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## Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change

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# KEYNOTE ADDRESS: TRANS LAW REFORM STRATEGIES, CO-OPTATION, AND THE POTENTIAL FOR TRANSFORMATIVE CHANGE

*Dean Spade\**

## I. INTRODUCTION

This symposium occurs in an interesting moment for the institutionalization or consolidation of the concept of transgender law. This semester, three symposia focused on trans law took place at three separate law schools, and an additional symposium on this topic is planned for Fall 2008.<sup>1</sup> To my knowledge, no prior symposia focused exclusively on this topic have occurred. The sudden popularity of this topic suggests an emergence of attention to transgender issues within the legal academy. Behind that phenomenon, and urging it forward, is a range of trans advocacy and activism.

No doubt this is an exciting moment, where we can imagine trans analysis offering new insight to a range of existing debates and controversies about the law, including questions about how law administers identity classifications; questions about bodily autonomy and self-determination; questions about how expertise and specifically medical expertise and authority establish administrative norms that harm marginalized people; questions about the “realness” of gender and how we should understand gender in the range of areas in which law relies on it as a classification tool; questions about access to health care; questions about the distribution of wealth and resources; questions about migration; and questions about criminalization and vulnerable populations in criminal

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<sup>1</sup> Harvard Law School Lambda Legal Advocacy Conference: Translaw (Feb. 29–Mar. 1, 2008); Rutgers School of Law Women’s Rights Law Reporter Symposium: Legal Gender: Limitations of a Male/Female Binary (Mar. 28, 2008); University of California, Hastings College of the Law Symposium: Transposium: A Conference on Transgender and Intersex Rights in the 21st Century (Apr. 10, 2008); Temple University, Beasley School of Law Political & Civil Rights Law Review Symposium: Intersections of Transgender Lives and the Law: Critical Perspectives on Legal and Social Challenges (Nov. 8, 2008).

punishment systems. There are certainly many areas of existing scholarship that can be enhanced by asking the questions that emerge when we think about the experiences of trans populations confronting legal systems.

These controversies may be particularly interesting and urgent because trans people exist at a juncture of erasure and hyper-regulation in the law.<sup>2</sup> Looking at the history of administrative regulation of gender categories reveals that since as early as the 1950s, and exploding in the 1970s, bureaucrats in the U.S. have been creating detailed rules and regulations regarding the recognition or refusal to recognize identities of trans people in various administrative contexts.<sup>3</sup>

Two simultaneous threads of policy development have emerged in this area. On the one hand, we see hyper-regulation, which has taken the form of hundreds of conflicting policies, all of which rely on medical authority and documentation in overtly contradictory ways to establish gender reclassification in various recordkeeping and identity verification/surveillance systems. On the other hand, we see a range of policies, laws and practices that refuse any recognition of trans identities. The combination of conflicting policies comprises an incoherent regulatory matrix that exposes trans people to economic marginalization, discrimination and violence. These simultaneous strains of hyper-regulation and erasure, each with their own vulnerability-producing results, leave much work for lawyers and law scholars seeking to build an analysis of trans law.

Much of the increased visibility of trans issues is being stimulated by a trend of institutionalization occurring in trans politics in the last two decades. Advocacy and activism on these issues have gained momentum and nonprofit organizations focused specifically on trans rights and trans law have emerged. In the last six or seven years, new organizations focused specifically on trans law and policy have developed, including the National Center for Transgender Equality,<sup>4</sup> Sylvia Rivera Law Project

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<sup>2</sup> Cf. Alisa Bierria et al., *To Render Ourselves Visible: Women of Color Organizing and Hurricane Katrina*, in *WHAT LIES BENEATH: KATRINA, RACE, AND THE STATE OF THE NATION* 31-47 (South End Press Collective ed., 2007). The authors discuss how simultaneous hyper-visibility and invisibility impact women of color, poor people, people with disabilities and black people abandoned in New Orleans during and after Hurricane Katrina. The simultaneous invisibility of these populations, allowing their vulnerability to abandonment and death and all of the conditions leading to it, was juxtaposed by their hyper-visibility in the media after the storm when images of their suffering were circulated for the titillation of viewers, often in ways that contributed to racist, sexist, and classist stereotypes. This erasure/sensationalist exposure combination impacts many marginalized and oppressed groups. *Id.* This hypervisibility/invisibility dynamic is a feature of oppression facing many marginalized populations in the US.

<sup>3</sup> For a detailed examination of these policies, see generally Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731 (2008).

<sup>4</sup> NAT'L CTR. FOR TRANSGENDER EQUAL., <http://www.nctequality.org/> (last visited Mar. 22, 2009).

("SRLP"),<sup>5</sup> the Transgender Law Center, Transgender Gender Variant and Intersex ("TGI") Justice Project;<sup>6</sup> and many gay and lesbian-focused law reform organizations have expressed a commitment to trans inclusion that sometimes includes increased advocacy efforts on certain issues.<sup>7</sup> The increasing momentum on these issues has also fueled some small but important philanthropic support for such work, which has led to the existence of some dedicated staff working on these issues at a few organizations over the past several years. Though these resources are small, the convergence of these developments has significantly impacted the discussion of trans law and the quality and quantity of advocacy going on nationwide.

The growing coordination, consolidation, and prominence of trans politics, though still quite small, requires scholars and activists to bring urgency to a set of key questions: What does it mean to build an infrastructure for this work in a responsible, sustainable, anti-racist, and feminist way? What are the central goals of this work, and what kind of world does it imagine? How can we utilize the insights of existing social movements of which we are a part and to which we are allied to identify the most transformative strategies and also to avoid co-optive strategies? And, finally, how can we specifically think about the law and legal reform as a strategy within the broader set of demands we might have while considering both its opportunities and its dangers?

## II. LAW AS A CO-OPTING FORCE

Much has been written about the ways that the law and legal reform strategies can be an ineffective or even a co-opting and neutralizing force for social movements or people seeking various kinds of transformative change. Critical Race Theory has generated particularly useful insights into this phenomenon. For the purposes of thinking through how this concern might emerge in the context of current trans law reform work, I will highlight just a few of the ways that Critical Race Theorists have discussed this concern.

### *A. The Limitations of the Discrimination Principle*

One important way of approaching this is to analyze how our ability to think about oppression or domination has been limited by the narrowness of the legal concept of "discrimination." Because passing gender identity-inclusive anti-discrimination laws and policies has been a central strategy

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<sup>5</sup> SYLVIA RIVERA LAW PROJECT, <http://www.srlp.org/about> (last visited Mar. 22, 2009).

<sup>6</sup> TRANSGENDER, GENDER VARIANT & INTERSEX JUSTICE PROJECT, <http://www.tgijp.org/> (last visited Mar. 22, 2009).

<sup>7</sup> See, e.g., LAMBDA LEGAL DEFENSE AND EDUCATION FUND, <http://www.lambdalegal.org/about-us> (last visited Mar. 22, 2009); NAT'L GAY AND LESBIAN TASK FORCE, <http://www.thetaskforce.org/> (last visited Mar. 22, 2009).

in recent years for trans law reform work, it is worth examining the critiques of discrimination doctrine as we strategize about trans law. One useful tool for understanding these limitations is the concept of the “perpetrator perspective.”<sup>8</sup> Alan Freeman uses this term to describe how limited the legal understanding of oppression or domination is, and how this undermines the possibility of providing meaningful legal remedies to address racism and white supremacy.<sup>9</sup>

The law relies on the perpetrator perspective when it finds discrimination only in situations where a specific perpetrator can be proven to have acted in a discriminatory manner. This perspective can be seen in case law where courts have refused to find discrimination wherever there was not evidence of a particular perpetrator intentionally denying a person or group a job, educational opportunity, lease, service, etc., based on a specific race-based intention. The perpetrator perspective says that discrimination happens when someone says, “You can’t have this job because you are [insert characteristic].”<sup>10</sup> The story this perspective tells us about oppression is that it is about bad individual perpetrators who have aberrant views and need to be individually punished so that the directly affected person/people can be made whole.<sup>11</sup>

What the perpetrator perspective does not account for, Freeman points out, is conditions.<sup>12</sup> A violation is only present, under this model, where a bad actor with bad motivations can be identified. Racially oppressive conditions cannot be addressed unless there is a perpetrator to be punished, and racially disparate conditions emerging out of historic conditions of white supremacy (slave trade, land theft, colonization, genocide) cannot be addressed.<sup>13</sup>

Examples of this kind of reasoning can be seen in cases where, without evidence of a prior *de jure* discriminatory policy in the district, courts have held school desegregation programs were illegal because they limited the school choices of white students.<sup>14</sup> In this example, the fact that the residential segregation that is causing school segregation stems directly from long histories and current realities of racism in housing, credit, and

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<sup>8</sup> Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 29, 29-31 (Kimberle Crenshaw et al. eds., New Press 1996).

<sup>9</sup> *Id.*

<sup>10</sup> *See id.* at 30.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 29.

<sup>13</sup> Freeman, *supra* note 8, at 30.

<sup>14</sup> *See* *Milliken v. Bradley*, 418 U.S. 717, 744-47 (1974); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2750-51 (2007); *cf.* Cheryl I. Harris, *Whiteness as Property*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* note 8, at 276, 287-90 [hereinafter Cheryl I. Harris, *Whiteness as Property*]; *cf.* Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1561-66 (2006) [hereinafter Angela P. Harris, *From Stonewall to the Suburbs?*].

employment, in addition to the broader problem of the racial wealth divide, which stems from numerous overt governmental programs that produced wealth accumulation for white people and prevented wealth accumulation for people of color, cannot be addressed by law.<sup>15</sup>

The perpetrator perspective, then, both affirms the fairness of the status quo and makes it illegal to address systemic oppression. Current conditions of racial stratification are made neutral, untouchable by law, because they cannot be attached to an individual perpetrator whose racist intention can be proven with traditional evidence of intent. The portrayal of oppression as something that happens because of aberrant individuals with bad views also creates a mythic class of innocents — all of us who do not engage in overt intentional discriminatory acts (and who may in fact materially benefit from long histories of colonization and exploitation) are blameless and have no responsibility to remedy racially stratified conditions.<sup>16</sup>

This logic matches the “common sense” American view that those at the bottom of the economic ladder are to blame for their position and that those with wealth and privilege should rightly resent any policies that seek to redistribute. This kind of logic has been key to attacks on welfare, affirmative action, school integration and other programs and policies aimed at remedying the effects of our country’s foundation in genocide, chattel slavery and economic exploitation of the many for the gain of the few. This view of discrimination, which only allows us to see a violation of law and to name a manifestation of oppression under extremely limited circumstances where oppression is rare and individualized, is an example of law reform producing an ultimately ineffective and retrenching remedy in the name of “equality.”

Another conceptual tool that may be useful for thinking and strategizing about trans law reform, is Ruth Wilson Gilmore’s definition of racism. Gilmore says that racism is “the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death.”<sup>17</sup> I find this definition particularly helpful because of the ways that it echoes and rearticulates the critique Freeman is making when he describes discrimination doctrine’s reliance on the perpetrator perspective. Gilmore’s definition does not start with a perpetrator or invite us to look at intention. It asks us to look at conditions — at how entire populations are excluded from life chances such as education, employment, housing, healthcare, food, open space, political participation, or art and to understand this maldistribution of life chances as producing premature

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<sup>15</sup> See Cheryl I. Harris, *Whiteness as Property*, *supra* note 14. For more information on the Racial Wealth Divide, see UNITED FOR A FAIR ECONOMY, <http://www.faireconomy.org/> (last visited Mar. 22, 2009).

<sup>16</sup> Freeman, *supra* note 8, at 30.

<sup>17</sup> RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 28 (2007).

death. Gilmore's definition draws our attention to who has access to healthy food, who lives in neighborhoods targeted for polluting industry, who lives in substandard housing, who lives in flood plains under levees the government has knowingly neglected, who goes to schools without enough textbooks, and who lives under the constant stress and fear that Immigration and Customs Enforcement ("ICE") might raid their workplace or the police might harm them or their loved ones. These everyday conditions of disparity severely impact people's lifespans and produce premature death.<sup>18</sup> This definition provides a conditions-focused alternative to the perpetrator perspective. It encompasses more harms and allows us to think more broadly about remedies than a perspective that focuses on whether we can identify individual perpetrators.

The last several decades of discrimination jurisprudence has shown how difficult it can be to identify perpetrators and prove discrimination even in the most egregious cases. Discrimination laws are under-enforced, and are structured and/or interpreted in ways that preclude any impact on most of the life-shortening conditions they should address. In fact, the anti-discrimination principle is now often used to undermine attempts to remedy conditions of oppression.<sup>19</sup> Anti-discrimination laws that have been on the books for the last thirty-plus years have not alleviated group-differentiated vulnerability to premature death produced by racism, sexism, and ableism.<sup>20</sup> Gilmore's definition helps us step away from the legalistic understandings of what the harm of oppression is and question whether or not legal remedies are actually alleviating it. From this vantage point, we can question whether anti-discrimination laws actually address oppression or whether they provide a window-dressing of equality and fairness on a set of violent and deadly inequalities that continue American trajectories of racism and colonialism.

### *B. Law Reform Can Narrow our Demands and Strengthen Oppressive Systems*

Another concern about law reform's co-optation of social movements and neutralization of their transformative potential can be seen in how battles for anti-discrimination laws often narrow our critical engagement

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<sup>18</sup> For an interesting description of the impact of the stress of discrimination and oppression on health outcomes, see *Unnatural Causes: Is Inequality Making Us Sick* (PBS Television Broadcast 2007), available at [www.unnaturalcauses.org](http://www.unnaturalcauses.org).

<sup>19</sup> See generally *Parents Involved in Cmty. Sch.*, 127 S. Ct. 2738 (prohibiting assigning students to public schools solely for the purpose of achieving racial integration and declining to recognize racial balancing as a compelling state interest); *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996) (holding that "the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school").

<sup>20</sup> See generally UNITED FOR A FAIR ECONOMY, <http://www.faireconomy.org/search/> (search "racial divide") (last visited Mar. 22, 2009).

with oppressive systems. Quests to broaden anti-discrimination laws to include gender identity, for instance, often include narratives about workers and our economy that are disappointingly complicit with current economic arrangements.<sup>21</sup> Advocates sometimes seem to be saying, “the unfair thing happens in our economy when I don’t hire you, or I fire you because you are trans.” But do we believe that everything would be fair and right in the world of employment if not for this one aberrant behavior of some employers? Even setting aside the fact that such laws do not seem to have the effect of stopping people from firing or not hiring trans people, that such laws are rarely enforced and members of our community rarely have access to legal resources to seek enforcement, and that proving discrimination is almost impossible, I worry about what critiques of the arrangements of working life we are forfeiting when our main intervention in economic exploitation is gender identity inclusive anti-discrimination laws.

Many people in our communities are in the positions they are in economically for a range of reasons related to the racial wealth divide, histories of enslavement, colonization, and land theft in their communities of origin whose legacies continue today to effect policies and practices. These include state laws and policies that criminalize the poor and mark people who have criminal convictions with lifelong stigma, the lack of a social welfare system that provides a livable benefit, the joke of a minimum wage, the transition of our economy to a contingent workforce with no job security or benefits, the exploitation of migrant laborers, the weakening of unionized labor, the erosion of public education, and other significant trends in capitalist and neoliberal economic arrangements. The narrow demand of anti-discrimination legislation in employment seems to shore up the erasure of the broader historical and contemporary structures that produce the growing wealth divide we see in the U.S. that impacts trans people so severely. The production of images of hardworking, qualified, professional trans people who just want a chance at success mobilized to support these reforms contribute to mythologies about employment that valorize self-sufficiency and individualism, pretend that the U.S. economy is a meritocracy where anyone hard-working can succeed, and justify demonization and abandonment of poor people.<sup>22</sup> In this way, the narrow law-reform focus limits the reach of our politics and co-opts our struggle, encouraging us to say something that props up our conditions of oppression rather than undermines them.

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<sup>21</sup> See Dan Irving, *Normalized Transgressions: Legitimizing the Transsexual Body as Productive*, 100 RADICAL HIST. REV., Winter 2008, at 38, 41, 51-55, available at <http://rhr.dukejournals.org/cgi/reprint/2008/100/38.pdf>.

<sup>22</sup> *Id.*



Moreover, law reform strategies frequently end up strengthening the systems that they seek to change.<sup>23</sup> This dilemma is evident in the legal work that many of us do to change the welfare system. Our work comes from an understanding that the welfare system is unfair and arbitrary, people are frequently denied benefits illegally, the entire system is underfunded, the benefits are not livable, the eligibility criteria are inappropriate, and that the system operates to discipline labor and prevent broadscale transformative change of our inherently exploitative economic arrangements.<sup>24</sup> We fight specific battles to oppose various cutbacks or punitive measures imposed on our clients with vigor. Yet, every time we fight some particularly egregious policy and seek change, we are also legitimizing and stabilizing the system overall. Of course, we must take any opportunity to struggle for increased life chances for people trying to survive on welfare, but we also need a broader strategy that addresses the fact that welfare always has been a system of racialized and gendered social control and exploitation<sup>25</sup> and we must envision broader transformation.

The homeless shelter system of New York City is another example where the co-optive dangers of reform confront advocates. New York City's shelter system is discriminatory toward trans people and dangerous, punitive, and inadequate for all people without housing in the city. Yet, I worked with the Sylvia Rivera Law Project and other organizations for years to force the city to create a policy that would prevent trans women from being placed in men's shelters where they faced violence. Even while we did this work we were aware that we were patching one little hole in the system, and perhaps making the system more efficient in its abusive control and containment of poor people. We saw an immediate need for trans people, but we also saw our work in a broader context and understood our connections to the ongoing political organizing of poor and homeless people as essential to formulating our strategy. This is one of the concerns we always face when we use law reform as a tool, and that responsible law reformers must consider in depth: are we strengthening and legitimizing a fundamentally oppressive structure? When we engage in law reform we should balance the immediate reform objectives with a long-term vision of

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<sup>23</sup> See Angela P. Harris, *From Stonewall to the Suburbs?*, *supra* note 14; Anna M. Agathangelou, M. Daniel Bassichis & Tamara L. Spira, *Intimate Investments: Homonormativity, Global Lockdown, and the Seductions of Empire*, 100 RADICAL HIST. REV., Winter 2008, at 120.

<sup>24</sup> See generally FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (1971).

<sup>25</sup> See, e.g., *id.* at 22-27; KENNETH J. NEUBECK & NOEL A. CAZENAVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR* 146-54 (2001); see generally, GWENDOLYN MINK, *WELFARE'S END* (1998).

the work, and consider whether the immediate payoffs for vulnerable people balance out against the detriment of system-strengthening.<sup>26</sup>

An example of a law reform project with a payoff that does not justify its system-strengthening effect is hate crime legislation. As is often discussed, trans people are frequent targets of bias-motivated violence and murder.<sup>27</sup> A conservative estimate I have heard is that we are seven to ten more times likely to be murdered than people who are not trans.<sup>28</sup> Anyone who works in our communities has known people who have been murdered; it is a common occurrence. The Sylvia Rivera Law Project is currently grieving the recent murder of a member of our New York community. When these horrifying events occur, calls for hate crimes legislation are a common response.<sup>29</sup>

The motivation for hate crimes legislation in our community makes sense on an emotional level. Many people know that murdered trans people are often considered "throw aways," that these murders are ignored by the media and police.<sup>30</sup> Often, these murders are not investigated or prosecuted, or people found guilty of these murders receive unusually low punishments.<sup>31</sup> I have heard anecdotes about murderers of trans people being given the same sentence that a person would receive for killing a dog. These concerns and experiences of violence, trauma, erasure, and abandonment lead many to call for penalty enhancements, suggesting that increased punishment of people who murder trans people would mean that our lives were taken seriously and valued publicly.

However, recently an increasingly visible sector of trans people have been openly opposing hate crimes legislation.<sup>32</sup> Many have suggested that investing in the criminal punishment system by expanding its punishing powers is the last thing trans people should be doing. These advocates

<sup>26</sup> I have written at length elsewhere about the necessity of balancing movement vision against short-term gains from reform when assessing political viability and incrementalism. See Dean Spade, *Methodologies of Trans Resistance*, in *A COMPANION TO LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER STUDIES* (George E. Haggerty & Molly McGarry eds., Blackwell 2007) [hereinafter Dean Spade, *Methodologies*].

<sup>27</sup> No conclusive statistics exist regarding the exact trans murder rate, but data that do exist suggest it is exceptionally high. Cf. Vicky Kolakowski, *Another Transgender Murder*, BAY AREA REP., Apr. 8, 1999, at 19 (reporting that the murder rate among transgender people is as great as sixteen times that among the general population); see also Remembering Our Dead, [www.rememberingourdead.org](http://www.rememberingourdead.org) (last visited Mar. 22, 2009); International Transgender Day of Remembrance, [http://www.transgenderdor.org/?page\\_id=58](http://www.transgenderdor.org/?page_id=58) (last visited Mar. 22, 2009).

<sup>28</sup> See sources cited *supra* note 27.

<sup>29</sup> See, e.g., Donna Brazile, *End the Hate, Expand the Law*, WASH. TIMES, May 13, 2007, available at <http://www.washingtontimes.com/news/2007/may/13/20070513-101109-9456r/>.

<sup>30</sup> See sources cited *supra* note 27.

<sup>31</sup> *Id.*

<sup>32</sup> Duncan Osborn, *Disagreement Among Advocates at GENDA Forum*, GAY CITY NEWS, Apr. 24, 2008, available at [http://www.gaycitynews.com/site/index.cfm?newsid=19514536&BRD=2729&PAG=461&dept\\_id=568864&rft=8](http://www.gaycitynews.com/site/index.cfm?newsid=19514536&BRD=2729&PAG=461&dept_id=568864&rft=8); SYLVIA RIVERA LAW PROJECT, SRLP ANNOUNCES NON-SUPPORT OF THE GENDER EMPLOYMENT NON-DISCRIMINATION ACT! (2009), available at <http://www.srlp.org/node/301>.

point out that hate crimes legislation has no payoff for trans people: it has never been shown to prevent violence or have any deterrent value.<sup>33</sup> Instead, it increases the resources of a system that we know targets and endangers trans people, especially poor people and people of color.<sup>34</sup>

This analysis warns us to not allow our grief to be co-opted by law into increasing the power of a system that perpetrates violence on our communities.<sup>35</sup> This analysis asks us to move beyond a punishment-focused perpetrator perspective and instead focus on directing resources toward changes that enhance the lifespan of trans people, such as access to healthcare and employment, police accountability, decarceration, and education. The popularity of hate crimes legislation in trans legal reform gives us an opportunity to consider the limitations of the perpetrator perspective and the problem of law co-opting anti-oppression frameworks to strengthen oppressive systems.

An additional concept from Critical Race Theory that may be useful in thinking about law's power to co-opt resistance struggles is the concept of "formal legal equality." Critical Race Theorists have used this term to describe legal change that declares equality while actually offering little change in conditions of existence.<sup>36</sup> "Formal legal equality" strategies change the named status of a group in the law, and create a veneer of fairness for the system or the institution in question. However, the effects of such changes on disparity in life chances are often minimal.<sup>37</sup> The people who were most vulnerable to premature death under the system or institution before the reform often remain the most vulnerable. The declaration of fairness and equality has been made, but those who fare the worst continue to fare the worst under a supposedly new regime.

Hate crimes legislation and anti-discrimination legislation are examples of formal legal equality measures that often do little to improve the life chances of those most vulnerable to oppression and, at worst, perpetuate inequalities in the legal system. Murders are not prevented by hate crimes legislation.<sup>38</sup> Instead, increased resources for the criminal punishment

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<sup>33</sup> See Agathangelou et al., *supra* note 23; Ann Cammett, Thought Paper for Barnard Center for Research and Women Colloquium: Toward a Vision of Sexual and Economic Justice, *Challenging Mass Incarceration and the Gendered Rule of Law* 3-4 (Nov. 29-30, 2007), available at <http://www.barnard.edu/bcrw/justice/papers/cammett.pdf>.

<sup>34</sup> See generally sources cited *supra* note 33.

<sup>35</sup> See Agathangelou et al., *supra* note 23; Sarah Lamb, *Retelling Racialized Violence, Remaking White Innocence: The Politics of Interlocking Oppressions in Transgender Day of Remembrance*, 5 SEXUALITY RES. & SOC. POL'Y 1, 24-42 (2008); Dean Spade, *Methodologies*, *supra* note 26.

<sup>36</sup> Cf. DERRICK A. BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 7-9 (2004).

<sup>37</sup> See *id.*; see also AMERICAN CIVIL LIBERTIES UNION, RACIAL JUSTICE IN THE 21ST CENTURY: NEW REMEDIES FOR PERSISTENT PROBLEMS (2003), available at <http://www.aclu.org/racialjustice/gen/15890res20030328.html> ("In effect, a regime of formal equality, layered on top of these structural inequalities, functions as a seniority system for injustice, placing a veneer of fairness over a fundamentally unfair structure.").

<sup>38</sup> See Cammett, *supra* note 33.

system means that the same people who face heightened exposure and violence in that system (people of color, queer and trans people, youth, immigrants, women, and people with disabilities) will bear the brunt of increased punishing power.<sup>39</sup> Hate crime legislation merely offers a new formal declaration of equality, which often has little more than symbolic value. The quest for such legislation also further mobilizes the logics of mass imprisonment that trans populations might want to oppose, such as the notion that the value of human life is determined by the amount of punishment meted out to those who destroy it, or the idea that enhancing criminal punishment makes people safer. Similarly, anti-discrimination laws declare that conditions of employment are now fair, but seem to do little to change the ongoing presence of an underclass of low-wage workers and unemployed people who are disproportionately people of color, trans people, immigrants, people with disabilities, and others who supposedly have been declared equal by law.<sup>40</sup>

This force of legal co-optation, and its connections to the stability of racialized class stratification, rears its head in even the most rudimentary questions of legal practice. How often must social movement lawyers ask ourselves, "How do we find the perfect plaintiff?" The moments when lawyers decide that the face of an issue must be someone both judges and the media can embrace (read: white, employed, citizen, able-bodied) are painful dividing moments for our communities even though they frequently occur behind closed doors. They are moments when the terms of inclusion and exclusion are set and where racist, classist, xenophobic, and abelist standards are reproduced. Even the question "is this a winning case?" highlights these issues. Do we only fight winning cases? In this system, and under these rules of law, whose oppression can be recognized? Who can prevail in court? Can people who experience multiple vectors of oppression ever be those perfect, winning plaintiffs in this model of practice? These questions guide lawyers to articulate legal agendas that are relevant to a very narrow swath of a given community, and certainly least relevant to those facing the most severe manifestations of oppression. Law seems to push us toward these kinds of individualizing, divisive decisions that ultimately undermine our anti-oppression goals, weaken solidarity within our communities and across social movements, and restrict our

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<sup>39</sup> See generally *id.*

<sup>40</sup> See Peter Clark, *Economic Forum a Big Draw*, BAY AREA REP., Mar. 19, 2009, available at <http://www.ebar.com/news/article.php?sec=news&article=2662> ("estimates of transgender unemployment go as high as 70 percent"); NAT'L IMMIGRATION LAW CTR., OVERVIEW OF KEY ISSUES FACING LOW-WAGE IMMIGRANT WORKERS 1 (2007) (providing an "overview of how the rights of immigrant workers under U.S. employment and labor laws are under assault and the increased immigration enforcement mechanisms that are used against them"); UNITED FOR A FAIR ECONOMY, <http://www.faireconomy.org/search/> (search "racial divide") (last visited Mar. 22, 2009); THE WORLD BANK GROUP, POVERTY AND DISABILITY, <http://go.worldbank.org/2ZGV4QHZP1> (then follow "Poverty and Disability" hyperlink under "Thematic Areas") (last visited Mar. 22, 2009) ("People with disabilities in developing countries are over-represented among the poorest people.").

vision until our victories are actually thinly veiled defeats that strengthen oppressive systems.

### III. NONPROFITIZATION AS CO-OPTATION<sup>41</sup>

The daily work of trans legal reform is also complicated by questions of strategy, not just about which types of law reform we engage, but also about how we structure our advocacy. As trans activism and advocacy begins to institutionalize, and as we ask ourselves what role law reform should have in trans resistance and how closely our visions for the world will be tied to legal equality goals, we must consider how the conditions under which we do our work impact what that work becomes.

Here, I want to briefly introduce a vibrant conversation going on amongst scholars and activists about the nonprofit structure and its impact on social justice work. Many of us do our legal services and legal reform work inside nonprofits and, as I mentioned earlier, trans activists have begun forming nonprofits specifically focused on legal advocacy in the last few years. For that reason, I want to review some of the key elements of the critical analysis that has emerged about the co-optive potential of the nonprofit structure.

#### *A. The Emergence of the Nonprofit Sector as the Location for Social Justice Work has Separated Survival Services from Organizing*

One critique that has emerged about the effect of the nonprofit model on current social justice movements is that it has separated the provision of direct, survival-based services, from organizing.<sup>42</sup> Funding streams usually focus on either overtly political organizing work or direct service work<sup>43</sup> and these two kinds of work have been segregated into different types of nonprofits that often operate with little connection or communication among them. Consequently, services are depoliticized, offering little opportunity for communities experiencing the effects of systemic oppression (e.g., poverty, homelessness, unemployment and

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<sup>41</sup> Much of this section of my remarks is taken from an article I co-authored with Rickke Mananzala. Dean Spade & Rickke Mananzala, *The Nonprofit Industrial Complex and Trans Resistance*, 5 SEXUALITY RES. & SOC. POL'Y 1, 53–71 (2008).

<sup>42</sup> See, e.g., Paul Kivel, *Social Service or Social Change?*, in *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX* 129-149 (INCITE! Women of Color Against Violence ed., South End Press 2007); Legal Trends Network, Community Lawyering, <http://www.legaltrends.net/community-lawyering> (last visited Mar. 22, 2009) (“[T]he traditional unilateral lawyering model does not serve the best interests of the underrepresented community at large . . . . [W]ithout an organized, fluid, and community centric advocacy campaign the community’s interests and best efforts at sustainable change will lack the momentum necessary to succeed.”).

<sup>43</sup> See, e.g., STEPHEN RATHGEB SMITH & MICHAEL LIPSKY, *NONPROFITS FOR HIRE: THE WELFARE STATE IN THE AGE OF CONTRACTING* 3-4 (1993) (making the argument that “mutual dependence” has blurred the line between nonprofits, large organizations and the public sector that accounts for large portion of their funding).

health issues) to build networking relationships for analysis and resistance of this oppression when seeking services to meet their immediate needs.<sup>44</sup>

Instead of survival services being a point of politicization, a locus from which people can connect their immediate needs to a community-wide issue of injustice or maldistribution, services are provided through a charity or social-work model that individualizes the issues to the particular client and too often includes an element of moralizing that casts clients as blameworthy for their need.<sup>45</sup> This dynamic reflects how the nonprofit sector emerged, in part, to fill the gap in government services that occurred under Reaganomics.<sup>46</sup> By ameliorating some of the worst effects of capitalist maldistribution, then, these services became part of maintaining the social order because they primarily operate through a depoliticizing charity framework rather than a social change model.

*B. The Nonprofit Structure Undermines and Contains the Radical Potential of Social Justice Work, Leading to More Policy and Service-Based Work and Less Organizing*

Critics have also pointed out that the increase in nonprofits has been accompanied by a greater prevalence of service-based and policy reform work, rather than base-building organizing in social justice movements.<sup>47</sup> Some have argued that because social justice nonprofits are funded through philanthropy — frequently directly by wealthy individuals and corporations — the strategies employed in this work have become more conservative to better fit those funders' capitalism maintenance and reformist goals, as opposed to the base-building, visionary organizing goals that might emerge more directly from communities facing oppression.<sup>48</sup> Funders favor policy work and services over base-building, resulting in lost opportunities for building political power among those directly affected by oppression.<sup>49</sup> Instead, service and policy reform organizations typically put people directly affected by oppression in the role of "clients" while the people in charge of forming and directing agendas for reform are educated elites (e.g., lawyers, administrators, social workers and public health experts). Overall, the aims of these organizations and the breadth of their political demands come to reflect the perspectives of people well-served by the

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<sup>44</sup> See *id.* at 4-6 (describing the variety of public functions that have been entrusted to private organizations).

<sup>45</sup> See *id.*

<sup>46</sup> See Spade & Mananzala, *supra* note 41, at 55-57; Ruth Wilson Gilmore, *In the Shadow of the Shadow State*, in *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX*, *supra* note 42, at 41-52 (describing how the rise of neoliberalism pushed nonprofit organizations to morph into what she calls a "shadow state," filling the gaps the government left in meeting people's social service needs).

<sup>47</sup> Christine E. Ahn, *Democratizing American Philanthropy*, in *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX*, *supra* note 42, at 63-78.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

status quo and are far narrower and less radical than they could be due to the incentives provided by philanthropy to pursue system-stabilizing service and policy reform goals.

*C. Racism, Educational Privilege, and Classism within Nonprofits Mirrors Colonialism because the Direction of the Work and Decisions about its Implementation are Made by Elites Rather than by People Directly Affected by the Issues at Hand*

The governance of nonprofits has been subject to critique as well. Critics have argued that the governance structure of most nonprofits, characterized by boards consisting of donors and elite professionals (sometimes with tokenistic membership for the community members who are directly affected by the organization's mission), perpetuates dynamics of dominance. Nonprofits serving primarily poor and disproportionately non-white populations are frequently governed almost entirely by white people with college and graduate degrees. Staffing follows this pattern as well, with most nonprofits requiring formal education as a prerequisite to working in administrative or management-level positions. The nature of the infrastructure in many social justice nonprofits often leads to concentrating decision-making power in the hands of people with race, education, and class privilege rather than in the hands of those facing the oppression. Consequently, the priorities and implementation methods of such organizations frequently do not reflect the perspective or approach that would be taken by the people most directly affected by oppression. For people who value self-determination as a goal of liberation struggles or who believe that people struggling under oppression possess unique understandings of the operations of that oppression that are not shared by others, this concern is especially significant.

*D. The Philanthropic Funding of Nonprofits Takes Direction of the Work Out of the Hands of the People Affected and Concentrates it on the Agendas and Time Lines of Funders, Preventing Long-Term, Self-Sustaining Movements from Emerging*

Part of the reason that decision-making power in nonprofits becomes concentrated in the hands of elites is because of how the organizations secure funding. The process of successfully applying for funding, including having 501(c)(3) status or a fiscal sponsor, researching applicable grants, writing formal funding requests using specific jargon, having an awareness of current trends in funding, and having personal relationships with philanthropic professionals requires skills and relationships that are concentrated in people with educational, class, and race privilege. The ability to direct work and spin it to a funder's vision is, more often than not, the key to success. As Suzanne Pharr has pointed out, the use of short-term funding cycles (often one to five years) and the focus on producing

deliverables has meant that nonprofits have been encouraged to operate on short-term vision rather than build long-term sustainable structures.<sup>50</sup>

Under this model, funders seek concrete returns (e.g., statistics about numbers of clients served or clear evidence of policy change) on their investment within a limited grant period. Thus, base-building work that involves less tangible returns, such as the growth of shared political analysis within a community or relationship building, is undervalued. This model encourages organizations to identify goals that can be achieved quickly, not to implement long-term strategies necessary for more radical changes to politics and culture. Because radical redistribution goals cannot be achieved in the short term, social justice groups caught up in dependency on philanthropy have lost much of their capacity for strategizing for significant transformation.

*E. The Emergence of the Nonprofit Sector has Created a Cultural Shift in Social Justice Activism, Including Professionalization, Corporatization, and Competition between Groups for Scarce Resources*

This funder-driven elitism has also included a professionalization of social justice organizations such that corporate business models are increasingly used to manage these organizations. This trend is evidenced by a rise in nonprofits' use of such terms as C.E.O. (Chief Executive Officer) and C.F.O. (Chief Financial Officer) for top-level staff;<sup>51</sup> a hierarchical pay scale in which people are compensated at very different rates based on valuations of skills and abilities similar to those used in the private sector; and other labor practices that reflect business values more than social justice values.

Critics have lamented that young activists are increasingly looking at social movement work as a paycheck, and that the expectation of a professional salary has become central to decisions about what kinds of activism and organizing to pursue.<sup>52</sup> Business models of management that focus on top-down decision-making, coupled with organizational structures in which educational, race, and class privilege often correspond to high positions in the hierarchy, mean that decision-making, compensation, and quality of life at work are concentrated in the hands of white "social justice entrepreneurs" with graduate educations (e.g., lawyers, social workers, people with degrees in nonprofit management).

*F. Nonprofits are a Way that Wealthy People and Corporations Avoid Tax*

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<sup>50</sup> Suzanne Pharr, Remarks at the University of California-Santa Barbara Conference: The Revolution Will Not Be Funded: Beyond the Non-Profit Industrial Complex (Apr. 30, 2004) (Conference CDs available at <http://www.incite-national.org/index.php?s=101>).

<sup>51</sup> *Id.*

<sup>52</sup> Madonna Thunder Hawk, *Native Organizing Before the Non-Profit Industrial Complex*, in THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX, *supra* note 42, at 101, 105.



*Liability, and Most of that Redirected Money Does Not go to Social Justice*

Finally, some critics urge social justice movements to be weary of the centrality of the nonprofit model because of its role in the maldistribution of wealth in the United States. Christine Ahn encourages taxpayers to recognize that money funneled into nonprofits by philanthropists is actually tax money diverted out of the government and into focused causes.<sup>53</sup> The vast majority of that money does not, she points out, end up in social justice organizations fighting oppression.<sup>54</sup> It goes primarily to churches, the arts, and right-wing causes, as well as back into the pockets of the wealthy through trustee fees, a system in which wealthy people “earn” hundreds of thousands of dollars as board members of foundations.<sup>55</sup> Only a tiny portion of the money ends up in social justice organizations and even then, there are contingencies that allow wealthy philanthropists to have inappropriate influence in directing the work.<sup>56</sup>

Ahn’s analysis instructs social justice activists to remain critical of the nonprofit industrial complex, even while making use of nonprofit structures in their work, because of its broad role in reducing the tax liability of the wealthy and putting decisions about wealth redistribution that could be made through governmental use of taxes into the hands of the wealthy individuals and foundations.<sup>57</sup> Ahn encourages social justice activists to view redirected tax money as their money — money that has been taken out of government revenue that can (theoretically) be directed through the electoral process by the people instead of being directed into causes chosen by the rich.<sup>58</sup>

*G. Gay and Lesbian Nonprofits Exemplify These Concerns*

These concerning characteristics of nonprofits are prevalent in organizations that have emerged as leaders in the field of lesbian and gay rights.<sup>59</sup> Looking at these critiques in the context of this specific area of activism is not only useful because doing so can illustrate the critiques, but also because trans work is often seen as a subset of lesbian and gay rights work and is often expected to follow similar strategies. Given these concerns, it may be worthwhile to question that assumption.

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<sup>53</sup> Ahn, *supra* note 47.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*; Kivel, *supra* note 42.

<sup>56</sup> Ahn, *supra* note 47.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> I have reservations about whether “movement” is an appropriate term for the advocacy, policy, and law reform work that has been engaged over the last twenty-five years seeking, for the most part, lesbian and gay rights or rights of same-sex couples and, more recently, some measure of transgender rights. The most well-funded organizations in this realm generally use the term LGBT to identify this work now, yet bisexual and transgender activists remain critical of the work of these organizations, pointing out the continued marginalization of their issues.

Countless scholars and activists have critiqued the direction that gay rights activism has taken since the incendiary moments of the late 1960s when criminalized gender and sexual outsiders fought back against police harassment and brutality at New York City's Stonewall Inn and San Francisco's Compton's Cafeteria.<sup>60</sup> What started as street resistance and un-funded ad hoc organizations, initially taking the form of protests and marches, institutionalized in the 1980s into nonprofit structures that became increasingly professionalized.<sup>61</sup> Critiques of these developments have used a variety of terms and concepts to describe the shift, including charges that the focus became assimilation;<sup>62</sup> that the work increasingly marginalized poor people,<sup>63</sup> people of color,<sup>64</sup> and transgender people,<sup>65</sup> and that the resistance became co-opted by neoliberalism<sup>66</sup> and conservative egalitarianism. Critics have argued that as the gay rights movement of the 1970s institutionalized into a new formation in the 1980s, creating such institutions as Gay and Lesbian Advocates and Defenders ("GLAD"),<sup>67</sup> the Gay and Lesbian Alliance Against Defamation ("GLAAD"),<sup>68</sup> the Human Rights Campaign ("HRC"),<sup>69</sup> Lambda Legal

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<sup>60</sup> See generally DAVID CARTER, *STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION* (2004); SCREAMING QUEENS (Jack Walsh 2005); see *infra* notes 61-65 and accompanying text.

<sup>61</sup> See generally CARTER, *supra* note 60.

<sup>62</sup> See Ian Barnard, *Fuck Community, or Why I Support Gay-Bashing*, in STATES OF RAGE: EMOTIONAL ERUPTION, VIOLENCE, AND SOCIAL CHANGE 74, 74-88 (Renée R. Curry & Terry L. Allison eds., 1996); see also Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ: J. LESBIAN & GAY STUDIES 437, 437-465 (1997); see generally THAT'S REVOLTING! QUEER STRATEGIES FOR RESISTING ASSIMILATION (Matilda Bernstein Sycamore ed., Soft Skull Press 2004).

<sup>63</sup> See generally Richard E. Blum & Barbara Ann Perina, *Why Welfare is a Queer Issue*, 26 N.Y.U. REV. L. & SOC. CHANGE 201 (2000-2001).

<sup>64</sup> Kenyon Farrow, *Is Gay Marriage Anti-Black???*, CHICKENBONES: J. FOR LITERARY & ARTISTIC AFRICAN-AMERICAN THEMES, available at <http://www.nathanielturner.com/isgaymarriageantiblack.htm> (last visited Mar. 22, 2009); Marlon M. Bailey, Priya Kandaswamy & Mattie Udora Richardson, *Is gay marriage Racist?*, in THAT'S REVOLTING! QUEER STRATEGIES FOR RESISTING ASSIMILATION, *supra* note 62, at 87.

<sup>65</sup> See generally Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real about Transgender Inclusion*, in TRANSGENDER RIGHTS 141, 141-70 (Paisley Currah, Richard M. Juang, Shannon Price Minter eds., 2006); Tommi Avicelli Mecca, *It's All About Class*, in THAT'S REVOLTING! QUEER STRATEGIES FOR RESISTING ASSIMILATION, *supra* note 62, at 13-22; see also Sylvia Rivera, *Queens in Exile, The Forgotten Ones*, in GENDERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY 67-85 (Joan Nestle, Clare Howell, & Riki Wilchins eds. 2004); Dean Spade, *Fighting to Win*, in THAT'S REVOLTING! QUEER STRATEGIES FOR RESISTING ASSIMILATION, *supra* note 62, at 31-38.

<sup>66</sup> Angela P. Harris, *From Stonewall to the Suburbs?*, *supra* note 14; see generally Bassichis et al., *supra* note 23; JASBIR K. PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* (2007).

<sup>67</sup> See GAY AND LESBIAN ADVOCATES AND DEFENDERS, GLAD 30 YEARS EQUAL JUSTICE UNDER THE LAW, <http://www.glad.org/30years/> (last visited Mar. 22, 2009).

<sup>68</sup> See GAY AND LESBIAN ALLIANCE AGAINST DEFAMATION, OUR HISTORY, <http://www.glaad.org/about/history.php> (last visited Mar. 22, 2009).

<sup>69</sup> See HUMAN RIGHTS CAMPAIGN, OUR HISTORY, [http://www.hrc.org/about\\_us/2514.htm](http://www.hrc.org/about_us/2514.htm) (last visited Mar. 22, 2009).

Defense and Education Fund,<sup>70</sup> and the National Gay and Lesbian Task Force,<sup>71</sup> the focus of the most well-funded, well-publicized work on behalf of queers shifted drastically.<sup>72</sup>

From its roots in bottle-throwing resistance to police brutality and radical claiming of queer sexual public space and gender non-conformity, the focus of gay rights moved toward the more conservative model of equality promoted in U.S. law and culture through the idea of equal opportunity. The thrust of these organizations' work became seeking access and equality through dominant U.S. institutions rather than questioning and challenging the fundamental inequalities promoted by those institutions. The key agenda items became anti-discrimination law focused on employment (e.g., the 2007 Federal Employment Non-Discrimination Act,<sup>73</sup> as well as equivalent state statutes), military inclusion,<sup>74</sup> decriminalization of sodomy,<sup>75</sup> hate crimes laws,<sup>76</sup> and a range of reforms focused on relationship recognition that increasingly narrowed to focus on marriage in the last decade.<sup>77</sup>

Critics have charged that the social justice focus was erased from the movement and replaced by a focus on formal legal equality that could produce gains only for people already served by existing social and economic arrangements.<sup>78</sup> For example, arguing for equal access to health care through a demand for same-sex marriage rights translates into fighting for health care access that would affect only people with jobs that include health benefits they could share with a partner, an increasingly uncommon privilege.<sup>79</sup> These questions came to the fore during the welfare reform debates and subsequent policy changes of the mid-1990s, when social

<sup>70</sup> See LAMBDA LEGAL, HISTORY, <http://www.lambdalegal.org/about-us/history.html> (last visited Mar. 22, 2009).

<sup>71</sup> See NAT'L GAY AND LESBIAN TASK FORCE, TASK FORCE HISTORY, [http://www.thetaskforce.org/about\\_us/history](http://www.thetaskforce.org/about_us/history) (last visited Mar. 22, 2009).

<sup>72</sup> See Angela P. Harris, *From Stonewall to the Suburbs?*, *supra* note 14; GAY AND LESBIAN RIGHTS ORGANIZING: COMMUNITY-BASED STRATEGIES (Yolanda C. Padilla ed. 2004); URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* (1995).

<sup>73</sup> See, e.g., NAT'L GAY AND LESBIAN TASK FORCE, EMPLOYMENT NON-DISCRIMINATION ACT 2007 ACTION CENTER, <http://www.thetaskforce.org/enda07/enda07.html> (last visited Mar. 22, 2009); see also H.R. 3685, 110th Cong. (2007-2008).

<sup>74</sup> See, e.g., LAMBDA LEGAL, MILITARY, <http://www.lambdalegal.org/our-work/issues/military/> (last visited Mar. 22, 2009).

<sup>75</sup> See, e.g., Joan M. Garry, GLAAD Executive Director, *Love, Sex & Lawrence v. Texas*, GLAAD.ORG, June 16, 2003, available at [http://www.glaad.org/publications/archive\\_detail.php?id=3404&PHPSESSID=f](http://www.glaad.org/publications/archive_detail.php?id=3404&PHPSESSID=f).

<sup>76</sup> See, e.g., HUMAN RIGHTS CAMPAIGN, HATE CRIMES, [http://www.hrc.org/issues/hate\\_crimes.asp](http://www.hrc.org/issues/hate_crimes.asp) (last visited Mar. 22, 2009).

<sup>77</sup> See, e.g., HUMAN RIGHTS CAMPAIGN, MARRIAGE & RELATIONSHIP RECOGNITION, <http://www.hrc.org/issues/marriage.asp> (last visited Mar. 22, 2009).

<sup>78</sup> See, e.g., Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309, 309-329 (2005).

<sup>79</sup> Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK: NAT'L LESBIAN & GAY QUARTERLY, Fall 1989, at 14, 14-16; Willse & Spade, *supra* note 78.

justice activists criticized gay rights organizations for not resisting the elimination of social welfare programs despite the fact that these policy changes had devastating effects on low-income queers.<sup>80</sup> Queer activists focused on opposing police brutality and mass incarceration of poor people and people of color in the United States have argued, as I described earlier, that hate crimes laws do nothing to prevent violence against queer and trans people, much of which happens at the hands of employees of the criminal justice system which lend more resources to hate crime laws.<sup>81</sup> These critics have pointed out that the shift in focus from police accountability to partnering with the criminal punishment system to increase penalties represents a significant move away from the concerns of low-income queers and queers of color, who are the most frequent targets of police and prisons, toward the perspective of white and economically privileged queers who may feel protected by the police and can latch on to the prison-expanding "law and order" fervor of the last thirty years in a claim to citizenship that is heavily mediated by race, class, and gender.<sup>82</sup>

These critics have argued that overall, the gay rights agenda has shifted toward white gay and lesbian experience while marginalizing or overtly excluding the needs and experiences of people of color, transgender people, and low-income people. This trend is represented by blatant examples such as the battle over whether the most well-funded gay rights organization, HRC, would include transgender people in its national legislation or cover only sexual orientation,<sup>83</sup> as well as examples of value shifting, such as the move from police accountability to hate crimes laws.<sup>84</sup> Professionalization in gay rights nonprofits may be one of the causes of this shift. As these organizations have emerged, often funded by wealthy white gay people and the foundations they have created, their staffs were and remain primarily white gay men and lesbians with professional degrees.<sup>85</sup> These organizations operate on typical hierarchal models of governance, with decision-making coming from the top down, including board members and senior staff who are even more likely to be white, wealthy, and have graduate-level educations.<sup>86</sup>

The gay rights agenda, then, has come to reflect the needs and experiences of those leaders more than the experiences of community members not present in these elite spaces. These paid leaders could see themselves fired from a job for being gay or lesbian, beaten up on the

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<sup>80</sup> Blum & Perina, *supra* note 63.

<sup>81</sup> See Dean Spade & Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, 20-21 CHICANO-LATINO L. REV. 38, 50 (2000).

<sup>82</sup> *Id.*

<sup>83</sup> See Posting to Transgender Tapestry, The International Foundation for Gender Education, Trans Activists Target HRC, <http://www.ifge.org/Article23.phtml> (June 17, 2004, 05:00 AM).

<sup>84</sup> See sources cited *supra* notes 26-35, 38-40 and accompanying text.

<sup>85</sup> See *supra* Part III.

<sup>86</sup> *Id.*

street, or kept out of military service. They could not imagine themselves as potentially imprisoned, on welfare, homeless, in danger of deportation, or targets of continuous police harassment, so those issues did not receive resources in their work. Furthermore, these leaders have come from graduate schools more than from radical movements of people facing centuries of state oppression, so their critiques of such notions as formal legal equality, assimilation, and equal rights are less developed. Even white feminist critiques of the institution of marriage could not trump the new call for “marriage equality” — meaning access for same-sex couples to the fundamentally unequal institution designed to privilege certain family formations for the purpose of state control.<sup>87</sup>

Their decision-making structures and priorities are not the only aspects of these nonprofits that have generated criticism. Money has also been a serious concern, both where it comes from and where it goes. The largest white founded and led organizations doing gay rights work have generated revenue through both foundation grants and sponsorships by such corporations as American Airlines, Budweiser, IBM, and Coors.<sup>88</sup> These partnerships, which include free advertising for the corporations, have been criticized by queers who are concerned about the narrow social justice framework of gay rights organizations willing to promote corporations whose labor and environmental practices have been widely criticized.<sup>89</sup> These partnerships have furthered the ongoing criticism that gay and lesbian rights have become single-issue politics, ignoring other social justice issues to promote only a narrow political agenda that concerns gays and lesbians experiencing oppression through a single vector — sexual orientation — and thus excluding from concern all the queer and trans people who simultaneously experience sexual orientation-based oppression and other oppressions related to their identities as people of color, workers, immigrants, gender non-conformers, people with disabilities, and so forth.<sup>90</sup>

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<sup>87</sup> For an excellent critical analysis of marriage politics, see Katherine M. Franke, *The Politics of Same-sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 238-42 (2006); Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1870-79 (2006).

<sup>88</sup> See HUMAN RIGHTS CAMPAIGN FOUNDATION, BUYING FOR EQUALITY 2009: A GUIDE TO THE COMPANIES, PRODUCTS AND SERVICES THAT SUPPORT LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUALITY (2009), [www.hrc.org/buyersguide2009/hrc\\_buyersguide\\_09.pdf](http://www.hrc.org/buyersguide2009/hrc_buyersguide_09.pdf); Marc Gunther, *Queer Inc.: How Corporate America Fell in Love with Gays and Lesbians. It's a Movement.*, CNN MONEY.COM, Nov. 30, 2006, [http://money.cnn.com/magazines/fortune/fortune\\_archive/2006/12/11/8395465/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2006/12/11/8395465/index.htm).

<sup>89</sup> See, e.g., THAT'S REVOLTING! QUEER STRATEGIES FOR RESISTING ASSIMILATION, *supra* note 62; Gay Shame San Francisco, <http://www.gayshamesf.org> (last visited Mar. 22, 2009); Posting of Todd Eaton to RTSNYC, Queer Resistance to HRC, NYC, Feb 5th, <https://lists.mayfirst.org/pipermail/rtsnyc/2005-February/002635.html> (Feb. 2, 2005, 20:56:25 EST). See also *Swallow Your Pride*, a zine produced in 1998 by a New York City organization called Fuck the Mayor Collective (on file with the author).

<sup>90</sup> See sources cited *supra* note 40 and accompanying text.

Lesbian and gay organizations have also, generally, followed labor practices that do not line up with progressive social justice values.<sup>91</sup> The well-funded organizations have typical pay scales, with executive directors often making three to four times the salaries of the lowest-paid employees. Pay often correlates to educational privilege, which again means that the most resources go to the white employees from privileged backgrounds and the least pay goes to employees of color and people without the benefit of educational privilege.

Furthermore, these organizations, for the most part, do not provide health benefits that include trans health care, despite the fact that this social justice issue is an essential one for trans people. The organizations also have a record of not prioritizing the development of antiracism within their work, with continued failure, despite requests by some employees, for meaningful anti-oppression training and development work. The refusal to devote resources toward the development of internal anti-oppression practices reflects the broader marginalization of issues important to people of color in these organizations' agendas.

Overall, the well-funded organizations that are focusing on gay and lesbian rights mirror the conditions for critiques made by activists from across a wide range of social justice movements about the problems with the nonprofit structure as a tool for social justice. Lack of community accountability, elitism, concentration of wealth and resources in the usual places, and exploitative labor practices are norms within these organizations that create and maintain a disappointingly narrow political agenda that fails to support meaningful and widespread resistance to and even colludes with oppressive institutions.

When we look at the growth of the nonprofit model in the context of U.S. government and business interests responding to the radical movements of the 1960s and 70s, we can see the dangers inherent in this model as a container for our resistance to the conditions facing trans communities. Many of the social movements of the 1960s and 1970s articulated very root-causes-focused analysis of the oppressions they were contesting.<sup>92</sup> They used frameworks that articulated the life or death

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<sup>91</sup> This information comes from my own work within these organizations and my relationships with other activists working inside these organizations.

<sup>92</sup> See generally KUWASI BALAGOO, *A SOLDIER'S STORY: WRITINGS BY A REVOLUTIONARY NEW AFRIKAN ANARCHIST* (2003); WARD CHURCHILL & JIM VANDER WAIL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DISSENT IN THE UNITED STATES* (2nd ed., South End Press 2002); Jill Soffiyah Elijah, *Special International Tribunal in Human Rights Violations of Political/POW Prisoners in the United States, Conditions of Confinement*, in *BLACK PRISON MOVEMENTS USA* 137-48 (1995); DAVID GILBERT, *NO SURRENDER: WRITINGS FROM AN ANTI-IMPERIALIST POLITICAL PRISONER* (2004); DAN GEORGAKAS & MARVIN SURKIN, *DETROIT: I DO MIND DYING* (South End Press 1998) (1975); ; Oscar Lopez-Rivera, *Puerto Rican Prisoner of War*, in *CAN'T JAIL THE SPIRIT: POLITICAL PRISONERS IN THE U.S.: COLLECTION OF BIOGRAPHIES* 171-74 (5th ed., 2002); Shin'ya Ono, *A Weatherman: You Do Need A Weatherman To Know Which Way the Wind Blows*, in *WEATHERMAN* 227 (Harold Jacobs ed., 1970); Tom Thomas, *The Second Battle of Chicago*

urgency of demands for wealth redistribution, demilitarization and an end to racism, sexism, abelism and heterosexism.<sup>93</sup> These movements linked historical phenomena, like chattel slavery and genocide, to current conditions of police forces colonizing black neighborhoods and the continued land theft, criminalization and social control of the indigenous people of North America, arguing that the American progress narrative that depicts white supremacy as “over” is a sham.<sup>94</sup> They did not identify the courts as locations to find justice, but sought justice in the streets, recognizing that the law and its enforcers (judges, police, and administrators) were key agents of violence and oppression.<sup>95</sup> These movements often talked about the U.S. government as an explicitly and centrally racist institution, founded on slavery and genocide and perpetuating exploitation and colonial rule both over its internal population and the globe.<sup>96</sup> Their demands were not shaped in terms of seeking a piece of the American dream, or a place in the American economy, or rights in the American legal system. Instead, they questioned the very terms through which such things are constituted and have come to exist, and made demands that were much more transformative and had much greater redistributive potential.

The containment responses to these movements included both the creation of discrimination law doctrine, which neutralized and reduced the content of these demands to mere formal legal equality, and the emergence of the nonprofit industrial complex, which shifted the terms of resistance into a professionalist structure beholden to philanthropists. Many of the movements most intent on identifying root causes of oppression and rallying mass support for major transformation found themselves targets of FBI infiltration, criminalization and assassination, and many leaders of those movements died at the hands of law enforcement or remain imprisoned today.<sup>97</sup> As people doing anti-oppression work today, what is the relevance of the frameworks used by these movements to our work? What can we learn about oppression and resistance from looking at those histories and reflecting on our contemporary world? What relevance does the tenor of those demands have to strategizing legal reform work addressing the life chances of trans people today?

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1969, in WEATHERMAN 196 (Harold Jacobs ed., 1970); EVELYN WILLIAM, INADMISSIBLE EVIDENCE: THE STORY OF THE AFRICAN-AMERICAN TRIAL LAWYER WHO DEFENDED THE BLACK LIBERATION ARMY (1993).

<sup>93</sup> For further discussion of social movements see sources cited *supra* note 92.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

## IV. TRANS LAW REFORM PRACTICES IN CRITICAL CONTEXT

These are broad questions requiring much consideration. A great deal of research, writing and strategizing needs to be done to address them. However, a few points seem plain to me. First, the conditions that activists from that time were identifying remain persistent today. Global neoliberal economic polices have not lessened the harsh exploitation that is fundamental to capitalist economic arrangements. If anything, we see an increasingly efficient consolidation of wealth with the few and worsening experiences of poverty for the many.<sup>98</sup> That reality remains heavily racialized, with white people possessing wealth and controlling the means of production while people of color disproportionately inhabit the growing domestic and global underclass.<sup>99</sup> Second, under these conditions, we need to evaluate the role of trans law reform projects in terms of how they can contribute to a meaningful redistribution of life chances and avoid being co-opted to support the very conditions of oppression that we are mobilizing to fight. Third, we have to be aware of how the structures we use in doing our work influence the content and effectiveness of that work.

Given these observations, I can offer a few initial proposals, many of which are already being undertaken by some lawyers and activists working on trans issues. Because we know the limits of formal legal equality for affecting the life chances of those most vulnerable to oppression, the first step in assessing our trans legal reform work has to be focusing on legal strategies that are not primarily symbolic. We know that trans people as a group are economically marginalized, face high rates of imprisonment, face severe issues of access to health care and education, and experience high levels of violence.<sup>100</sup> Many experience violence in institutions and contexts that will not be reached by anti-discrimination laws, and most do not have access to legal help to enforce broad statutory rights.<sup>101</sup> Given this, we must think about legal strategies that directly help those who are most vulnerable. We do not want legal victories that only provide a veneer of equality papering over a reality of extreme stratification. We do not want reforms to systems that only enhance their efficiency at reducing the

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<sup>98</sup> See generally James B. Davis, Susanna Sandstrom, Anthony Shorrocks & Edward N. Wolff, *The World Distribution of Household Wealth* (World Inst. for Development Economic Research (UNU-WIDER)), Working Paper No. DP2008/03, 2008), available at <http://www.wider.unu.edu/stc/repec/pdfs/rp2008/dp2008-03.pdf>.

<sup>99</sup> See generally UNITED FOR A FAIR ECONOMY, <http://www.faireconomy.org/search/> (search "racial divide") (last visited Mar. 22, 2009).

<sup>100</sup> See Agathangelou et al. *supra* note 23; Gabriel Arkles (SRLP), Chris Daley (Transgender Law Center), Jody Marksammer (National Center for Lesbian Rights) & Dean Spade (SRLP), Testimony to the National Prison Rape Elimination Commission (Aug. 15, 2005), available at <http://www.srlp.org/node/73>; Pooja S. Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care*, SEXUALITY RES. & SOC. POL'Y: J., 2007, at 7, 7-35; JESSICA M. XAVIER, THE WASHINGTON TRANSGENDER NEEDS ASSESSMENT SURVEY (2000), available at <http://www.glaa.org/archive/2000/tgneedsassessment1112.shtml>.

<sup>101</sup> See sources cited *supra* note 100.



life chances and life spans of trans people. The quality of our legal reform work should be measured in meaningful changes to trans lives — how many people get to go to school, have health care and stable housing, do safe and meaningful work, and become leaders in political struggles that concern them.

Prioritizing legal work like criminal defense, immigration assistance and public benefits access are key for helping our community members survive and become politically active. Building meaningful political power to make change is tied to survival. If we want trans leadership in social movements, trans issues on many different kinds of agendas, and organized communities that can respond to attacks, then providing survival-level legal services in the areas where people are most vulnerable is essential. Waiting for “perfect plaintiffs” and “winning cases” on a narrow set of issues about employment and family protection, while ignoring the issues of most trans people who are either unemployed, low-wage workers, or criminalized workers means missing opportunities to effectuate the most change for the most people. This shift in how we think about legal reform, from big symbolic wins for plaintiffs with the most privilege and access and who experience discrimination through a single vector of oppression, to the daily struggle against legal hurdles for people who are most vulnerable is central to building meaningful change for trans people. Through this kind of analysis, we might find that law reforms like decriminalizing sex-work, drug possession, or homelessness might be more meaningful interventions than passing hate crime or anti-discrimination laws. Because of the narrowness with which the question “what is a trans law issue” is currently approached, we may be missing the most relevant opportunities for law reform to improve life chances.

Further, changing the direct service model to focus on bringing directly impacted people into organizing, rather than using traditional models that often make people feel judged for requiring services or keep people separate from others who are in similar or related situations, is essential. Survival services can be a key component for bringing people into political community with others facing similar conditions and can create a bridge to build a broader political awareness. Making our legal organizations look more like community organizing organizations, with a focus on offering our clients pathways to political organizing, builds the potential of our work to cultivate much more significant change than courts will ever deliver.

Our policy reform work also needs to come from this perspective. Changing key laws and policies that impact the survival of our communities is important, but must be done with care to avoid the dangers of legitimizing and expanding oppressive systems. When we seek to reform oppressive institutions, we have to ask ourselves how the reforms we are considering, or the various compromise positions we might be pushed into, will impact the most vulnerable people in our communities.

For example, if we are trying to get a discriminating institution or system to recognize trans people's genders, but they want to use a surgery standard, we must recognize that this type of policy is not a victory for our community. Most trans people cannot or do not want to access such health care, and surgery-reliant policies shore up the stereotype that such care defines trans people's identities. Changing a law or policy from one transphobic position (trans people do not exist/cannot be recognized) to another (trans people can be recognized only through surgery) can actually make it harder to push for a policy that is based in the realities of trans people's lives, dividing our communities along lines of class, race, and gender.

Hate crime laws reflect a similar dilemma. The desire to have the violence trans people face recognized by law is reasonable. However, taking up a strategy that does nothing to prevent that violence and uses that violence to build up a criminal punishment system that targets people of color and the poor stands to divide our communities further and to legitimize that system.

To confront these challenges in our policy work, we must center the experiences of those most vulnerable in our communities (prisoners, poor people, youth, people with disabilities, immigrants) to determine whether the policy change we are considering actually looks good from the perspective of their experience. Policy issues like Medicaid coverage, prison health care, prison placement, immigration, gender change on identification documents, homeless shelter placement, access to health care for foster youth and youth in the juvenile punishment system, and placement in gendered group homes are examples of urgent areas affecting the survival of vulnerable trans people today. Within each of those areas in every jurisdiction there are an assortment of specific policy changes that could make these systems safer for trans people. Most of these issues still receive very little attention.

In doing policy reform work we must assess whether any aspects of our reform project that are incremental are actually regressive. Doing so means having a clear vision of what the world is that we are fighting for, against which we can measure incremental steps in order to ensure that they are going in the right direction.<sup>102</sup> This means we need to use political processes that actually identify vision. In our work as lawyers, that means stepping beyond the usual space of the nonprofit office where lawyers meet with each other alone to determine direction, or simply react to various unfair laws we discover. We need to connect our work directly with community organizing campaigns that bring together large groups of directly impacted trans people and work to build shared analysis of what we are experiencing and to build shared visions for how we want things to

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<sup>102</sup> I discuss this question of incrementalism and vision in my article *Methodologies*, *supra* note 26.

be.<sup>103</sup> These processes should guide our legal work. Any agenda will be stronger with organized communities pushing it forward, and any legal victory that does not have communities behind it will be unlikely to create deep and meaningful change in the distribution of life chances it is aimed to effect.

Building trans politics that is centered around a concern with the redistribution of life chances, that focuses on those who are most vulnerable, and that is primarily committed to anti-racism, feminism, anti-abelism and wealth redistribution does not interest everyone. When we choose to think about our legal work in the context of this kind of politics, it is important to be aware that it may change who we count as allies and who will want to commit to this work with us. Not all trans people, for example, might be committed to prison abolition, or to enhancing income support to poor people in the U.S., or to demilitarization. But even knowing what our visions are allows us to figure out who we want to partner with in which moments and how to retain our vision in the face of difference. It also allows us to find allies we might have missed. If we know that trans people are experiencing significant harms because of “War on Terror” policy and law changes related to identification, for example, we have the opportunity to partner with other communities facing similar harms. These kinds of partnerships strengthen our political position and our political analysis and build long-term relationships that continue to benefit our visions for change. Getting clear about our vision makes it easier to make principled decisions about who to partner with and to build political alliances that strengthen our work.

## V. CONCLUSION

As we propose, push, and practice these politics, we must be aware that we will continue to face lawyers, legal reformers, policy reformers, and others who will simply say, “That is impossible.” This is a strong message that people proposing significant change receive. We are told we are not politically viable, our visions are ridiculous, we have to wait because what we want cannot happen, or sometimes even cannot be talked about right now. The good thing about trans people is that we are pretty used to hearing this. Every time we turn around someone tells us we do not exist, people cannot be like that, our lives and identities are impossible. Gay and lesbian rights organizations have been cutting us out and leaving us behind for a long time now, telling us we are not politically viable. Because of these experiences of impossibility, I like to believe that we are well-

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<sup>103</sup> For a discussion of theories of social change that impact how different groups use law reform and how lawyers might work with community organizers on trans issues, see generally Mananzala & Spade, *supra* note 41. Suzanne Pharr’s book, *In the Time of the Right: Reflections on Liberation*, also offers a useful model in the chapter, *Trying to Walk the Talk: An Example*. SUZANNE PHARR, *IN THE TIME OF THE RIGHT: REFLECTIONS ON LIBERATION* 105 (1996).

positioned to challenge narrow notions of what is possible or politically viable because we are well-practiced at living impossibility in our daily lives.

I think we are primed to take up a set of demands that seem impossible and ridiculous to the law, but that we know are the only chance for survival. Ideas like prison abolition, an end to poverty and wealth, an end to people being marked as “illegal,” and full, quality health care for everyone are unrecognizable to narrow legal agendas that rely on the anti-discrimination principle. For people in our communities these ideas are the basis for a set of concrete demands that are growing in volume every day. As lawyers, we need to make sure that we do not become forces of suppression of these demands, and that instead we temper our legal frameworks and our dominant leadership qualities and find out how our work can support the visions of communities facing violence under the current regimes of oppression. My hope is that this symposium helps us to think simultaneously very broadly about demands and very concretely about immediate strategies that serve them. Connecting those levels of understanding, and using our shared knowledge and commitment to solve the complex problems this work includes, is the proper focus for our collaborative efforts.