

68. *Id.* at 787-88.

69. *Id.*

70. Spade, *supra* note 32, at 787-88; see Ralph Thomas, *State Tries to Rule Out Aid for Sex-Change Surgery*, SEATTLE TIMES, Aug. 7, 2006, at B1, available at [http://seattletimes.nwsources.com/html/localnews/2003180336\\_sexchange07m.html](http://seattletimes.nwsources.com/html/localnews/2003180336_sexchange07m.html).

71. N.Y. COMP. CODES R. & REGS. tit. 18, § 505.2(l) (2005).

policies and practices increasing surveillance and demanding a greater level of identity verification and documentation consistency than ever before. These policy changes have included new comparisons between databases that previously existed separately. Data from DMVs, the Social Security Administration, and the IRS have been increasingly compared. Inconsistencies among the various databases can result in a person's exclusion from a public welfare program or an inability to obtain a piece of identification. In some cases, an agency will contact a person's employer to discuss the potential of fraud, and as a result trans people face a new set of administrative problems related to identity verification systems.<sup>72</sup> During this period trans people have had drivers license applications denied, have been outed as trans to their employers by federal agencies, and have faced significant limitations in travel. In some places, trans activists have joined with immigrants and other communities harmed by these policy changes to oppose the fear-based expansion of government surveillance in the name of terrorism prevention.

My examination of these policies resulted in a discovery that is not novel: the gender category is totally unstable. It does not do what we think it does. These systems assume that they are tracking a verifiable identity marker—that a gender marker tells them something stable about each of us—but they do not agree on what it is they know about someone from this marker. Sometimes a gender classification means that the person does not have any breast tissue, and sometimes it means that he or she got a letter from a doctor, and sometimes it means that he or she was born in Tennessee. It is not a useful system for tracking anything. In part, we could argue that identity verification itself is a futile pursuit and that other categories, not just gender, are just as unstable as markers of identity for surveillance purposes. The idea being promoted by the growing surveillance apparatus is that we can really track people if we just identify their genitals or scan their retinas or have their fingerprints, but every single piece of identity verification technology is very flawed. More importantly, the technology is utilized in ways that continue to be racialized and to target marginalized groups.

In light of these problems with gender classification in the U.S., some people have asked whether we should try to pass legislation similar to the UK's Gender Recognition Act (GRA).<sup>73</sup> In the UK, there is just one national policy for gender reclassification governing all systems, and it is preferable to many policies in U.S. institutions and agencies because it does not have any kind of medical requirements for gender reclassification. You do not have to prove any particular medical intervention to change your gender marker. However, I do not recommend this path for U.S. trans activists and lawyers. First, not surprisingly, local activists in the UK report that the Act is not enforced as written, and many people cannot seem to get through the system if they have not had medical intervention. It is always useful to note the many instances in which a law's enforcement fails to live up to its promise. Second, and more importantly, the move toward gender recognition in

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72. Social Security Gender No-Match Letters and Transgender Employees, National Center for Transgender Equality, (Jan. 2008), [http://www.nctequality.org/Resources/NoMatch\\_employees.pdf](http://www.nctequality.org/Resources/NoMatch_employees.pdf).

73. Gender Recognition Act, 2004, c. 7 (Eng.).



some ways tries to re-stabilize this category; it tries to rehabilitate it, and make it work, and make it mean something, and I do not think that should be our goal.

My aim is to understand that the categories on identity documents—more broadly the categories we use in administrative governance—perform a sorting function that appears neutral, but when mobilized as a security apparatus, actually produces targeted insecurities and death for those who are unclassifiable and misclassified.<sup>74</sup> So, even if the U.S. passed a GRA, the most vulnerable trans people in this country still would not benefit from the law for any number of reasons—because they do not have lawyers, they are not documented, the system is not set up for people with disabilities, or they are caught in the criminal punishment system. The conditions of administration would produce insecurity through gender categorization, although differently. The range of problems that produce structured insecurity for so many trans people—poverty, racism, immigration enforcement, ableism—would not be addressed by a U.S. Gender Recognition Act, and would probably be reflected in its enforcement just as they are in the rest of our administrative apparatuses.

Looking at the problems that gender classifications create in the context of the War on Terror helps generate an understanding of the broader impacts of systems aimed at identity verification and mobilized through racism and xenophobia. War on Terror policies and practices draw from an array of data collection systems that were previously somewhat dispersed and merge them in a way that tightens the squeeze on the populations that survive at the margins of these systems, particularly immigrant populations, although elderly, disabled, rural, poor, and trans populations are also especially impacted. These systems produce conditions in which some people become legal impossibilities—their existence is contrary to law in ways that make them extremely vulnerable. Trans people currently operate under these dire conditions: being impossible, having an identity that cannot be recognized or that is recognized inconsistently.

I was fascinated when I went to Sweden this summer and met a trans activist there who told me a story that illustrated this experience of being administratively impossible, though in a different context. Sweden seems to have so many of the things that people in the U.S. on the Left dream of. The people I met live in government-owned apartments, activists and artists I met are paid to do their work, the government sends their kids to summer camp every summer, and everyone has full healthcare. There seems to be a floor of poverty and degradation that people could not fall below in Sweden that is much higher than our floor here in the U.S. Of course, much of this is on the decline as neoliberal trends sweep the globe, but still, Sweden has a lot of supports that are unimaginable in the U.S. Interestingly, Sweden was the first country that covered trans healthcare and that allowed trans people to legally change their gender. Because of that, Sweden is an interesting place to look when thinking about trans-related administrative policies.

During my visit I learned from local trans activists that in Sweden the gender reclassification system is actually quite gender normative. These activists told me

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74. See BOWKER & STAR, *supra* note 50, at 129-225 (discussing the significance of classifications systems in producing certain oppressive arrangements).

that to get through the system and get approval from various doctors for care and documentation, trans people have to follow the “true transsexual” narrative very narrowly. Similar to what gender clinics of the 1960s and 70s have been critiqued for in the North America,<sup>75</sup> the Swedish medical establishment enforces narrow gender norms on trans people and in order to remain in the programs and get approved for treatment, people have to fit their lives into these expectations. Certainly, these kinds of medical approaches to trans people where doctors act as gate-keepers and demand heteronormative, stereotyped performances of gender still occur regularly in the U.S., but according to the people I spoke with in Sweden, these protocols are routinely and consistently applied there. At the same time, trans people cannot legally change their gender in Sweden until they have completed what the government considers to be the full course of treatment, which in this case means genital surgery.

It is interesting because, arguably, trans people in Sweden have much better access to gender confirming health care since it is paid for and fully covered under their universal insurance, while in the U.S. most people can only get as much of this care as they can pay for out of pocket. At the same time, the way the Swedish system as administered seems to focus on the same goals that our system focuses on—the production of “proper” men and women and the rigid maintenance of those categories. These aims are achieved through two very different sets of policies—in Sweden the rigidity of these categories is mandated by the method of treatment, which is fully paid for, as well as by the legal requirements of surgery. In the U.S., the market governs who has access to health care, meaning that most trans people do not have access. Then, a range of conflicting laws and policies (many of which require surgery of some kind) align to produce legal documentation problems that likely are similar to what many trans people in Sweden—who do not fit the narrow mold required by the health and law systems—face. However, I would imagine that since there is a more meaningful social safety net in Sweden and far less wealth inequality, imprisonment, and general abandonment of the poor, Swedish trans people probably still fare better in the long run.

Nonetheless, I heard an interesting story illustrating how trans people in Sweden can become legal/medical impossibilities in their administrative systems. One activist I spoke with had moved to Sweden from the UK and had changed the gender markers on her identity documents to “F” while she was in the UK. In the UK, as I mentioned before, the law does not require any particular medical

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75. See Irving, *supra* note 28, at 41–48 (suggesting that medical professionals who worked in early gender identity clinics sought to produce “proper” men and women who could contribute economically to society); see also Dwight B. Billings & Thomas Urban, *The Socio-Medical Construction of Transsexualism: An Interpretation and Critique*, 29 SOC. PROBS. 266, 276 (1982) (providing a feminist and anti-capitalist analysis of the gender norm-enforcement taken up by doctors who constitute their own authority by centering their sexist gender expectations in their treatment of trans patients). Billings and Urban miss the mark in their analysis because they fail to perceive the complex relations between trans people and their doctors as including agency on the part of trans people, and instead seem to read trans people as dupes who are solely co-opted by medicine through the transsexual diagnostic process rather than as gender outsiders who often co-opt medical technologies by carefully navigating the gendered truths medical professionals require. Irving provides a more nuanced and less transphobic approach to questions of medical authority and political economy in a trans context.

treatment to change one's documents. Sweden's system requires that trans women have genital surgery. Now, this woman and her non-trans female partner plan to have a baby using their own biological matter, and in Sweden, my friend will have to adopt her baby because it is not legally possible for her to do what she plans to do: under the Swedish medical/legal administration of gender, her situation and identity/body are impossible.

This story gave me pause and illustrated for me why we need a critical engagement about law reform as a strategy for bettering the lives of people who live outside the norms of gendered citizenship. Certainly the Swedish system is less violent to trans people and to all people than our system is, and the distribution of life chances is much better, but the Swedish system still tries to establish "proper" men and women and then distributes life chances based on whether you can fit these regularities.

I want to think critically about modes of governance that are mobilized to promote healthy populations, using norms for "health" that produce structured insecurity and premature death for certain people.<sup>76</sup> Whenever governments create systems to administer health across the population, the vision inevitably labels some subsets of the population as threats or drains. Contemporary examples include women on welfare, people with disabilities, terrorists, people with AIDS, drug users, immigrants, trans people—the words used to describe these "internal enemies" or "drains," and even the groups themselves, change over time—"welfare queens," "AIDS monsters," "drug dealers," "human traffickers," "illegals"—though in this country they almost always target racialized populations. In the United States, a combination of targeted abandonment and violent detention addresses the populations that are marked as drains or threats. Whole sub-populations, communities, are abandoned through the elimination of welfare programs, the closing of schools and hospitals, the neglect of essential infrastructure, and other policies that have continued the upward distribution of wealth. These same communities are then mined by systems that pull their people into detention of various sorts—juvenile punishment systems, foster care, prison, jail, immigration detention, and asylums. Looking through this lens we can understand that the fundamental conditions of oppression and domination occur at the population level, structured through the administration of various norms, although law often refuses to recognize or address systemic oppression, focusing instead on narrow narratives of intentionality and individual harm and retribution. Thinking about oppression as a question of the distribution of life chances is essential to determining what role law reform strategies could or should have in improving trans people's life chances.

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76. This Section of these remarks draws heavily from the work of Michel Foucault, specifically *The History of Sexuality, Vol. 1: An Introduction and Society Must Be Defended: Lectures at the Collège de France 1975-1976*, as well as Mariana Valverde, *Genealogies of European States: Foucauldian Reflections*, 36 *ECON. & SOC'Y* 159 (2007) (reviewing MICHEL FOUCAULT, *SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE 1975-1976* (Arnold Davidson ed., David Macey trans., 2003) (1997) and MICHEL FOUCAULT, *SÉCURITÉ, TERRITOIRE, POPULATION: COURS AU COLLÈGE DE FRANCE 1977-1978* (2005)).

This information instructs us politically. For example, it helps us analyze the War on Terror, which should be a central issue in LGBT politics, yet clearly is not cast by the well-resourced LGBT organizations as a priority issue. We need to not only take up the urgent issues of immigration and surveillance raised by the flurry of xenophobic law change, but also carefully examine how we can avoid being co-opted into supporting it. We need to analyze the War on Terror and connect it with homophobia/transphobia, but not in ways that mobilize neoliberal/liberal fantasies of privacy and accuracy. Privacy arguments have been used to suggest that trans people need to be protected from having our medical histories exposed in every administrative interaction; that we need to pass rules that allow us to protect our trans identities as private information that should be free from scrutiny. Accuracy arguments have been used to say that the problem with certain War on Terror policies is that they are creating obstacles for trans people and other groups who are “not really terrorists” and that better policies should be created to address the proper targets of terrorism prevention efforts. These arguments are investments in the current security apparatus. They suggest the legitimacy of the apparatus by asserting that there are proper targets of the War on Terror, that privacy and accuracy are universals rather than rare privileges that have only ever meaningfully existed for white, straight, landed, able-bodied men. In other words, these arguments suggest that the *only* problem with the technologies of surveillance mobilized by the War on Terror is that they fail to protect the medical privacy of trans people or that they are harming innocent non-terrorists. These kinds of arguments concern me because they forfeit a broader critique of the forms of racial state-making that ground and sustain the United States in exchange for minor tinkering with and refining of elements of the security apparatus. Part of their failure stems from analyzing the problems solely through an individual rights framework and failing to understand the ways that administrative governance structures life chances, securities, and insecurities at the population level. Like other liberal/neoliberal reforms, even if their aims are achieved they are unlikely to deliver any improvement in life chances to the bulk of the people they claim to serve.

I want to point out these broad problems with the range of liberal/individual-focused law reform strategies emerging under the name “trans rights” while also recognizing concrete ways that legal tools can be used in the immediate term to improve trans people’s life chances. If we can let go of liberal ideas of non-discrimination, privacy and accuracy, and we can see that trans people’s lives are shortened in these systems, we can develop better and more interesting strategies with more appropriate roles for legal reform, rather than shore up oppressive systems. We can work to avoid the trap of having legal equality become our narrow goal and can instead recognize that lawyers have important roles in helping people survive oppression so they can organize, demystifying complex administrative and legal systems, and allying to social movements in ways that aim to serve rather than replace deeply transformative visions that exceed the possibilities of law reform.

Law students who want to play a role in social change should train themselves in the values and history of community organizing and should learn about the history of change in the U.S. and globally. It is essential to think deeply and

critically about how social change works. Why has significant resistance and change happened at various moments? How did the legal institution of chattel slavery end? Why didn't the end of slavery or the end of Jim Crow end racism in this country? How did the growth of the criminal punishment system continue the trajectories of slavery under new legal formations?<sup>77</sup> How is the prison system going to end? What did the farm workers do, and how did it change the relationship between workers and owners? What is the history of welfare and resistance? What have labor unions done, and how have governments and employers responded? These kinds of hard, important questions that take us outside the narrow study of legal doctrine are essential for examining what role lawyers have had and might have in transformative change. If we do not think about these questions, there is a danger of our work failing to engage the most generative sites of resistance and ending up being complicit with or supportive of oppressive regimes.

We must have a long-term view about how social change works or else we get short-sighted strategies. The struggle for same-sex marriage is a relevant example in this moment. That fight makes perfect sense from a lawyer's perspective—"These things are not equal under the law. I'm going to make them equal." It only stops making sense when you think a little more broadly about resource allocation in our movements, and about the broader context of the resistance to family and sexual regulation. When we look at the history of feminist and anti-racist critiques of marriage, we can raise questions about why we might not want to be involved in that institution.<sup>78</sup> When we look at marriage as an institution of private property, we can analyze its role in various regimes of distribution and wealth accumulation.<sup>79</sup> Engaging questions that bring us beyond analysis of formal legal equality to critically look at the role of institutions and regimes of governance in broad trajectories of oppression and exploitation allows us to take up legal reform with greater care.

It is essential to center the history of racialization, white supremacy, colonialism, and genocide in this work. America fantasizes that those things are in the past; I think it is clear that that is not true. If we recognize the central role of the administrative governance, we can see that the administrative state itself was born in racialization.<sup>80</sup> The goals of producing a healthy population in the U.S. have always been fundamentally racialized and have always involved the identification of internal enemies or people who are marked as drains on the state.<sup>81</sup> It is

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77. See generally ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003).

78. Marlon M. Bailey, Priya Kandaswamy & Mattie Udora Richardson, *Is Gay Marriage Racist?*, in *THAT'S REVOLTING!: QUEER STRATEGIES FOR RESISTING ASSIMILATION* 87 (Matilda a.k.a. Matt Bernstein Sycamore ed., 2004).

79. Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309 (2005).

80. See generally Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1 (2002) (discussing the impact of early federal immigration laws on the development of administrative law).

81. See generally ANDREA SMITH, *CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE* (2005).

impossible to form an accurate analysis of the legal regulation of gender and sexuality in the U.S. without critically engaging questions of race and genocide.

My hope is that we can begin formulating demands that seek to do more than just slightly alter regulatory norms. The demands I hear coming out of trans communities directly affected by the most severe manifestations of transphobia are transformative demands like prison abolition, access to housing and income, and universal trans-inclusive healthcare. Those kinds of demands cannot be won by lawsuits—they require deep transformation of oppressive systems. They confront the very bases of capitalism, white supremacy, body norms, and empire. We need to rethink the role lawyers play in this vision—it does not involve “winning equality” for people. It is a role that involves supporting the political movements that change these dynamics, not replacing their demands with demands for formal legal equality. We should not be saying, “That’s unrealistic, that’s politically unviable, let’s have a demand that continues to keep you in your cages and makes me still feel like a hero because I changed the law.” If we have a desire for meaningful redistribution and if we see it as central to any possibility of improving trans people’s life chances, we need to recognize that liberal inclusion strategies will not get us there. Liberal inclusion strategies strengthen the very systems that oppress trans people and reduce our life spans.

Luckily, many social movements have already thought about and produced useful analysis about the roles of lawyers in change. People in welfare rights, civil rights, and elsewhere have produced clear analysis about the failures of certain law reform strategies and the problems with lawyers changing movement demands into law reform demands that do not help the people most directly impacted by racism, ableism, sexism, homophobia, poverty, and xenophobia. We need to work to maintain a broad vision of the most significant changes that we want to see and to be able to identify whether the more incremental reforms actually move us toward them or whether they undermine our vision. I think we are capable of doing that, but I think it involves a departure from the assumption that we are an addition to the lesbian and gay rights framework and that the strategies pursued under that rubric will benefit trans people. Those strategies have been unsuccessful at reaching the people most directly impacted by the worst effects of homophobic violence, and have little to offer the people most vulnerable to the violence of gender norms. Plenty of alternative strategies exist though they are less visible than the “victories” of formal legal equality that win headlines. As lawyers working to bring our tools to the problems of poverty, marginalization, and premature death in trans communities, we must examine our role and engage transformative strategies that ask hard questions and relentlessly and self-reflectively pursue meaningful answers.

