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Dean Spade

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Introduction: Transgender Issues and the Law

Dean Spade

This year, scholars and activists are marking the twentieth anniversary of “the enunciation and analysis of ‘intersectionality’ by legal theorist Kimberlé W. Crenshaw.”¹ The early 1990s also saw the emergence of some important galvanizing texts in what would come to be identified as trans studies and trans politics, especially Leslie Feinberg’s *Stone Butch Blues*² and Kate Bornstein’s *Gender Outlaw*.³ Reflecting on the cluster of trans studies writings gathered by the *Seattle Journal for Social Justice* in this issue, I am struck by how these two trajectories of critical engagement have generated the conversations and controversies that are central to trans politics today. The writings in this cluster come from some of the most significant leaders in trans politics, law, and scholarship working in the United States and Canada. Their pieces raise issues analyzing the cutting-edge questions, strategies, and issues that people like Crenshaw, Feinberg, and Bornstein brought to the fore in their own ways two decades ago—issues that social movements have toiled with for much longer and that are at the forefront of trans politics today. The writings in this cluster delve into the ways that gender operates as a vector of regulation and distribution and describe a coercive system that orders the world through violence. They raise questions about the implications of resistance to violence, the limitations of law reform as an intervention, and the creation of trans politics centered in racial and economic justice.

Eli Clare provides a moving and beautiful exploration of how shame shapes the lives of people living in bodies marked “wrong.”⁴ With the arresting prose and incisive analysis he is known for, Clare opens up the topic of shame through both his own experiences and his observations of

how shame is produced and circulated in certain spaces—in clinics, hospitals, and communities divided by judgment and hierarchy. Clare exposes how trans politics and identity are not just intellectual or political disruptions, not just projects of resistance, and not just metaphors for alterity. Trans experiences of being “excessive” and “outside” are produced and reproduced as sites of harm and violence; trans people simultaneously live with vulnerability to violence and struggle with our internalization of the norms that define our otherness. In Clare’s articulation, this shame requires constant negotiation; healing from shame is a process and never a place of arrival.

Masen Davis and Kristina Wertz provide a snapshot of the impact of systemic trans phobia in their article, *When Laws are Not Enough: A Study of the Economic Health of Transgender People and the Need for a Multidisciplinary Approach to Economic Justice*.⁵ The recent studies they cite measure trans people’s experiences of discrimination and poverty and demonstrate the significant economic marginalization of trans populations. Twenty-five percent of trans Californians, Davis and Wertz tell us, report that they are, or have been, homeless. Ninety-seven percent of respondents in a national study of trans people report having experienced some form of workplace harassment or discrimination on the basis of gender identity or expression. The California survey found that less than half of trans respondents are employed full-time. These statistics reveal what advocates and activists have long known: that trans people face severe economic insecurity, exclusion from social services, high rates of imprisonment, and high rates of violence. Trans people of color, trans people with disabilities, trans people who are poor or homeless, trans youth, and trans immigrants are particularly vulnerable, especially because the systems that target those groups for policing and detention of various kinds are organized through gender segregation, and gender-nonconforming people face severe violence in those systems.⁶

As the interview included in this cluster demonstrates,⁷ Medicaid is one area of law and policy where these conditions may even be worsening. In recent years, Medicaid has increased coverage exclusions of gender-confirming healthcare for trans people. This disturbing trend suggests that those who are already experiencing the many dangers of economic insecurity may be facing increased harm.

A key challenge facing trans politics, like other social movements, is how to properly account for the uneven distribution of vulnerability and violence across trans populations. Not all trans people are equally vulnerable, yet the framework of studying, describing, and addressing these harms through the single vector of transphobia often causes the erasure of the reality of conditions facing those most vulnerable. Countless scholars who have taken up Crenshaw's call for intersectional analysis—as well as the tools of queer theory,⁸ women of color feminism,⁹ Critical Race Theory,¹⁰ critical disability studies,¹¹ queer of color critique,¹² and other critical analytical frameworks and resistance practices—problematize political responses that focus on a single vector of subjection. Their work shows that when a single identity category is the focus, narratives of subjection through that identity category end up erasing the other factors that participate in producing vulnerability. The strategies for change that emerge tend to only serve those who have privilege in all other realms.

Thus, a domestic violence response framed around a falsely universalized women's experience comes to actually frame white, able-bodied, nonimmigrant, straight, class-privileged, non-trans women's experience.¹³ The strategies that emerge for addressing domestic violence, such as increased criminal prosecution of batterers, are actually harmful to women whose other identity categories make them targets of criminalization.¹⁴ Similarly, a response to the control of reproduction framed by white, able-bodied, class-privileged, nonimmigrant, straight, non-trans women's experience becomes focused on abortion rights but fails to address forced sterilization; vulnerability to family dissolution by child welfare systems;

the impacts of criminalization of both youth and adults on families; genocidal practices targeting native families; and access to reproductive technologies for public benefits recipients.¹⁵ Similarly, a response to homophobia that centers white, nonimmigrant, able-bodied, wealthy gay men becomes centered on access to private property rights through marriage rather than the abuses faced by queer prisoners and immigration detainees, the harms experienced by queer low-income and homeless people in shelters and foster care systems, the child welfare battles of lesbian mothers of color, or other urgent sites of vulnerability.¹⁶

In the trans context, this analysis of the limits of single-issue politics can be seen in the controversies over hate crime statutes.¹⁷ Trans organizations that center on racial and economic justice charge that these statutes are the wrong approach to violence faced by trans people because they enhance criminal punishment systems while doing nothing to prevent the harms trans people face.¹⁸ Since criminal punishment systems are actually the worst perpetrators of violence against trans people, especially trans people of color and poor people, these critics suggest that the demand for hate crime statutes is actually a cooptation of trans deaths to support the project of continued expansion of criminal punishment in the United States. The narration of trans deaths through the single lens of transphobia—erasing that most trans murder victims are also vulnerable because of intersecting vectors of subjection such as poverty, homelessness, race, disability, or immigration status—recasts these events narrowly. Thus, they can be claimed and deployed for racist, ableist, xenophobic, antipoor, transphobic projects like the expansion of imprisonment.¹⁹

The writings in this cluster take up these critiques of the oversimplified deployment of identity categories and look at how these critiques contribute to worsening conditions for those trans populations that are most vulnerable. Lucas Crawford's article asks us to consider how narratives about trans embodiment are deployed to reintegrate the disruptive potential of trans practices and identities into the social order.²⁰ His description of

these processes calls to mind the disciplinary projects of medicalization, legal recognition, and punishment that work to recuperate trans subjects and make them stable and legible for binary gender systems. His article asks us to question the “homeward” journey of that integration, to consider those people who have identified the home as a site of discomfort, containment, and violence.

Christoph Hanssmann examines how the mobilization of the “transgender” category in health research may “obscure and complicate issues relating to other factors of marginalization and social determinants of health.”²¹ His work offers an urgently needed cautionary analysis that comes at a time when trans health research is emerging and institutionalizing. How that research frames its subjects and their health issues will determine what it can assess and what responses it can generate. Given the uneven distribution of health and healthcare across trans populations, it is essential that the research highlights rather than obscures the specific vulnerabilities of trans people of color, trans immigrants, trans people with disabilities, trans prisoners, trans homeless people, and others who face the most significant health disparities.

Pooja Gehi, Gabriel Arkles, and Elana Redfield take up a critique of single-issue politics in their examination of decision-making structures in trans legal advocacy.²² Gehi, Arkles, and Redfield expose a key way that social movements produce single-issue politics with narrow and harmful reform strategies as solutions. They describe how undemocratic, white-centered, lawyer-centered agenda setting in trans legal advocacy is keeping multivector analysis of trans people’s legal needs and resistance strategies marginalized, and producing a legal reform agenda that replicates the dangers outlined by scholars of intersectionality. This urgent intervention is part of a broader conversation that is taking place across several racial, economic, and gender justice-centered social movements—how the professionalization of social justice activism has co-opted resistance politics to produce system-stabilizing reform goals rather than transformative

change.²³ As attorneys working in a trans legal organization that uses collective governance as a strategy for creating community accountability rather than consolidating the power of lawyers, Gehi, Arkles, and Redfield offer incisive critique and useful alternative models for building a more participatory trans advocacy infrastructure.

Together, this cluster of articles participates in conversations that have been developing under the signs of “intersectionality” and “trans politics” for the last two decades, and mobilizes questions that have been central to resistance formations for much longer. The stakes of these engagements are high. Will we produce trans political resistance that actually addresses the most deadly conditions faced by the most vulnerable trans populations? Or will we create a window dressing of legal equality that obscures and stabilizes conditions of maldistribution? Will we produce participatory social movements grounded in racial and economic justice, or consolidate decision-making power in the hands of white lawyers and other elites? All of the authors in this cluster bring our attention to the multiple deployments of trans identity and politics—both as instruments of regulatory regimes and flashpoints of resistance²⁴—that confront today’s activists and scholars. As we continue to build the analytical and practical tools of our interventions, I look forward to seeing how our contributions are taken up by others who take part in these developing conversations.

¹ Center for the Study of Gender and Sexuality at New York University, Dec. 1, 2009 Event, *Two Decades & Counting: Critical Reflections on Intersectionality*, <http://www.csgsnyu.org/2009/11/two-decades-counting-critical-reflections-on-intersectionality/>; Critical Race Studies Online, Mar. 11, 2010 Symposium, *4th Annual CRS Symposium*, http://crsonline.law.ucla.edu/CRS_Program/Annual_Symposium/03.11.10/CRS_Agenda.

² LESLIE FEINBERG, *STONE BUTCH BLUES: A NOVEL* (1993).

³ KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US* (1994).

⁴ Eli Clare, *Resisting Shame: Making Our Bodies Home*, 8 SEATTLE J. SOC. JUST. 455 (2010).

⁵ Masen Davis & Kristina Wertz, *When Laws Are Not Enough: A Study of the Economic Health of Transgender People and the Need for a Multidisciplinary Approach to Economic Justice*, 8 SEATTLE J. SOC. JUST. 467 (2010).

⁶ Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 525–27 (2009); SYLVIA RIVIERA LAW PROJECT, “IT’S WAR IN HERE”: A REPORT ON THE TREATMENT OF TRANSGENDER & INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS 7-16 (2007), available at <http://srp.org/files/warinhere.pdf>; see generally Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731 (2008); Dean Spade, *Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in TRANSGENDER RIGHTS 217, 218–28 (2006); AMNESTY INTERNATIONAL USA, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY AND TRANSGENDER PEOPLE IN THE U.S., 12–19 (2005), available at http://www.amnestyusa.org/LGBT_Human_Rights/Stonewalled_A_Report/page.do?id=1106610&n1=3&n2=36&n3=1121.

⁷ Spade et al., *Medicaid Policy and Gender-Confirming Healthcare for Trans People: An Interview with Advocates*, 8 SEATTLE J. SOC. JUST. 497 (2010).

⁸ See, e.g., Kenyon Farrow, *Is Gay Marriage Anti Black???*, CHICKENBONES: A JOURNAL FOR LITERARY & ARTISTIC AFRICAN-AMERICAN THEMES (2007), <http://www.nathanielturner.com/isgaymarriageantiblack.htm>; Anna M. Agathangelou, M. Daniel Bassichis, & Tamara L. Spira, *Intimate Investments: Homonormativity, Global Lock-Down, and the Seductions of Empire*, 100 RADICAL HIST. REV. 120 (2008); Ian Barnard, *Fuck Community, or Why I Support Gay Bashing*, in STATES OF RAGE: EMOTIONAL ERUPTION, VIOLENCE, AND SOCIAL CHANGE 74–88 (1996); Richard E. Blum, Barbara Ann Perina & Joseph Nicholas DeFillipis, *Why Welfare is a Queer Issue*, 26 N.Y.U. REV. L & SOC. CHANGE 201 (2000–2001); Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ: A J. OF LESBIAN AND GAY STUD. 437 (1997); Dean Spade, *Fighting to Win, in THAT’S REVOLTING!: QUEER STRATEGIES FOR RESISTING ASSIMILATION* 31 (2004); Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539 (2006).

⁹ See, e.g., CHELA SANDOVAL, *METHODOLOGY OF THE OPPRESSED* (2000); COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY (Incite! Women of Color Against Violence eds., 2006) [hereinafter COLOR OF VIOLENCE]; THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherrie Moraga & Gloria Anzaldua eds., 2002).

¹⁰ See, e.g., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al. eds., 1995); CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002); Harris, *supra* note 8.

¹¹ See, e.g., DISABILITY STUDIES READER (Leonard J. Davis ed., 1997); Nirmala Erevelles, *Disability in the New World Order*, in COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY (Incite! Women of Color Against Violence ed., 2006).

¹² See, e.g., RODERICK A. FERGUSON, *ABERRATIONS IN BLACK: TOWARD A QUEER OF COLOR CRITIQUE* (2004).

¹³ See, e.g., COLOR OF VIOLENCE, *supra* note 9; KRISTIN BUMILLER, *IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE* (2008); Alisa Bierria & Mayaba Liebenthal, *To Render Ourselves*

Visible: Women of Color Organizing & Hurricane Katrina, in WHAT LIES BENEATH: KATRINA, RACE, AND THE STATE OF THE NATION 31 (South End Press Collective ed., 2007).

¹⁴ *Id.*

¹⁵ See, e.g., Loretta J. Ross, *The Color of Choice: White Supremacy and Reproductive Justice*, in COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY (Incite! Women of Color Against Violence ed., 2006); Dorothy Roberts, *Feminism, Race, and Adoption Policy*, in COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY (Incite! Women of Color Against Violence ed., 2006). See generally DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997); OUTSIDERS WITHIN: WRITINGS ON TRANSRACIAL ADOPTION (Jane Jeong Trenka et al. eds., 2006).

¹⁶ See, e.g., Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309 (2005); Marlon M. Bailey, Priya Kandaswamy & Mattie Udora Richardson, *Is Gay Marriage Racist?*, in THAT'S REVOLTING: QUEER STRATEGIES FOR RESISTING ASSIMILATION 87 (Mattilda, aka Matt Bernstein Sycamore ed., 2004).

¹⁷ See, e.g., Sylvia Rivera Law Project, *SRLP Opposes the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, <http://srlp.org/fedhatecrimelaw> (last visited Mar. 5, 2010); Posting of The CUAV Team, In support of communities responding to violence, to <http://www.cuav.org/blogpost/9> (Nov. 12, 2009, 4:15 p.m.); Katherine Whitlock, *In a Time of Broken Bones: A Call to Dialogue on Hate Violence and the Limitations of Hate Crimes Legislation* (American Friends Service Committee, Working Paper, 2001), available at <http://www.afsc.org>; Dean Spade, *Trans Law Reform: Strategies, Co-optation, and the Potential for Transformative Change*, 30 WOMEN'S RTS. L. REP. 288, 296–314 (2009); Dean Spade, *Methodologies of Trans Resistance*, in A COMPANION TO LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER STUDIES (George E. Haggerty & Molly McGarry eds., 2007).

¹⁸ *Id.*

¹⁹ Sarah Lamble, *Retelling Racialized Violence, Remaking White Innocence: The Politics of Interlocking Oppressions in Transgender Day of Remembrance*, 5 SEXUALITY RES. & SOC. POL'Y 1 (2008).

²⁰ Lucas Cassidy Crawford, *Breaking Ground on a Theory of Transgender Architecture*, 8 SEATTLE J. SOC. JUST. 515 (2010).

²¹ Christoph Hanssmann, *Counting Us In: Problems and Opportunities in Health Research on Trans and Gender Nonconforming Communities*, 8 SEATTLE J. SOC. JUST. 541, 542 (2010).

²² Gabriel Arkles, Pooja Gehi, & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579 (2010).

²³ See generally THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX (Incite! Women of Color Against Violence ed., 2007); Rickke Mananzala & Dean Spade, *The Nonprofit Industrial Complex and Trans Resistance*, 5 SEXUALITY RES. & SOC. POL'Y 53, 57 (2008).

²⁴ “[I]dentity categories tend to be instruments of regulatory regimes, whether as the normalizing categories of oppressive structures or as the rallying points for a liberatory

contestation of that very oppression.” Judith Butler, *Imitation and Gender Insubordination*, in *THE LESBIAN AND GAY STUDIES READER* 307, 308 (Henry Abelove et al. eds., 1993).