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STOP SURVEILLING MY GENRE!: On the Biometric Surveillance of (Black Trans) People

William B. Heberling*

Guide Quotes:

[1] It is outrageous anybody should have to live with a target on their back. That is unacceptable. For me it is not being a trans man. I'm black first, trans second. I know the experience on both spectrums . . . I need to work twice as hard; it sucks right? . . . [B]eing a black man in America and Trans is just a double whammy almost. It is – you need to be constantly aware of situations where you are and very careful; *that is how this world is set-up now.*¹

- Carson Graham, Co-founder and President of Transinclusive Group

* I owe thanks to many for supporting me through this project. To Kendall Witaszek, my bestie, center of gravity, and accomplice in the intellectual struggle / Sylvia Wynter, whose work set me off on this journey / my editors Jackie B., Ericka K., Tori S., Paige K., Ellen E., Ashley B., Ericka K., Wyatt F., Miki S., and Carsen N. / my adoptive parents Sara Heberling and Eli Brennan / my loving friends Jo L., Stephanie P., Sarah Jane, Mariana M., Jaclyn S., Jamie H., Maia A., T V., Ashley T., and Madyson F. / my muse, Carrie B. / my writing advisors Kathryn Boling and Dean Spade / my NBLSA family Leslie, Sara, Jeffrey, and Suwana / my mentors Brandon A. and Akua A. / Georgia W. + 8ball / Lavonne, without whom I would not have made it through a single day of law school / Renee, House of Lorde / the staff at Lavender Rights Project. To all my black trans ancestors - I love you and I wrote this for you.

¹ Transgender Law Center et al., *COVID-19 Call 9 — The Black Trans Leaders Showing the Way to Liberation* (May 18, 2020), <https://transgenderlawcenter.org/resources/covid19/the-black-trans-leaders-showing-the-way-to-liberation-covid-19-community-call-9> [<https://perma.cc/3F9Q-RZUN>], *emphasis added* (this article is a transcript of a Zoom conversation held between the leaders of several organizations focused on Black trans liberation, namely Kayla Gore, Ciora Thomas, Carson Graham, and Zahara Green) [hereinafter *COVID-19 Call 9*].

[2] Blackness is gender trouble. The etymology of cisgender² itself presumes a correspondence between assigned sex [at birth]³ and gender, which fails to account for Blackness . . . [C]aptive flesh figures a critical genealogy for modern transness, as chattel persons gave rise to an understanding of gender as mutable and as an amenable form of being—this happens through fungibility. The slave is the ground for modern gender and sexuality.⁴

- Che Gossett, *Black Trans Feminist Thought Can Set Us Free*

[3] Yet among these black women and gender-non-conforming convicts' often unrecorded and almost always misrecognized practices and labours of mothering, caring, music-making and knowledge producing, we are offered radically different theories of gender that History simply cannot properly capture as evidence. The 'symbolic integrity' of gender was thus always violently yoked to the normative notion of 'womanhood' as a racialized condition of the subject of History. Blackness, that is the genders of blackness then are always cast in the blind spot of disavowal that allows History to be told as gender, to be measured as gender, to know and to liberally progress as gender. Blackness then is not just circumscribed by its opacity to History, but surely by its ability to perform otherwise. This otherwise is something like what we might and must think of as *the radicality of black history* as

² See Gender & Sexuality Dictionary, DICTIONARY.COM, <https://www.dictionary.com/e/gender-sexuality/> (This resource is helpful to me when I am unfamiliar with certain vocabulary about gender and sexuality; you may find it useful while reading this paper).

³ States often statutorily mandate this information be given via vital statistics. See VITAL STATISTICS, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁴ George Yancy, *Black Trans Feminist Thought Can Set Us Free*, TRUTHOUT (Dec. 9, 2020), <https://truthout.org/articles/black-trans-feminist-thought-can-set-us-free/> [<https://perma.cc/UAR4-P9M4>], *internal quotation marks removed* (interviewing Che Gossett).

black freedom, that is black history as always a critique of History and a *revelatory initiative* that imagines an otherwise.⁵

- Jeramy Decristo & David Marriott, *Black Critical and Cultural Theory*

[4] If you think about the origins of the modern world, because gender was always there, how did we institute ourselves as humans; why was gender a function of that? . . . Although I use the term “race,” and I have to use the term “race,” “race” itself is a function of something else which is much closer to “gender.” Once you say, “besides ontogeny, there’s sociogeny,” [by sociogeny, she means that all social phenomena are storytellingly created, rather than biological impetus] then there cannot be only one mode of sociogeny; there cannot be only one mode of being human; there are a multiplicity of modes. So I coined the word “genre,” or I adapted it, because “genre” and “gender” come from the same root. They mean “kind,” one of the meanings is “kind.” Now what I am suggesting is that “gender” has always been a function of the instituting of “kind.” For example, in our order, which is a bourgeois order of kind, a bourgeois order of the human, the woman was supposed to be the housewife and the man was supposed to be the breadwinner. Each was as locked into their roles. By making the feminist movement into a bourgeois movement, what they’ve done is to fight to be equal breadwinners. This means that the breadwinning man and the breadwinning woman become a new class, so that the woman who remains in her role becomes a part of a subordinated class.

I am trying to insist that “race” is really a code-word for “genre.” Our issue is not the issue of “race.” Our issue is the issue of the

⁵ Jeramy Decristo & David Marriott, *Black Critical and Cultural History*, 24 THE YEAR’S WORD IN CRITICAL & CULTURAL THEORY 107, 115–16 (2016), *emphasis added*.

genre of “Man.” It is this issue of the “genre” of “Man” that causes all the “-/sms.”⁶

- Sylvia Wynter, *Proud Flesh Inter/Views: Sylvia Wynter*

[5] Niggas changed; which means anti-Blackness mutated. Somehow policy became a love language, and protests became performance. Grants became easier than fires, and task-forces became simpler than autonomous communities. Voting worked more than suppression, and representation worked more than praxis. Demands became lullabies to rock our oppressors to sleep, and abolition became a consensual request of the state.

How can a radical nigga stay radical when everything revolutionary turns 501(c)(3)? How can a nigga who wants to die for the revolution stay in that commitment if people won’t die with or for you? What’s the point of revolutionary suicide if they won’t make your death significant to progress for liberation? You can’t be revolutionary in death if the niggas who are left alive aren’t revolutionary too. You can’t get closer to freedom if niggas only let your death end in eulogy without momentum.⁷

- Hunter Shackleford, *The Slave Harriet Would’ve Shot*

⁶ Greg Thomas & Sylvia Wynter, *Proud Flesh Inter/Views: Sylvia Wynter*, 4 PROUD FLESH: NEW AFRIKAN J. CULTURE, POLS. & CONSCIOUSNESS 1, 23–24 (2006); Sylvia Wynter, *Towards the Sociogenic Principle*, in NATIONAL IDENTITIES AND SOCIO-POLITICAL CHANGES IN LATIN AMERICA 30, 34, 58 (Antonio Gomez-Moriana & Mercedes Duran-Cogan, eds., 2001).

⁷ Hunter Shackleford, *The Slave Harriet Would’ve Shot: On Killing the Abolition Mammy*, WEAR YOUR VOICE (Mar. 5, 2021), <https://www.wearyourvoicemag.com/the-slave-harriet-wouldve-shot-on-killing-the-abolition-mammy/> [https://perma.cc/4DKH-NJVM].

I. INTRODUCTION

A. Preamble

Black trans people exist and should not be erased by an anti-black and transphobic system of government. We are in your communities living resiliently. We desire. For many of us, we simply want to live a life of peace and joy. In other cases, we are just as ambitious as the most ambitious people you know. We are going through things that are at the same time extremely similar to you and extremely different. Our lives matter.

I was legally adopted in December 2020, which, for me, included a significant name change. I had not felt aligned with the gendered expectations of my former name for years before my adoption, but had not necessarily felt dysphoria toward it either. I feared the consequences that such a significant name change might have on my life, knowing that I had already had countless experiences with TSA pat downs due to my Black and nonbinary status and having been engaging in this research project for some time, all at the height of the coronavirus pandemic. As I have navigated updating government documents and the like, the work that I have produced here feels like an intervention that is directly necessary for my survival. Despite having an extremely fluid and ever-changing gender identity, I notice my gender constantly monitored by state institutions, for reasons that have yet to prove any relevance for how I live my life, while this monitoring simultaneously demands that I be and remain in one rigid, easily identifiable category at all times. Beyond that, I was summoned into government offices where other people in closely overlapping positions⁸ were allowed to have their needs met without the added risk that

⁸ For example, I was forced to go into a Washington DOL office in person to renew my Driver's license in relation to my name update, where most other people could renew their licenses remotely. For me, there were no appointments available near home, so my drive entailed a trek across a mountain pass during a snowstorm, all so that I could avoid the risk of driving with an expired license.

accompanied social contact. The likelihood that there will be more pandemics in the years to come makes the dangerous consequences of our current regime of surveillance on my life that much more obvious. Thus, I have spent copious time contemplating what I want for myself and how to bring such a world into being.

This paper is the result of a yearlong attempt to read critical texts alongside my legal education. I found myself drawn to the texts of celebrated Jamaican scholar Sylvia Wynter, whose scholarship focuses on Black Studies, because in law school, we often glaze over the social beliefs that guide the production and maintenance of laws, as though they were naturally occurring and not socially and politically constructed. I am fascinated by the way Wynter has described Man as “law-likely,” adhering to a set of prescribed, though narratively invented, impetuses. Wynter’s use of the phrase “law-like” condenses concepts many lawyers will find familiar, such as prescription, legislation, and judgment; and that judgment also involves understanding how certain genres or epistemes appear to be more law-like than others, and thereby how being human is indeed a praxis.⁹ From my studies, I determined to write a text that thinks jurisprudentially—that is, scientifically—about the way that law functions as a repository of codified beliefs that cluster and bear witness to broader connections between privacy, the law, and power.¹⁰ To understand these connections, I needed to embrace thinking across disciplines. Thus, the work below moves between, through, and around a multiplicity of knowledge bases. The guide quotes are intended to introduce and orient the reader to the text in ways that legal analysis alone cannot. Indeed, they embody the motion inherent in transforming theory into practice.

⁹ Decristo & Marriott, *supra* note 5, at 115–16.

¹⁰ LISA LOWE, *THE INTIMACIES OF FOUR CONTINENTS* 4 (2015).

Accordingly, I hope they allow you to join me in “the difficult labor of thinking the world anew.”¹¹

B. Overview of Argument

This comment will provide an analytical framework to correct an unjust system of lawmaking that continues to romanticize the ongoing traumas Black trans people experience. This framework is one that refuses the ongoing violence of colonization while remaining attuned to the lived experiences of Black trans people. Specifically, I develop a conceptual framework that must be used when considering acts related to identity and the surveilling of bodies. I then apply this framework to the REAL ID Act (“the Act”) and proposed reforms to it as an example of how my framework might operate in praxis. In applying this framework to the REAL ID Act’s mandate that states gather gender information on identification cards¹² and the broader regime of state surveillance and securitization, I will make explicit the consequences of our current system on Black trans vitality. I focus on the collection of gender markers because the forced categorization interpolates Black trans people into an enactment of being human that necessarily fractures any sense of self-recognition.¹³ I have chosen to talk explicitly about the experience of Black trans people because in many ways we live under a binary racial system where people are Black or nonblack. This does not mean that we cannot account for the individual experiences of various racial and ethnic identities—in fact, Wynter’s work does this well through a relational analysis—but rather that Black experience is seen as a floor of sorts; as argued by the second guide quote, the institution of slavery

¹¹ KATHERINE MCKITTRICK, *Yours in the Intellectual Struggle*, in SYLVIA WYNTER: ON BEING HUMAN AS PRAXIS 1, 7–8 (Katherine McKittrick, ed., 2015).

¹² 6 C.F.R. § 37.17(c) (2008) (“Gender, as determined by the State”).

¹³ See, e.g., Privacy International, *My ID, My Identity? The Impact of ID Systems on Transgender People in Argentina, France and the Philippines* (Jan. 15, 2021), <https://www.privacyinternational.org/long-read/4372/my-id-my-identity-impact-id-systems-transgender-people-argentina-france-and> [<https://perma.cc/4QX2-4TH4>].

has determined how humanity is defined, and all other identities function by comparing their experience to that of the slave position.

Surveillance technologies are largely unregulated by federal laws, even though many are just as destructive as weapons of mass destruction.¹⁴ In many cases, federal, state, and municipal governments extract data from their residents in ways that are dangerously unknown to the general public.¹⁵ This lack of regulation is intimately tied up with and symptomatic of our present social order's desire to surveil certain bodies in order to preserve the genre of Man as eugenically preferred.¹⁶

Moreover, I am interested in the REAL ID Act because it marks a shift in the United States that required all persons receiving an Identification Document card to submit to a universal biometric data collecting regime.¹⁷ The Act sought to increase national counterterrorism efforts by standardizing the biometric data collected by state licensing departments across the United States.¹⁸ The Act's widespread mandate, although connected to historical patterns of surveillance against Black bodies,¹⁹ was

¹⁴ See generally Sharon Weinberger, *Inside the Massive (and Unregulated) World of Surveillance Tech*, TED SALON (Nov. 2020), https://www.ted.com/talks/sharon_weinberger_inside_the_massive_and_unregulated_world_of_surveillance_tech [<https://perma.cc/W2YS-GHH7>].

¹⁵ See, e.g., *Ten Years After First Warning, Chicago's Massive Surveillance Camera System Continues to Pose an Unregulated Threat to Privacy*, ACLU ILL. (Feb 11, 2021), <https://www.aclu-il.org/en/news/ten-years-after-first-warning-chicagos-massive-surveillance-camera-system-continues-pose> [<https://perma.cc/3HRC-4VA3>]; Jackson Cote, *Who's Watching You? Unregulated Facial Recognition Technology Has Some Massachusetts Communities Pressing Pause to Protect Civil Liberties*, MASS LIVE (Feb. 27, 2020), <https://www.masslive.com/police-fire/2020/02/whos-watching-you-unregulated-facial-recognition-technology-has-many-massachusetts-communities-pressing-pause-to-protect-civil-liberties.html> [<https://perma.cc/W8AF-5HN6>].

¹⁶ See Toby Beauchamp, *Artful Concealment and Strategic Visibility: Transgender Bodies and U.S. State Surveillance After 9/11*, 6 SURVEILLANCE & SOC. 356. See also guide quote 4.

¹⁷ Beauchamp, *supra* note 16.

¹⁸ Real ID Act of 2005, Pub. L. 109–13, Div. B, 119 Stat. 302 (codified in scattered sections of 8 and 49 U.S.C.).

¹⁹ See generally SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* (2015).

also a fundamentally different way of tracking people. It has given way to the explosion of new and more deeply invasive forms of technology.²⁰ In effect, it has sanctioned a new wave of privatized security, wherein corporations who are unaccountable to the surveilled are developing and storing data in ways that outpace that of the federal government.²¹ The Act's emphasis on collecting biometric facial recognition²² has led companies like Target, Facebook, Amazon, and more to race toward developing the best biometric technologies in order to secure the corporate sustainability that is guaranteed by government funding.²³ Thus, this comment does not think of these corporations as discrete from the federal government, but rather, as institutions working together to form overall state interests. Frighteningly, some artificial intelligence skeptics have gone as far as to warn the public that algorithms created by these companies might soon be making government decisions.²⁴ Given that we know that many of these biometric surveillance technologies rely on racist, sexist, and anti-poverty artificial intelligence algorithms,²⁵ this regime poses a deep

²⁰ Weinberger, *supra* note 14.

²¹ *See id.*

²² *See generally* Marcus Smith & Seumas Miller, *The Ethical Application of Biometric Facial Recognition Technology*, 37 *AI & SOC'Y* 167–75 (2022).

²³ *See, e.g.*, RJ Pierce, *Amazon Allegedly Collected Biometric Data Without Consent In Its COVID Wellness Checks*, *TECH TIMES* (Jan. 4, 2022), <https://www.techtimes.com/articles/270025/20220104/amazon-wellness-checks-biometric.htm> [<https://perma.cc/BA97-HK8A>].

²⁴ *See* Dillon Reisman et al., *Algorithms are Making Government Decisions. The Public Needs to Have a Say*, *ACLU* (Apr. 10, 2018), <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/algorithms-are-making-government-decisions> [<https://perma.cc/HS4J-JCQX>].

²⁵ Karen Hao, *We Read the Paper that Forced Timnit Gebru out of Google. Here's What it Says*, *MIT TECH. REV.* (Dec. 4, 2020), <https://www.technologyreview.com/2020/12/04/1013294/google-ai-ethics-research-paper-forced-out-timnit-gebru/> [<https://perma.cc/H3QB-6WNE>]; Todd Feathers, *Sexist AI is Even More Sexist Than We Thought*, *VICE* (Feb. 22, 2021), <https://www.vice.com/en/article/y3gj3v/sexist-ai-is-even-more-sexist-than-we-thought> [<https://perma.cc/XK7L-28S3>]; Karen Hao, *The Coming War on the Hidden Algorithms that Trap People in Poverty*, *MIT TECH. REV.* (Dec. 4, 2020),

threat to Black trans people. As such, my paper must also focus on the overall norm/mode(l)/genre of surveillance the REAL ID Act is situated within.

Ultimately, the REAL ID Act is just one concrete example of the federal government's desire to monitor and police colonized bodies endlessly through systems of surveillance. These systems of surveillance often trap people of Black trans experience into the archipelagos of poverty, social death, and carcerality.²⁶ Absent an intervention in the underlying ideologies that produce these regimes of surveillance, we are headed toward a world of surveillance that can track individuals across the globe through DNA²⁷—which is surely a world foreclosed to Black trans vitality. Because the central modality of this source of harm involves the military industrial complex and the prison industrial complex, we must leverage interdisciplinary methods to challenge the (un)conscious codes of symbolic life/death that form the seemingly invisible conviction that biometric surveillance keeps us safe.²⁸ These methods of challenge will require that we think of surveillance as a poverty-hunger-habitat-energy-trade-population-atmosphere-waste-resource problem that stems from the genre of Man and its overrepresentation and that cannot be solved in isolation.²⁹

C. Roadmap

Section II will address background information to understand how our current framework positions Black trans people as sites of vulnerability before turning to an overview of the Act. Section III will introduce a

<https://www.technologyreview.com/2020/12/04/1013068/algorithms-create-a-poverty-trap-lawyers-fight-back/> [<https://perma.cc/P9EK-X2GM>].

²⁶ Yancy, *supra* note 4.

²⁷ Weinberger, *supra* note 14.

²⁸ See, e.g., SYLVIA WYNTER & KATHERINE MCKITTRICK, *Unparalleled Catastrophe for Our Species? Or, to Give Humanness a Different Future: Conversations*, in SYLVIA WYNTER: ON BEING HUMAN AS PRAXIS 9 (Katherine McKittrick, ed., 2015).

²⁹ See *id.* at 44.

theoretical framework proposed by Sylvia Wynter, *inter alia*, that will guide my treatment of the policy discussions in the rest of this comment. Section III.B will then explore how regimes of surveillance are always already antiblack technologies that render our lives subhuman, before closing with an examination of the ways that traditional modes of policymaking have failed to address these concerns. Section IV, relying on the frameworks discussed in Section III, will challenge current policy proposals to change the Act by exploring how they ultimately reproduce Black trans people as dysgenically chosen for damnation. Finally, Section V will attempt to grapple with these challenges by proposing a new mode of changemaking for Black trans people that recognizes our collective power to enact new ways of being that do not rely on the aspects of our present social order that continue to (re)produce the surveillance of our bodies.

My comment demands an answer to the question of who *we* are and how to best express our values. Like the Black feminist ancestors who formed the Combahee River Collective, I believe freedom, autonomy, and self-determination for Black trans people will necessitate freedom from all oppressions.³⁰ These themes will reoccur frequently throughout this paper. I hope that my intervention here will enable us to find new relational ways of being that move us “onto the possibility . . . of our fully realized autonomy of feelings, thoughts, behaviors.”³¹ Perhaps then and only then we might be able to “work toward new iterations of livability and inhabitability of this planet.”³²

³⁰ ZILLAH EISENSTEIN, THE COMBAHEE RIVER COLLECTIVE STATEMENT (1978).

³¹ Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Toward the Human, After Man, Its Overrepresentation—An Argument*, 3 CR: THE NEW CENTENNIAL REV. 257, 331 (2003).

³² Yancy, *supra* note 4.

II. BACKGROUND

This Section will explore the lived experiences of Black trans people through a statistical framework before turning to an exploration of concerns about the REAL ID Act. It takes a positivistic posture, meaning it departs from the somewhat more imaginative, fiat-oriented position in the introduction,³³ in order to make clear what is at stake for Black trans people in the status quo.

A. Life on the Liminal Side

Black trans people experience a unique set of harms that require us to reconsider the way gender is administered³⁴ in the status quo. A comprehensive survey by Black Trans Advocacy on the experiences of Black trans people reveals that these harms range from economic hardships to social stigmatization and criminalization.³⁵ The survey found that in the United States, trans people experience an overall higher amount of hardship when compared to the general population, and that Black trans people disproportionately experience the most hardship.³⁶

The economic hardships are severe. Of the Black respondents to the 2015 U.S. Transgender Survey, nearly four in ten people were living in poverty,³⁷ with 30% making less than \$10,000 per year,³⁸ and one in five respondents

³³ See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

³⁴ See generally Dean Spade, *Documenting Gender*, 59 HASTINGS L. J. 731 (2008).

³⁵ See generally S. E. JAMES ET AL., 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF BLACK RESPONDENTS (2017), <https://www.transequality.org/sites/default/files/docs/usts/USTSBlackRespondentsReport-Nov17.pdf> [<https://perma.cc/3BZY-ZYXL>].

³⁶ S. E. JAMES ET AL., 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF BLACK RESPONDENTS (2017), <https://www.transequality.org/sites/default/files/docs/usts/USTSBlackRespondentsReport-Nov17.pdf> [<https://perma.cc/3BZY-ZYXL>].

³⁷ *Id.* at 8.

³⁸ *Id.* at 9.

indicating that they were unemployed.³⁹ Even when Black trans people are able to obtain employment, we are likely to experience workplace discrimination. Seventeen percent of Black respondents reported losing a job at some point in their lives because of being transgender.⁴⁰ Workplace abuse then forces Black trans people into more high-risk income earning avenues, such as the nearly three in ten respondents who reported that they had participated in the underground economy for income at some point in their lives, including sex work, drug sales, and other forms of currently criminalized work.⁴¹ In the wake of COVID-19, these statistics have become even more stark; Black trans people are more likely to face unemployment, have work hours reduced, or struggle to pay their rent or bills due to the pandemic compared to white LGBTQ people and the general U.S. population.⁴²

In addition to employment discrimination, Black trans people also experience other markers of structural harm including homelessness, lack of access to shelter,⁴³ and inadequate social support when experiencing hardships.⁴⁴ We are also more likely to have negative experiences with medical providers.⁴⁵ This social vulnerability means Black trans people experience all forms of harassment, with nearly half of the respondents in the 2015 survey indicating they had experienced verbal or physical assaults

³⁹ *Id.* at 7.

⁴⁰ *Id.* at 11.

⁴¹ *Id.* at 9.

⁴² Sarah McBride, *HRC, PSB Research Release Data On Disproportionate Economic Impact of COVID-19 on Trans Community* (June 17, 2020), <https://www.hrc.org/news/hrc-psb-research-release-data-on-disproportionate-economic-impact-of-covid> [<https://perma.cc/YZQ8-NEF7>]; see also Madeleine Roberts, *New Data Shows Black LGBTQ People Disproportionately Suffer Adverse Economic Impact of COVID-19* (Aug. 4, 2020), <https://www.hrc.org/news/new-data-shows-black-lgbtq-people-disproportionately-suffer-adverse-economi> [<https://perma.cc/PX7F-3VQA>].

⁴³ JAMES ET AL., *supra* note 35, at 13.

⁴⁴ *Id.* at 6.

⁴⁵ *Id.* at 18–19.

at some point in their life⁴⁶ and 53% having experienced sexual assaults.⁴⁷ Like in the case of employment concerns, the wake of COVID-19 has only made it more clear that Black trans people have inadequate access to essential forms of communal care such as support networks and mental and physical health care.⁴⁸ These increased challenges have made Black trans sex workers especially vulnerable to STIs and HIV.⁴⁹ Other Black trans people have had increased barriers to Hormone Replacement Therapies, such as no longer having access to a gender affirming pharmacy or struggling to find needles and alcohol pads for medication injections.⁵⁰

The effect of these harms is amplified by states' disregard for Black trans lives, which is reflected in the way we are neglected, criminalized, over policed, and over surveilled.⁵¹ A collective of Black trans advocates has cataloged the ways that states' responses to COVID-19 explicitly neglect Black trans people.⁵² Even before COVID-19, Black trans people were overwhelmingly more likely to report violent run-ins with law enforcement.⁵³ In the 2015 U.S. Transgender Survey, 73% of respondents who had interacted with police or other law enforcement officers who thought or knew they were transgender experienced some form of mistreatment.⁵⁴ This mistreatment included being verbally harassed, repeatedly referred to as the wrong gender, physically assaulted, or sexually assaulted.⁵⁵ Notably, nonbinary Black respondents were most

⁴⁶ *Id.* at 14.

⁴⁷ *Id.* at 15.

⁴⁸ See, e.g., Megan N. Freeland, PharmD, RPh, *The Black Transgender Community Is Disproportionately Impacted by the COVID-19 Pandemic, Research Shows*, GOODRX HEALTH (Mar. 8, 2021), <https://www.goodrx.com/blog/black-trans-community-impact-covid-19/> [<https://perma.cc/WL8B-XAHY>].

⁴⁹ See *COVID-19 Call 9*, *supra* note 1.

⁵⁰ See *id.*

⁵¹ Yancy, *supra* note 4 (quoting Che Gossett).

⁵² *COVID-19 Call 9*, *supra* note 1.

⁵³ JAMES ET AL., *supra* note 35, at 16.

⁵⁴ *Id.*

⁵⁵ *Id.* at 17.

uncomfortable with police interactions, with some citing squabbles over identification documents as the cause of their discomfort.⁵⁶ Moreover, Black trans people are more likely to experience heightened scrutiny in places like airports, despite the very real trauma that often accompanies TSA pat downs.⁵⁷

Andrea Ritchie's writing on the extent of police violence against Black trans people⁵⁸ reveals that Black trans people are frequently accused of misrepresenting their gender on identification documents.⁵⁹ She has also shown how the history of gendered surveillance leaves Black trans people at risk of bodily invasion by police because they "look suspicious."⁶⁰ Ritchie explains how these interactions often serve as sites of sexual violence against Black trans bodies, including the forced stripping of wigs and bodily examinations, and one horrific example where a Black gender nonconforming person in Washington, D.C., was asked, "Why are you wearing boys' underwear? Are you a dyke? Do you eat pussy?"⁶¹ Often times, Black people, even when they do not identify as having trans experience, fail to meet the subjective expectations of gender that police uphold.⁶²

In all aspects of our existence, Black trans people are outside of what Wynter terms the "sanctified universe of obligation,"⁶³ and at close proximity to death. In fact, a 2009 report found that a trans person was

⁵⁶ *Id.* at 20.

⁵⁷ See generally, *Airport Security*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/airport-security> [https://perma.cc/5K29-PP5N].

⁵⁸ See ANDREA J. RITCHIE, *INVISIBLE NO MORE* (2017).

⁵⁹ *Id.* at 133–36.

⁶⁰ *Id.* at 128–29.

⁶¹ *Id.* at 131.

⁶² *Id.* at 135.

⁶³ Sylvia Wynter, "No Humans Involved": *An Open Letter to My Colleagues*, 1 FORUM N.H.I. KNOWLEDGE FOR THE 21ST CENTURY 42, 45 (1994).

killed every three days worldwide.⁶⁴ Trans advocacy group SisTers PGH found that the overwhelming majority of trans people murdered in 2020 were Black women of trans experience,⁶⁵ with 2020 and 2021 as the worst years on record for violence toward Black trans people.⁶⁶ This proximity to death at the hands of others often leads Black trans people to psychological distress, leading nearly half of Black trans people to contemplate or attempt suicide at some point in their lives.⁶⁷ And while this Section introduces statistics that collectively summarize all Black trans people, it is important to note that Black trans women and femmes tend to experience the highest degrees of vulnerability.

I raise the fact of our proximity to death in the hopes that I do not fetishize the deaths of my kin. I do not wish for this violence to become a naturalized way to subjectify Black trans people, wherein our symbolic death becomes “a psychic place for those who are understood within other identificatory rubrics to imagine, through [our] dying, other modes of freedom and vitality.”⁶⁸ Instead, I raise these concerns to ask what might “constitute a usable history for more livable Black and trans lives?”⁶⁹

⁶⁴ Carsten Balzer, *Every 3rd Day the Murder of a Trans Person is Reported. Preliminary results of a New Trans Murder Monitoring Project Show More than 200 Reported Cases of Murdered Trans People from January 2008 to June 2009* (July 2009), https://transrespect.org/wp-content/uploads/2016/02/TvT_TMM_July2009_Report_EN.pdf [<https://perma.cc/6M69-CL74>].

⁶⁵ *Remembering Our Dead 2020*, SISTERS PGH, <https://www.sisterspgh.org/remembering-our-dead2020#> [<https://perma.cc/8FUK-UXYX>].

⁶⁶ Serena Sonoma, *44 Trans People Killed in 2020, Marking Worst Year on Record for Transphobic Violence*, THEM. (Jan. 7, 2021), <https://www.them.us/story/44-trans-people-killed-2020-worst-year-for-transphobic-violence> [<https://perma.cc/M4GW-6HHL>].

⁶⁷ JAMES ET AL., *supra* note 35.

⁶⁸ C. RILEY SNORTON, *BLACK ON BOTH SIDES: A RACIAL HISTORY OF TRANS IDENTITY* 183 (2017).

⁶⁹ *Id.*

B. REAL ID Act

The REAL ID Act sought to increase national counterterrorism efforts by standardizing the biometric data collected by state licensing departments across the United States.⁷⁰ It was initially proposed by Representative Sensenbrenner and died on the floor, but was later attached to the 2005 Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief as a rider.⁷¹ The REAL ID Act creates uniform requirements for state IDs, an issue previously left to the states.⁷² It is noteworthy that the Act was passed through Congress with little debate (and with unanimous final approval from the Senate) four years after 9/11 as the U.S. waged war in several countries.⁷³ The ease with which the Act passed is likely attributed to the fact that this emergency spending bill funded the wars in Afghanistan and Iraq.⁷⁴

Despite how little debate occurred during its passage, the Act was articulated by its proponents as resolving an inefficient system where the variation in state laws made it difficult for federal offices to streamline their processes for verifying ID cards.⁷⁵ Thus, the Act requires that all states include the following information on their respective ID cards: name, date issued, biometrics such as a picture suitable for facial recognition, and gender.⁷⁶ The biometric data requirement created a secondary economy of surveillance with respect to image recognition software.

⁷⁰ Real ID Act of 2005, Pub. L. 109–13, Div. B, 119 Stat. 302 (codified in scattered sections of 8 and 49 U.S.C.).

⁷¹ H.R. 418, 109th Cong. (2005); H.R. 1268, 109th Cong. (2005); Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, 2005, PL 109–13, May 11, 2005, 119 Stat 231; H. Rept. 109–16; *Glossary Term: Rider*, U.S. SENATE, <https://www.senate.gov/about/glossary.htm#R> [<https://perma.cc/9M6A-PXPU>].

⁷² Real ID Act of 2005.

⁷³ Beauchamp, *supra* note 16, at 360.

⁷⁴ *Id.*

⁷⁵ H. Rept. 109–16.

⁷⁶ 6 C.F.R. § 37.

It appears more likely that the true motivation to pass the Act was the increased concern over counterterrorism efforts.⁷⁷ Congress argued that the requirement to include gender on state IDs would allow the Department of Homeland Security (DHS) to more quickly differentiate between people with similar names.⁷⁸ With regard to the corresponding federal regulations to the Act, states are given discretion to define gender for their residents.⁷⁹ Because a number of states are increasingly allowing a third gender option,⁸⁰ the practical implication is that Congress's previous argument is no longer relevant.

Many scholars have discussed the implications of the REAL ID Act,⁸¹ but very few have done so in the context of the Black trans experience. These scholars have pointed out that the Act privileges a gender binary that deeply harms trans people and that anti-terrorist sentiments ultimately promote racism and xenophobia. Toby Beauchamp, author of numerous critical texts on the surveillance of trans people, has explored the way that trans people are harmed by these concerns; he explains: “[i]t is in this cultural landscape of intensified medical, legal and social surveillance that [a DHS Advisory] warning security personnel of the gendered disguises that terrorists may appear in, the Advisory neatly fuses the threat of terrorism-in-disguise with perceived gender transgression, marking

⁷⁷ H. Rept. 109–16.

⁷⁸ H. Rept. 109–16; Beauchamp, *supra* note 16, at 356–57.

⁷⁹ 6 C.F.R. § 37.

⁸⁰ See, e.g., Rachel Savage, *Nonbinary? Intersex? 11 U.S. states issuing third gender IDs*, REUTERS (Jan. 31, 2019), <https://www.reuters.com/article/us-us-lgbt-lawmaking/nonbinary-intersex-11-u-s-states-issuing-third-gender-ids-idUSKCN1PP2N7> [<https://perma.cc/J2HE-HRWX>].

⁸¹ See, e.g., Spade, *supra* note 34; Beauchamp, *supra* note 16, at 360; Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J. L. & GENDER 491 (2016); Christine Quinan, *Gender (in)securities: Surveillance and Transgender Bodies in a Post-9/11 Era of Neoliberalism*, in SECURITY/ MOBILITY 153 (Matthias Leese & Stef Wittendorp, eds., 2017).

particular bodies as deceptive and treacherous.”⁸² Specifically, Beauchamp critiques the way that DHS promoted deviation from expected gender presentation, national identity, and bodies marked as dangerously deceptive.⁸³ Beauchamp explained that although trans people may not have been the target of the DHS Advisory, it posed a great risk to individuals who failed to conform to normative racial, class, and national presentations.⁸⁴ Complicity with the gendered expectations that accompany the REAL ID Act thereby forces trans bodies to eliminate any signs of deviant gendering and create a non-threatening body that is undetectable as trans in any way. This can mean subjecting ourselves to the violence of the medicalization of trans identities, as the healthcare industry often subjects trans people to paternalistic requirements regarding matters of transition.⁸⁵

One obvious limitation of Beauchamp’s critiques is that they cannot account for the ways that the biometric data sought by the REAL ID Act is part of a broader history of surveillance against Blackness that is further explored in Section III.B below. Throughout this history of surveillance against Blackness, one can trace the ways that surveillance links up with beliefs that Black people are slaves to irrationality⁸⁶ and likened to beasts.⁸⁷ In the case of Black trans people, this means we cannot access forms of subjectivity (freedom) that would allow our gender self-determination to register meaning in the world. Black trans scholar C. Riley Snorton articulates this as the way that Blackness and transness require that “both author and reader [fail to] suspend a demand of transparency” and “forgo a methodological operation that seeks to bring the submerged to the surface.”⁸⁸

⁸² Beauchamp, *supra* note 16, at 359.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Wynter, *supra* note 31, at 306.

⁸⁷ Yancy, *supra* note 4, (quoting Che Gossett).

⁸⁸ SNORTON, *supra* note 68, at 10.

Another limitation of Beauchamp’s focus on terrorism is a disavowal of the various modes of living engaged in by Black people. In fact, fugitive slaves had a history of relying on stealth/cross-gender ways of performing “as a contrivance for freedom.”⁸⁹ Moreover, Beauchamp ignores the way that “cross-dressing” tied to racial “passing” provided space for personal sovereignty among Black people living in the antebellum North.⁹⁰ When we overlook these stories, it ensures that we will continue to live according to the present-day order of knowledge that renders Black trans lives sites of symbolic death. This next Section will dive deeper into the processes that make such a statement true.

III. THE STATE ISN’T GOING TO SAVE US

With a vast array of social processes impacting our lives, it is important to understand how they all feed into one another. This next Section will elucidate the ways that these hardships are related to an overall normative value system that reproduces Black trans folks as dysselected, or outside the realm of humanity. Through this analysis, I hope to make evident that the REAL ID Act’s biometric requirements are not just a Black trans issue, but also an issue with the genre of Man that requires a fundamental shift in how legal scholars understand humanity.

Ultimately, the statistical data presented in Section II does a disservice to the lived experience of Black trans people because it individualizes what is in reality the product of centuries of systemic patterns. It is therefore important to pause here and clarify terminology and explain where this comment departs significantly from a normative policymaking lens before returning to the debate over the REAL ID Act. In doing so, it will become apparent that our legal system is not a place where Black trans people will

⁸⁹ *Id.* at 57.

⁹⁰ *Id.*

find liberation.⁹¹ Here, I intend to explore terms such as human, Blackness, gender, trans, and surveillance. As my analysis will reveal, deepening our understanding of how these terms are deployed to produce a normative frame of humanity that excludes Black trans people will allow trans communities to focus on strategies of survival that go beyond small legal reforms that ultimately leave the underlying causes of inequality untouched. I have chosen to emphasize these terms because legal communities often rely on these concepts in ways that are seemingly invisible, as if they might somehow pre-exist our engagement with law, when in reality we shape and control them ourselves.

A. No Humans Involved: Blackness, Transness, and the Gaze from Below

This text seeks to articulate a genealogy of Black trans surveillance that will enable us to form new answers to the question of what to do about state sanctioned violence on our bodies. By bringing these conversations together, rather than treating them as discrete from one another, we might discover new tactics for organizing.

For Sylvia Wynter, humans are hybrid beings; we are not purely biological.⁹² Humans are distinct from other forms of biological life because we narrate ourselves into existence: “[i]f our very being is always bios and logos, we are always in language, in words.”⁹³ “It is the ability of language to correlate with the physicalistic correlates of the brain that then constitutes us as human.”⁹⁴ It is the fact of this correlation, so to speak, that

⁹¹ In the words of Professor Spade, “demands for legal inclusion and recognition often reinforce the logics of harmful systems by justifying them, contributing to their illusion of fairness and equality, and by reinforcing the targeting of certain perceived ‘drains’ or ‘internal enemies,’ dividing the population into ‘the deserving’ and ‘the undeserving,’ and then addressing only the issues of the deserving.” DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 24 (11.6.2011 ed., South End Press 2011).

⁹² WYNTER & MCKITTRICK, *supra* note 28, at 34.

⁹³ Thomas & Wynter, *supra* note 6, at 13.

⁹⁴ Thomas & Wynter, *supra* note 6, at 13.

led to human auto-institution or “autopoiesis.”⁹⁵ If Wynter’s theory of autopoiesis is correct, it would mean that our DNA forms a “first set of instructions [for how to survive in the world],” while the social act of storytelling (sociogeny) forms a second set of instructions.⁹⁶ With this second set of instructions in mind, “we are no longer, as individual biological subjects, primarily *born of the womb*; rather, we are both *initiated* and *reborn* as fictively instituted inter-altruistic kin-recognizing members of each such *symbolically re-encoded* genre-specific *referent-we*.”⁹⁷ This means that our very bio-chemistry (i.e., the opiate reward and punishment neuro-chemical system of the brain) is both semantically and physically activated.⁹⁸

Therefore the human brain—part genetic instruction, part semantic instruction—leaves humans with an attraction to cosmologies or origin stories. In fact:

. . . as humans, we cannot/do not preexist our cosmogonies, our representations of our origins—even though it is we ourselves who invent those cosmogonies and then retroactively project them onto a past. We invent them in formulaic storytelling terms, as “donor figures” or “entities,” who have extrahumanly (supernaturally, but now also naturally and/or bioevolutionarily, therefore secularly) mandated what the structuring societal order of our genre-specific, eusocial or cultural present would have to be.⁹⁹

These origin stories almost always assign value of symbolic life/death that activates the opiate reward system. “The positive verbal meanings attributed to their respective modes of kind are alchemically transformed into living flesh, as its members all reflexly subjectively experience themselves, in the mimetically desirable, because opiate-rewarded, placebo

⁹⁵ *Id.* at 31–32; WYNTER & MCKITTRICK, *supra* note 28, at 26–28.

⁹⁶ WYNTER & MCKITTRICK, *supra* note 28, at 35.

⁹⁷ WYNTER & MCKITTRICK, *supra* note 28, at 9, 34.

⁹⁸ Thomas & Wynter, *supra* note 6, at 11.

⁹⁹ WYNTER & MCKITTRICK, *supra* note 28, at 36.

terms of that mode of symbolic life prescribed by the storytelling code.”¹⁰⁰ Wynter’s analysis helps to uncover the truth of our present episteme: that Man is simply an invention, and a relatively recent one in the overall timeline of human history.¹⁰¹ Man here describes the figure of *homoeconomicus* that Wynter explores in this comment’s fifth guide quote. By taking up her analysis, we might be able to unsettle Man’s disproportionate power over the distribution of resources that impacts all human survival.¹⁰²

Wynter also emphasizes the fact that we have the power to enact different and relational kinds of being, through the rewriting of our present order of truth/knowledge.¹⁰³ Another way to think of this is that Wynter suggests we are “Grammarians of our order”;¹⁰⁴ in this enactment of being human, we might refuse the common temptation to “keep our own authorship and agency opaque to ourselves.”¹⁰⁵ If it is true that words evolve us genetically, then surely we can do more than we have to interrupt systemic patterns of violence. We do not have to continue to perform roles that are actively harming our communities. By investigating both the cosmological and physical properties of human relationships, Wynter helps us develop a methodology that insists we think across disciplines rather than rely on disconnected tracts of knowledge production.¹⁰⁶

¹⁰⁰ WYNTER & MCKITTRICK, *supra* note 28, at 34.

¹⁰¹ Alexander G. Weheliye, *After Man*, 20 AM. LITERARY HIST. 321, 323 (2008).

¹⁰² “This second fallacy, that of supraculturalism, mistakes our present local culture’s representation-of-the-human-as-a-natural organism as if it were the human-in-itself, mistakes the representation for the reality, the map for the territory.” Wynter, *supra* note 63, at 49.

¹⁰³ Katherine McKittrick, Frances H. O’Shaughnessy, & Kendall Witaszek, *Rhythm, or On Sylvia Wynter’s Science of the Word*, 70 AM. Q. 867, 867 (2018). I am including all authors because Witaszek is my best friend and has greatly influenced me as a person and my work as a scholar.

¹⁰⁴ Wynter, *supra* note 63, at 55.

¹⁰⁵ Wynter, *supra* note 31, at 315.

¹⁰⁶ McKittrick, O’Shaughnessy, & Witaszek, *supra* note 103, at 868.

With respect to policies like the REAL ID Act, enacting a new mode of being human requires us to understand the historical trajectory of surveillance of Black trans bodies. While both transness and Blackness here are meant to evoke Black trans people, transness and Blackness are also performances that reify a particular way, or genre, of existing in the status quo. From this perspective, I do not wish to differentiate between how one's transness or one's Blackness may affect a Black trans person's life. Instead, Blackness and transness are different yet intimately experienced phenomena that require us to question the stories we tell ourselves about being human.¹⁰⁷

For example, Wynter's analysis helps us to understand the processes by which Black trans people are fictively made into the dysselected genre of humanity. We see this analysis play out where gender divisions, expressions, and roles, and gender-based hierarchies that determine distribution of power, violence, and wealth, are seen as natural and politically neutral products of biological and social processes.¹⁰⁸ These so-called neutral biological and social processes that define cisness and transness are deeply predicated on white narratives and logics.¹⁰⁹ Deviation from a false gender binary in appearance, behavior, or expression of characteristics associated with the gender assigned at birth leads to suspicion and presumptions of "instability, criminality, fraud and violence in police interactions."¹¹⁰

Here, this work is heavily indebted to the work of Black feminist theorists who discuss the nature of antiblack violence in the context of

¹⁰⁷ Marquis Bey, *The Trans*-ness of Blackness, the Blackness of Trans*-ness*, 4 TSQ: TRANSGENDER STUDIES QUARTERLY 275, 276 (2017).

¹⁰⁸ RITCHIE, *supra* note 58, at 127.

¹⁰⁹ L'lerret Jazelle Ailith, *When Transness Is An Illusion*, L'LERRÉT (Jan. 30, 2016), <http://www.llerret.com/when-transness-is-an-illusion>.

¹¹⁰ RITCHIE, *supra* note 58, at 127.

gender identity.¹¹¹ These theorists emphasize that gender is beyond an essentialist biological understanding of assigned sex at birth, to one that considers the processes of racialization described by Wynter, as well as gender expression.

This analysis argues that antiblackness is a significant impediment to Black trans people's experiences of gender. In fact, our contemporary understanding of gender has its roots in the slave trade.¹¹²

The Enlightenment's proposal of human subjectivity and rights which was in fact inscribed into the world the slave trade and slavery had made (Blackburn), created a vertical structure of access claims to self-representation and social participation from which African-origin people, as hereditary commodities, were a priori abjected. It is on the basis of that abjection, that the category of woman, of gender as a framework to negotiate the social, cultural and economic position of white European women was created. To accept that the very constitution of gender as a term in European early modernity was tied to a social, cultural and political system which constitutively pre-figured "wasted lives," and an extreme precariousness of what constitutes human existence, throws contemporary notions of gendered subjectivity into stark relief.¹¹³

This history leaves Black trans people without sufficient grammar to describe Black trans existence, as "Black existence becomes something other, a blend of sorts of categories that is unrecognizable as gender."¹¹⁴ This is consistent with Wynter's analysis that "gender roles are always a

¹¹¹ Here, I am thinking of the collective works of the Combahee River Collective, Angela Davis, Kimberlé Crenshaw, Saidiya Hartman, Patricia Hill Collins, and Hortense Spillers, just to name a few important and episteme shattering contributions to the field.

¹¹² Sabine Broeck, *Enslavement as Regime of Western Modernity: Re-reading Gender Studies Epistemology Through Black Feminist Critique*, 22 GENDER FORUM 3, 13 (2008).

¹¹³ *Id.*

¹¹⁴ Calvin Warren, *Calling into Being: Tranifestation, Black Trans, and the Problem of Ontology*, 4 TSQ: TRANSGENDER STUD. Q. 266, 269 (2017).

function of the enacting of a specific *genre* of being hybridly human.”¹¹⁵ This phenomenon is further demonstrated by the fourth guide quote that reflects on Black women’s labor in the chain gang in the post-13th Amendment South,¹¹⁶ wherein the technologies and methods of surveillance developed through those chain gangs are now the basis of our modern mandatory reporting and foster system that surveils Black parenting.¹¹⁷

Many authors cited in this text also caution against tying Blackness to Black/African-American bodies. Blackness, they argue, “bears a vexed and tense relationship with Black people/bodies, which is to say that there must be a highly textured conveyance of the ‘para ontological distinction’ between Blackness and the people (which is to say, more generally, the things) that are called Black.”¹¹⁸ “It is crucial to disarticulate Blackness from Black people, since not doing so accepts too easily race as a given natural and/or cultural phenomenon rather than an assemblage of forces that must continuously re/produce Black subjects as nonhuman.”¹¹⁹ In other words, Blackness is not natural—or inherent or commonsensical—to Black people.¹²⁰ This does not mean these authors separate Blackness from bodies of Black people, rather they mean, “Blackness as a poetic force is both linked to and disarticulated from Black bodies.”¹²¹ Simone Browne explores this idea further:

In this fashion, I am indebted to Stuart Hall’s unsettling of understandings of “cultural identity” that does not see the black diaspora and black experiences as static or singular, but instead as “a result of a long and discontinuous series of transformations . . .” [M]y use of the term “blackness” is to “signal blackness as a sign,

¹¹⁵ WYNTER & MCKITTRICK, *supra* note 28, at 34.

¹¹⁶ Decristo & Marriott, *supra* note 5.

¹¹⁷ MAYA SCHENWAR & VICTORIA LAW, *Policing Prisons in PRISON BY ANY OTHER NAME* 115 (2020).

¹¹⁸ Bey, *supra* note 107, at 281.

¹¹⁹ Weheliye, *supra* note 101, at 333.

¹²⁰ *Id.*

¹²¹ Bey, *supra* note 107, at 281.

one that carries with it particular histories of resistance and domination” that is “never closed and always under contestation.” Blackness is identity and culture, history and present, signifier and signified, but never fixed. As Ralph Ellison names it in *Invisible Man*, “Black is . . . an’ black ain’t.”¹²²

This caution against tying Blackness to Black people is also consistent with Wynter’s analysis. Wynter suggests that “the issue of ‘race’ and its classificatory logic . . . lies in the founding premise, on which our present order of knowledge or episteme and its rigorously elaborated disciplinary paradigms, are based.”¹²³ Such an acknowledgement is necessary because:

Black Americans are the only population group of the post-1492 Americas who had been legitimately owned, i.e., enslaved, over several centuries. Their owned and enslaved status had been systemically perceived within the ‘inner eyes’ and the classificatory logic of the earlier episteme, its hegemonic political categories and behaviour-orienting political ethic, to be legitimate and just.¹²⁴

Transness on the other hand, can be understood as “messy shit.”¹²⁵ One cannot arrive at trans precisely because it is movement, excitation, and agitation.¹²⁶ Transness is not linear, permanent, or an end—it is in fact the impossibility of these things.¹²⁷ Furthermore, transness is “a not-yet differentiated singularity from *which* distinct genders, race[s], species, sexes, and sexualities are generated in a form of relative stability.”¹²⁸ Like Blackness, transness denotes a poetic, para-ontological force that is only tangentially, and ultimately arbitrarily, related to bodies said to be

¹²² BROWNE, *supra* note 19, at 14.

¹²³ Wynter, *supra* note 63, at 47.

¹²⁴ *Id.* at 62.

¹²⁵ Bey, *supra* note 107, at 287.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ SNORTON, *supra* note 68, at 5.

transgender.¹²⁹ Therefore, the existence of Black trans people demonstrates the impossibility of finding symbolic coherency in the world.¹³⁰ I argue that this incoherency means that Black trans people deserve more space to actualize their gender identity than the status quo allows. As will be explored shortly, simply adding a third gender option on ID cards does not resolve the fundamental concerns raised in this paragraph.

Snorton's analysis of Christine Jorgensen, a white transsexual¹³¹ woman who became one of the most widely recognized transgender people in U.S. history, can be used to elaborate Wynter's Work.¹³² Through Snorton's analysis, we can see how Black trans folks are positioned "as the ostensible missing link between rational human and irrational animals."¹³³ Jorgensen's description of her transsexual experience helped to create the tropes of transgender identity against which transgender people are forced to narrate themselves.¹³⁴ Snorton fills a gap in transgender studies and transgender history scholarship by theorizing trans embodiment "in relation to the kinds of violence that inflect [B]lack and trans life, only one of which is the violence of erasure, and for which that erasure is about not an absence but a persistent and animating presence."¹³⁵ Black trans people are thereby

¹²⁹ Bey, *supra* note 107, at 277 ("So while race, class, gender, and sexuality will no doubt inform the way a person walks through the world, it will not provide a predetermined outcome as much as we might like it to. This is especially true when our politics or the leadership we endorse is limited by scenario.' In short, racial identification will not determine one's relationship to power, thus making epidermal blackness in this case not an a priori determinant of politicality. This is what Hortense Spillers, quoting George Lamming, says 'we definitively know now': 'the nature of power [is] unrelated to pigmentation, that bad faith [is] a phenomenon which [is] independent of race' (quoted in Spillers 2012: 936).")

¹³⁰ Warren, *supra* note 114, at 271.

¹³¹ Christine Jorgensen identified as a transsexual. Many folks of trans identity have moved away from this term.

¹³² See SNORTON, *supra* note 68, at 139–40.

¹³³ Wynter, *supra* note 31, at 266.

¹³⁴ SNORTON, *supra* note 68, at 157 ("mimicry" here reminds me of Wynter's use of mimetically).

¹³⁵ See *id.* at 144.

constructed as having failed to obtain homo-economicus's "mastery over their own sensory, irrational nature,"¹³⁶ so irrational that we must be governed by others;¹³⁷ somehow transness is both naturalized and denaturalized all at the same time. You see? Black trans folks are fundamentally denied an opportunity for self-determination. To live as a Black trans person means to live with "no guarantee that even if you experience yourself in self-alienating terms, you will not push that out of the mind; it shows that there is no guarantee that you cannot be assimilated into seeing yourself in normative terms."¹³⁸

I want to close this Section by reflecting on the multitude of trans identities and language to reflect gender diversity that exists in the world. I actively refuse to create a definition of gender that limits any trans person's ability to self-determine. I define self-determine as the freedom to choose who you are and how you want to live your life. When states require trans people to adhere to a bi or trifurcated gender regime, they effectively restrict trans people's ability to explore their identity freely. For more information on gender identities and the multitude of genders that exist outside of the binary, see the gender and sexuality dictionary.¹³⁹

B. Surveillance Through Time and Our Narratively Condemned Status

Using Wynter's theory of sociogyny can help us understand how surveillance is an essential component of our present social order. In order to maintain economics as the master discipline of Man that, through Malthusian scarcity, produces the social code of selected/dysselected, the concept of the human needed to be "mapped and anchored on the only available 'objective set of facts' . . ."¹⁴⁰ This objective set of facts positions

¹³⁶ Wynter, *supra* note 31, at 290.

¹³⁷ *Id.* at 306.

¹³⁸ Thomas & Wynter, *supra* note 6, at 18.

¹³⁹ See *Gender & Sexuality Dictionary*, *supra* note 2.

¹⁴⁰ Wynter, *supra* note 31, at 315.

present social arrangements as naturally occurring and thereby observable by the natural sciences.¹⁴¹ This kind of thinking is embedded into the REAL ID Act. My paper presents a relational conversation across disciplines to uncover how the surveillance of Black trans people is law-likely made justifiable by irrational thoughts about Black trans people. Having this conversation will allow us to recognize these more mundane forms of violence that Black trans people encounter.

Here, the work of Simone Browne, through her extraordinary intervention into the field of Surveillance Studies, is especially illustrative. Browne begins by framing surveillance in terms of its originary definition.¹⁴² In its most basic sense, surveillance means “oversight”; with the French prefix “sur-” meaning “from above” and the root word “-veillance” deriving from the French verb “*veiller*” and taken to mean “observing” or “watching.”¹⁴³ This definition frames the emphasis of how surveillance is studied and thought in the status quo:

[S]urveillance studies has been primarily concerned with how and why populations are tracked, profiled, policed, and governed at state borders, in cities, at airports, in public and private spaces, through biometrics, telecommunications technology, cctv[sic], identification documents, and more recently by way of Internet-based social network sites such as Twitter and Facebook . . . [L]ooking at contemporary sites of surveillance requires us to examine some “common threads” including rationalization (where reason “rather than tradition, emotion or common-sense knowledge” is the justification given for standardization), technology (the use of high-technology applications), sorting (the social sorting of people into categories as a means of management and ascribing differential treatment), knowledgeability (the notion that how surveillance operates depends on “the different levels of knowledgeability and willing participation on the part of those

¹⁴¹ *Id.* at 328–31.

¹⁴² SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 18 (2015).

¹⁴³ *Id.*

whose life-details are under scrutiny”), and urgency (where panic prevails in risk and threat assessments, and in the adoption of security measures, especially post-9/11).¹⁴⁴

For Browne, “Sociogeny, or what Wynter calls ‘the sociogenic principle,’ is understood as the organizational framework of our present human condition that names what is and is not bounded within the category of the human, and that fixes and frames Blackness as an object of surveillance.”¹⁴⁵ An understanding of the ontological conditions of Blackness is integral to developing a general theory of surveillance and, in particular, “racializing surveillance—when enactments of surveillance reify boundaries along racial lines, thereby reifying race, and where the outcome of this is often discriminatory and violent treatment.”¹⁴⁶ Browne’s insight into racialized aspects of surveillance allows us to see how new technologies, such as automated facial recognition, drones, or biometric identification cards, are ongoing developments of antiblackness sustaining of our present order.¹⁴⁷

Browne’s work connects biometric surveillance to the transatlantic slave trade through her review of the Brooks slave ship, which employed “biometric identification by branding the slave’s body with hot irons, slave markets and auction blocks as exercises of synoptic power where the many watched the few, slave passes and patrols, manumission papers and free badges, black codes and fugitive slave notices.”¹⁴⁸ As the introduction to this paper discusses, the passage of the REAL ID Act has only bolstered biometric technologies. Because people have developed these very technologies in an environment hostile to Black life, these technologies will continue to produce these same outcomes.

¹⁴⁴ *Id.* at 13–14.

¹⁴⁵ *Id.* at 7.

¹⁴⁶ *Id.* at 8.

¹⁴⁷ *Id.* at 8–9.

¹⁴⁸ *Id.* at 12.

The incentive for private companies to produce these biometric surveillance technologies is cause for deep concern. New surveillance differs from traditional forms of social control in ten specific characteristics: (1) it is no longer impeded by distance or physical barriers; (2) data can be shared, permanently stored, compressed, and aggregated; (3) it is often undetected, meaning that surveillance devices can either be made to appear as something else or can be virtually invisible; (4) data collection is often done without the consent of the target; (5) surveillance is about the prevention and management of risk through predictive or anticipatory means; (6) it is less labor intensive than before, opening up the possibility for monitoring that which was previously left unobserved; (7) it involves more self-surveillance by way of wearable computing or “electronic leashes” such as fitness trackers or other means by which people come to monitor themselves; (8) the presumption of guilt is assigned to some based on their membership within a particular category or grouping; (9) technological innovations have made for a more intensive and interiorizing surveillance where the body is concerned, for example, with voice analysis that is said to measure stress as a way to differentiate between lies and truths; and (10) it is now so intense and with reduced opportunities to evade it that “the uncertainty over whether or not surveillance is present is an important strategic element.”¹⁴⁹

Returning to the question of surveillance and Blackness and the specific experiences of Black trans people, it is important to understand the concept of the human eye as a “body-borne camera” that fixes and frames the Black subject within a “rigid and limited grid of representational possibilities.”¹⁵⁰ In other words, these are ways of seeing and conceptualizing Blackness through stereotypes, abnormalization, and other means that impose limitations, particularly in spaces shaped for whiteness.¹⁵¹ The inevitability

¹⁴⁹ *Id.* at 14–15.

¹⁵⁰ *Id.* at 20.

¹⁵¹ *Id.* at 20.

of this process would suggest that the REAL ID Act effectively condones this form of surveillance on Black trans bodies.

Race here operates in an interlocking manner with transness among intersections.¹⁵² Returning to Beauchamp, “Medical surveillance focuses first on individuals’ legibility *as* transgender, and then, following medical interventions, on their ability to *conceal* any trans status or gender deviance.”¹⁵³ As articulated above, ideas about race and femininity created the conditions for these women’s bodies to become sites of medical experimentation.¹⁵⁴ This effectively forces certain populations to assimilate into white modes of being, consistent with Snorton’s analysis above.

Wynter provides insights into the process by which society forces certain populations to mirror white society, or in the case of the Black trans experience, forced to go stealth. This force leaves Black trans folks struggling to prove that they are not the dysselected.¹⁵⁵ “The impetus for state classification and surveillance of deviant bodies has increased dramatically in the context of amplified monitoring of immigration and heightened nationalist security measures justified by the rhetoric of the War on Terror.”¹⁵⁶ This process can explain the ways that “we are conscripted into a carceral version of safety and a carceral version of justice that is part of the social contract and part of social life.”¹⁵⁷

Again, Ritchie’s genealogy of police violence against gender diverse people fills in a much-needed gap in this argument. Ritchie’s work explores how tactics such as sumptuary laws, designed to regulate habits on moral or

¹⁵² *Id.* at 17.

¹⁵³ Beauchamp, *supra* note 16, at 357.

¹⁵⁴ See SNORTON, *supra* note 68, at 33.

¹⁵⁵ See Wynter, *supra* note 31, at 325.

¹⁵⁶ Beauchamp, *supra* note 16, at 360.

¹⁵⁷ Akwugo Emejulu et al., *Revolution is Not a One-Time Event*, THE WHITE REV. (June 2020), <https://www.thewhiterreview.org/feature/revolution-is-not-a-one-time-event-2/> [<https://perma.cc/SH4D-EYCM>].

religious grounds, have transformed gendered policing.¹⁵⁸ Sumptuary laws often evolved to supplement and replace laws “prohibiting enslaved people and people of lower classes from wearing clothing associated with ruling classes.”¹⁵⁹ These laws required police to scrutinize bodies in the public sphere for any disjuncture of gendered clothing and sexed body.¹⁶⁰ Officers even focused on things like the size of a suspect’s hands,¹⁶¹ which runs parallel to Browne’s argument about the optical function of the human eye. What’s worse is that many people commonly understood sumptuary laws as an attempt to neutralize threats to male dominance posed by reform feminists.¹⁶² The early versions provided some of the first examples of gender searches, wherein the government subjected certain people to violative actions such as the removal of wigs and jailhouse medical examinations to reveal their “true” body parts.¹⁶³

Ritchie tracks this history into the present day, including several examples of policy violence against trans folks that I have written about in Section II.A. This tracing demonstrates that the REAL ID Act is yet another excuse for police to stop and frisk Black gender nonconforming people, one that stems from the “legacy of presumptions that people whose appearance is deemed gender nonconforming are inherently fraudulent and mentally unstable.”¹⁶⁴ Perhaps even more disturbing is that law enforcement agents frequently conduct gender checks aimed solely at determining an individual’s physical characteristics to assign gender or, in some cases, for pure sexual gratification;¹⁶⁵ this is an example of what Wynter means by the biochemical response or opiate reward. The idea that trans people are

¹⁵⁸ ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* 128 (2017).

¹⁵⁹ *Id.* at 128–29.

¹⁶⁰ *Id.* at 129.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*; Beauchamp, *supra* note 16, at 358.

¹⁶⁴ RITCHIE, *supra* note 158, at 132.

¹⁶⁵ *Id.* at 138.

inherently fraudulent is a cover for how people are often embarrassed for their sexual attraction to trans people,¹⁶⁶ which again speaks to the opiate reward-punishment system. Moreover, such policies point to how concealing and revealing trans identity actually depend on one another, demonstrating the impossibility of thinking of these actions as binary opposites.¹⁶⁷

C. *Black Trans Politics and the Failure of Normative Policy Making*

We are, in fact, still in that awful normal that is narrativized as minor injustices, or social ills that would get better if some of us waited, if we had the patience to bear it, if we had noticed and were grateful for the miniscule “progress” etc . . . Well, yes, this normal, this usual, this ease was predicated on dis-ease. The disease was always presented as something to be solved in the future, but for certain exigences of budget, but for planning, but for the faults of “those” people, their lack of responsibility, but for all that, there were plans to remedy it, in some future time. We were to hold onto that hope and the suspension of disbelief it required to maintain “normal.”¹⁶⁸

- Dionne Brand

To bring back a note from the introduction, if Wynter is correct, we must think through the law-likely projects that sustain Black trans people as the dysselected. As I hinted at in Section II, I ask here, “what do specific manifestations of (black) suffering at the hands of political brutalization tell us about the category of human as such?”¹⁶⁹ This question poses a challenge to my work and reading of Wynter because ultimately, “what is at stake is not so much the lack of ‘language’ per se or a jargon of authenticity, but the

¹⁶⁶ *Id.* at 139.

¹⁶⁷ Beauchamp, *supra* note 16, at 361.

¹⁶⁸ Dionne Brand, *Dionne Brand: On Narrative, Reckoning and the Calculus of Living and Dying*, TORONTO STAR (July 4, 2020), <https://www.thestar.com/entertainment/books/2020/07/04/dionne-brand-on-narrative-reckoning-and-the-calculus-of-living-and-dying.html> [<https://perma.cc/QYA4-YS5Y>].

¹⁶⁹ Alexander G. Weheliye, *After Man*, 20 AM. LITERARY HIST. 321, 325 (2008).

kinds of dialects available to the subjected, since these languages, imaginaries, dreams, shrieks, etc., sound nothing less than differently pitched humanities.”¹⁷⁰ Moreover, if long-time law professor and civil rights activist Derrick Bell’s argument about convergence politics is true, Black trans people must find ways outside of the state to meet our material needs. Here, I am reminded of the guide text from Black trans activists who discuss consistent neglect from the federal government. Brand’s critique of progress narratives then helps to illustrate that this governmental neglect is not accidental but part of a pattern to design laws that uplift certain populations while actively harming others.

It is obvious that no single act of policy is going to address all the concerns laid out in this comment.¹⁷¹ A Black trans politic would demand more than legal recognition and inclusion, seeking instead to transform current logics of state, civil society, security, and social equality.¹⁷²

We have already explored, indirectly, how law functions by way of constitutive exemptions of Black trans people from the state’s political grammar of protection. Indeed, the law’s language systematically produces the bottommost role of Black Americans in the United States, since it is the ostensible proof of their alleged dysselected “undeservingness” that then functions as the central psychic compensatory mechanism for the white working middle class. At the same time, this mechanism induces Black trans folks to continue to see and experience ourselves as also being, in terms of class, “dysselected by evolution”—a perception that induces us to accept our class-subordinated status and the hegemony of the middle classes.¹⁷³ Unfortunately, this kind of self-regulation logically excuses state neglect as simply the “law of nature”—a law that also calls for the category

¹⁷⁰ *Id.* at 332.

¹⁷¹ SPADE, *supra* note 91, at 68–69.

¹⁷² *Id.* at 19.

¹⁷³ Wynter, *supra* note 31, at 324.

of the poor to be left by themselves, unaided by any measures taken by the state in order that the “iron laws” of nature can weed out its members.¹⁷⁴

Also embedded here is a rejection of progress narratives that teach us that “the United States is a democracy in which law and policy derive from what a majority of people think is best, that the United States used to be racist and sexist but is now fair and neutral thanks to changes in the law, and that if particular groups experience harm, they can appeal to the law for protection.”¹⁷⁵ Borrowing from the work of professor and activist, Dean Spade, Black trans politics would attempt to reconcile the reality that the United States is a settler colony and a racial project, founded and built through genocide and enslavement,¹⁷⁶ and reject neoliberal policy changes such as privatization, trade liberalization (globalization), labor and environment deregulation, the elimination of health and welfare programs, increased immigration enforcement, and the expansion of prisons and imprisonment.¹⁷⁷

Even as it is important to consider failings of the neoliberal processes above, according to Wynter, it is also an incomplete frame; the normative justification for Black trans neglect is more than economic. It also entails the shift to an order of consciousness that centers homoeconomicus insofar as capitalism is itself a function of the reproduction of Man.¹⁷⁸ Because this order of knowledge relies on the master discipline of economics, it is instructive to understand how neoliberalism motivates the bio-chemical responses that socialize us. Thus, Spade can also help us understand more about the nature of population management and disciplinary forms of control, ultimately speaking to the law-like methods of storytelling that inform globalization.

¹⁷⁴ *Id.* at 320.

¹⁷⁵ SPADE, *supra* note 91, at 2.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 13.

¹⁷⁸ Thomas & Wynter, *supra* note 6, at 1, 16, 29.

For Spade, population management describes institutional arrangements that determine which lives are guaranteed security and insecurity through the unequal distribution of resources.¹⁷⁹ It functions by naturalizing and erasing the historical and contemporary conditions that lead different groups to have starkly dissimilar life chances.¹⁸⁰

Under the second form of control, disciplinary control, individual self-regulation and auto-policing displace directly coercive means of control; however, corporeal violence and looming threats of state violence do still bolster these forms of control. This paper has already explored this phenomenon in the discussion of sumptuary laws, i.e., the expectation that certain items of clothing are limited to a specific gender and the medicalization of trans identities, where medical and administrative systems force trans people to conform to rigid gender norms in order to gain access to medical technologies that support gender transition, such as hormone replacement therapy and gender-affirming surgeries.¹⁸¹ By underscoring population management and disciplinary control, we might emphasize the decentralization of power and the distribution of certain practices, ways of knowing, norms, and technologies in myriad ways, rather than only from one single person or institution,¹⁸² which has profound implications for organizing communities.

I turn again to Andrea Ritchie to explore how this understanding of disciplinary and population control has informed Black trans resistance strategies. Ritchie has found that police accountability groups that attempt to reform police treatment of Black trans people, such as efforts requiring police to use preferred names and pronouns, or body cams, are seldom

¹⁷⁹ SPADE, *supra* note 91, at 57.

¹⁸⁰ SPADE, *supra* note 91, at 67.

¹⁸¹ See Beauchamp, *supra* note 16, at 357–58

¹⁸² SPADE, *supra* note 91, at 2.

followed and ultimately re-legitimize surveillance as a fair strategy of police forces.¹⁸³

As the impacts of reformist interventions discussed above show, it is not enough to simply increase Black trans representation in policy-making spaces. Here, Wynter's work is again especially instructive, helping us understand how the genre of Man and its logic of whiteness frames and minimizes opportunities for more radical acts:

Look back at all the “Studies” that were called for, all the “Studies” that have come up. Each is saying, “Look at how I’ve been negatively represented.” Suppose we ask, “What are the rules that govern those representations, and why?” You then begin to have the same “scientific” knowledge not simply of the physical and biological universe but of this third level of ontogeny-*sociogeny* existence. It would be “scientific” in a way quite different.¹⁸⁴

Because antiblackness and white supremacy are logics of making the human, they are always already a political project.¹⁸⁵ They are distinct from, but often act in concert with, the political projects of making and sustaining nation, ethnicity, and ethnic nationalisms.¹⁸⁶ Most importantly, I return to Wynter's analysis that certain humans in our world are constructed as dysselected, irrational, and intentionally excluded and subject to Malthusian disposal—making the vast majority of policy-making spaces hostile for us.

The REAL ID Act is one example of a policy that relies on these white supremacists' logics because it sustains a ruse of safety even though it provides very little safety in actuality, and despite the ways gender surveillance continues to harm Black trans people.¹⁸⁷ The state can point to

¹⁸³ See RITCHIE, *supra* note 158, at 140–42.

¹⁸⁴ Thomas & Wynter, *supra* note 6, at 17.

¹⁸⁵ Christina Sharpe, *Lose Your Kin*, THE NEW INQUIRY (Nov. 16, 2016), <https://thenewinquiry.com/lose-your-kin/p> [<https://perma.cc/24RE-Y5UD>].

¹⁸⁶ *Id.*

¹⁸⁷ See generally, Beauchamp, *supra* note 16, at 361.

what it considers the incoherence of Black trans identity as a justification for extending an unjust policy by positioning Black trans people as outside of the range of convergence. This pattern connects deeply to the way that the transatlantic slave trade used “the internment of bodies that lacked reason/rationally . . . [to build a] new social order that was undergirded by bodily or homo-ontological principles of sameness and difference.”¹⁸⁸

As discussed, the slave trade market is where the government developed a significant portion of our legal policies around surveillance.¹⁸⁹ Unfortunately for Black trans people, “the slave trade’s logics and technologies have intensified, expanded, and become more insidious.”¹⁹⁰ A politic that centers Black trans people would recognize that the ongoing development of surveillance techniques supports these ongoing acts of violence and is part and parcel to a pattern of casting Black people as the dysselected of humanity.

To refuse to align Black trans politics with these ongoing acts of violence is an opportunity to exercise creativity and imagination. To the extent that Black trans desire exceeds the frame of civil rights and political emancipation to find expression in quotidian acts labeled “fanciful,” “exorbitant,” and “excessive,” I view this as a successful departure from the bourgeois expectations that I have critiqued.¹⁹¹ And this is a task that those engaged in a Black trans politic must practice to bring about a different way of being.¹⁹² This move might help us to convert theory into praxis.

¹⁸⁸ Tiffany Jeannette King, *In the Clearing: Black Female Bodies, Space and Settler Colonial Landscapes* 37 (2013) (Ph.D. dissertation, Univ. of Md.) (on file with the Digi. Repository, Univ. of Md.).

¹⁸⁹ Stephen Dillon, *Possessed by Death: The Neoliberal-Carceral State, Black Feminism, and the Afterlife of Slavery*, 2012 *RADICAL HIST. REV.* 113, 118 (2012).

¹⁹⁰ *Id.*

¹⁹¹ SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA* 13 (1997).

¹⁹² *Id.* at 13–14.

IV. TRADITIONAL LEGAL CHALLENGES

Law reform must never constitute the sole demand of trans politics. If we seek transformation that is more than symbolic and that reaches those facing the most violent manifestations of transphobia, we must move beyond the politics of recognition and inclusion.¹⁹³

- Dean Spade, NORMAL LIFE

We live in a world that demands other niggas to eat your flesh, consume your labor, drain you of care work, sacrifice your safety for theirs, mannequin your radical politic, perform the fight for freedom, and then let you die to uphold liberalism because it's easier than watching everything burn. It's easier than accountability. It's easier than violence against the state. It's easier than intervening within intracommunity harm. It's easier than being honest about the fact that most of us aren't ready to be free by any means necessary. It's easier than freedom because freedom demands immediate and nonnegotiable death. And niggas want to live, even if they have to kill freedom and other niggas; even if it means they're already dead.¹⁹⁴

- Hunter Shackleford, The Slave Harriet Would've Shot

The central question facing the latter portion of this comment is how to create a world where gender is not subject to state surveillance. Communities have organized around several efforts worth further exploration.¹⁹⁵

¹⁹³ SPADE, *supra* note 91, at 28.

¹⁹⁴ Hunter Shackleford, *The Slave Harriet Would've Shot: On Killing the Abolition Mammy*, WEAR YOUR VOICE (Mar. 5, 2021).

¹⁹⁵ See generally Sam Stanton, *Here's Why Every Trans Person Deserves Access to a Corrected ID*, OUT MAGAZINE (Nov. 20, 2019), <https://www.out.com/transgender/2019/11/20/why-every-single-trans-person-needs-corrected-id> [<https://perma.cc/T5YR-LCDV>]; Rachel Savage, *Nonbinary? Intersex? 11*

I am only one person, who does not have a final say on what is or is not Black trans politics. Instead, I am proposing that centering Black trans people will allow us to raise critical questions about these policy proposals. This Section discusses how things are but does not actively invest in the neoliberal principles that undergird many of its sources. By now, I hope it is clear why I am apprehensive toward what follows. As such, my treatment here does not over emphasize obsessions with the particularities of these policies so as not to grant legitimacy to the normative modes of policy making that they are indicative of.

This Section will discuss the current limitations posed by the REAL ID Act and explore (1) amending the Act; (2) state challenges to the Act; (3) increased use of the “X” and other gender markers; and (4) municipal ID programs that exclude a gender marker. I want to underscore that these proposals are ultimately inadequate to resolve the broader structural patterns that my work is explicitly disinvesting from, primarily because they are overtly connected to the dominant modes of policy making that continue to reproduce antiblack and antitrans violence.

A. Amend the REAL ID Act

The REAL ID Act should be amended to remove the requirement for states to collect gender or any other of its biometric data requirements. There are two possible ways to amend the Act’s requirements.

First, DHS could enact a Notice of Proposed Rulemaking (NPRM) to adopt minimal requirements for IDs.¹⁹⁶ Section 205 of the REAL ID Act

U.S. states issuing third gender IDs, REUTERS (Jan. 31, 2019), <https://www.reuters.com/article/us-us-lgbt-lawmaking/nonbinary-intersex-11-u-s-states-issuing-third-gender-ids-idUSKCN1PP2N7> [<https://perma.cc/FTV8-ZFDJ>]; Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J. L. & GENDER 491 (2016).

¹⁹⁶Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5, 290-93 (Jan. 29, 2008) (codified at 6 C.F.R. § 37).

vests the Secretary of Homeland Security with the authority to make regulations and set standards.¹⁹⁷ The process involves a period of proposal and public comment.¹⁹⁸ While DHS does have general rulemaking authority, Section 202(b) of the Act also explicitly requires states to include gender markers on IDs.¹⁹⁹ Thus, the rulemaking process may not be effective in this instance.

Second, Congress could amend the REAL ID Act to lessen its requirements. Doing so would allow states greater flexibility over what information gets collected, but without the burdensome lawsuits I analyze below.²⁰⁰ Given the relative popularity of the REAL ID Act at the time of its passage,²⁰¹ there may not be a great deal of support for this change, but it is nevertheless important to point out that Congress does have the authority to make such a change.

In the end, this strategy is unlikely to improve the material conditions of Black trans people. The gender marker requirement is based on an irrational understanding of gender performance, gender expression, and gender identity that continues to erase the existence of trans people.²⁰² That the Real ID Act—having been created as part of a war funding bill and approved in a climate of fear and militarization—attempts to render individual identities static and make them more accessible to state agencies speaks to the ways that multiple, ambiguous, or shifting identities are viewed as menacing and risky on a national scale.²⁰³ The assumption that people are and remain one gender for their whole life continues to naturalize Black trans people as dysselected. Beyond the very real forms of

¹⁹⁷ REAL ID Act of 2005, Pub. L. 109–13, § 205.

¹⁹⁸ 5 U.S.C § 551 et seq.

¹⁹⁹ REAL ID Act, § 202(b).

²⁰⁰ See discussion *infra* Section IV.B.

²⁰¹ Cf. *Final Vote Results For Roll Call 31*, <https://clerk.house.gov/evs/2005/roll031.xml> [<https://perma.cc/6NRQ-LNUL>].

²⁰² Beauchamp, *supra* note 16, at 358.

²⁰³ Beauchamp, *supra* note 16, at 361.

structural violence that this argument reinforces, it also lacks coherence because gender is not static,²⁰⁴ and often an individual's gender expression may not match the state's subjective conception of binary genders, or even third genders, where applicable.²⁰⁵ Gender ambiguity often creates so much confusion even among nonwhite people of cisgender experience, who are often at risk of increased surveillance and governing.²⁰⁶ The federal government's insistence on surveilling gender simply does not increase its ability to capture terrorists nor justifies the added burden that forced categorization of one's gender identity creates for Black trans people.²⁰⁷ Thinking back to the ways that sumptuary laws ultimately just enforce Christian morality, it seems as if surveilling gender serves an ideological function, rather than a *legitimate* government purpose.

B. State Challenges to the REAL ID Act

In the years following Congress's enactment of the REAL ID Act, many states, including Washington,²⁰⁸ passed legislation that allowed various state agencies to sue the federal government on their behalf, based on various concerns with the Act.²⁰⁹ In Washington, the state legislature cited

²⁰⁴ Spade, *supra* note 34, at 738.

²⁰⁵ Quinan, *supra* note 81, at 163–65; Beauchamp, *supra* note 16, at 358; Emily Anne Parker, *The Human as Double Bind: Sylvia Wynier and the Genre of "Man"*, 32 J. SPECULATIVE PHIL. 439 (2018) (Man2 overdetermines our views on gender); see generally Vera Papisova, *What It Means to Identify as Agender: Thinking Beyond the Binary*, TEEN VOGUE (Jan. 20, 2016), <https://www.teenvogue.com/story/what-is-agender> [<https://perma.cc/F862-2RPE>].

²⁰⁶ Quinan, *supra* note 81, at 153.

²⁰⁷ *Id.* at 158–63; Paisley Currah & Tara Mulqueen, *Securitizing Gender: Identity, Biometrics, and Transgender Bodies at the Airport*, 78 SOC. RSCH. 557 (2011); JAMES ET AL., *supra* note 35, at 20–21.

²⁰⁸ See, e.g., WASH. REV. CODE § 46.20.1911 (2007) (authorizing the Washington Attorney General to challenge the legality or constitutionality of the REAL ID Act of 2005).

²⁰⁹ The Impact of Implementation: A Review of the REAL ID Act and the Western Hemisphere Travel Initiative, Hearing Before the Sen. Subcomm. on Oversight of Government Mgmt., the Fed. Workforce, & the District of Columbia, 110th Cong. 5 (2008) (statement of Rep. Donna Stone, Del. General Assembly, Nat'l Conference of

financial issues related to bringing their IDs into compliance,²¹⁰ while Montana, Arkansas, and Nebraska cited concerns about data privacy.²¹¹ While most states eventually abandoned their legal claims due to increased pressure to comply with the Act from DHS,²¹² these lawsuits offer a valuable model for states to pursue legal challenges based on the Act's gender requirement.

Prior to the passage of the REAL ID Act, a national ID program was regularly rejected.²¹³ Despite the 20th century's explosion of state level identification card programs, states had no interest in federal guidance over their programs.²¹⁴ States objected to the REAL ID Act as an unfunded mandate that impermissibly "commandeers" and coerces states to serve federal objectives, an unconstitutional encroachment by the Federal government under the Tenth Amendment.²¹⁵ When Congress forces state

State Legislatures) [hereinafter NCSL Congressional Testimony 2008]; Todd B. Tatelman, Cong. Research Serv., *The REAL ID Act of 2005: Legal, Regulatory, and Implementation Issues* 6–8 (2008).

²¹⁰ See WASH. REV. CODE § 46.20.1911(1) (2007); "EXECUTIVE DEPARTMENT—DRIVERS LICENSES—RULES AND REGULATIONS" 2007 Wash. Legis. Serv. Ch. 85 (S.S.B. 5087) (WEST) WASHINGTON 2007 LEGISLATIVE SERVICE 60th Legislature, 2007 Regular Session.

²¹¹ *Montana Is Trying to Fight Off the National ID Card*, Mont. Law. 6 (2007); H.B. 2528, 86th Gen. Assem., Reg. Sess. (Ark. 2007); Leg. Res. 28, 100th Leg., 1st Reg. Sess. (Neb. 2007).

²¹² Press Release, DHS Press Office, DHS Releases Phased Enforcement Schedule for REAL ID (Dec. 20, 2013), <http://www.dhs.gov/news/2013/12/20/dhs-releases-phased-enforcement-schedule-real-id> [<https://perma.cc/597G-9UUF>].

²¹³ Jim Kouri, *Social Security Cards: De Facto National Identification*, AM. CHRON. (Nov. 29, 2005), <http://www.americanchronicle.com/articles/3911> [<https://perma.cc/6N4J-Q5AX>]. In 1971, a SSN task force chose not to expand Social Security Cards into a national ID card. *Social Security Number Policy Chronology*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/ssn/ssnchron.html> [<https://perma.cc/P6MU-NZX9>].

²¹⁴ Kouri, *supra* note 213.

²¹⁵ NCSL Congressional Testimony 2008, *supra* note 209, at 6; Shirley Lin, *States of Resistance: The Real Id Act and Constitutional Limits Upon Federal Deputization of State Agencies in the Regulation of Non-Citizens*, 12 N.Y. CITY L. REV. 329, 349 (2009); *New York v. United States*, 505 U.S. 144, 161 (1992) ("As an initial matter, Congress may not simply 'commandeer[r] the legislative processes of the States by directly

governments to bear the financial costs and implementation of a federal regulatory program, budgetary issues and political accountability for any excessively “burdensome” or “defective” federal law unfairly falls upon the states.²¹⁶

A second area for legal challenges involves a number of questions regarding the federal government’s purpose for collecting gender information. First, gender is an area that has traditionally been left up to the states.²¹⁷ Second, the fluidity of gender identity may mean that the Act as written actively forces state governments to violate the Equal Protection Clause by denying their residents the right to gender self-determine.²¹⁸ The fundamental liberties protected by the Fourteenth Amendment’s Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.²¹⁹ Here, it could be argued that states have no authority to impose personal identity onto its residents and yet, Congress has effectively forced them to do so.

If successful, state-level lawsuits would be beneficial because they would allow states greater flexibility in determining the markers they include on their ID cards. Unfortunately, momentum to challenge the Act has declined since all states are now compliant with the Act,²²⁰ suggesting that this

compelling them to enact and enforce a federal regulatory program.”) (quoting *Hodel v. Virginia Surface Mining & Reclamation*, 452 U.S. 264, 288 (1981)). For a detailed analysis regarding the unconstitutionality of the REAL ID Act under *New York*, see Michael J. Allen, *A Choice That Leaves No Choice: Unconstitutional Coercion Under REAL ID*, 32 SEATTLE U. L. REV. 231, 243–56 (2008).

²¹⁶ Lin, *supra* note 215, at 350; *Printz v. United States*, 521 U.S. 898, 930 (1997).

²¹⁷ See Julie A. Greenberg, *Beyond the Binary: Constitutional Challenges to Male/female Sex Classification Systems*, 41 T. JEFFERSON L. REV. 195 (2019).

²¹⁸ *Id.*

²¹⁹ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (citing *Eisenstadt v. Baird*, 405 U. S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U. S. 479, 484–486 (1965)).

²²⁰ *All U.S. States Now Compliant Ahead of REAL ID Deadline*, DHS (Sept. 10, 2020), <https://www.dhs.gov/news/2020/09/10/all-us-states-now-compliant-ahead-real-id-deadline> [<https://perma.cc/RS7H-8S6F>].

strategy is unlikely to gain traction from state legislatures. Given the unlikelihood that a broader coalition will develop around this issue, the pessimism Derek Bell has expressed toward convergence politics suggests this strategy would fail.

C. Increase Gender Marker Options

Many states have begun to add an additional gender option for ID applicants, typically marked by an X.²²¹ This is permitted because the relevant CFR allows for states to determine how they define gender.²²² Therefore, states could take advantage of this flexibility by increasing the number of gender markers they allow on ID cards.

Ultimately, this strategy is inadequate to resolve this paper's primary concerns for a few reasons. First, it still involves government surveillance of gender identity, which is antithetical to the thesis that gender should not be subject to administrative regulation.²²³ This surveillance will always target people of color but especially Black people of trans experience, as demonstrated by the geneology of gendered surveillance above.

Second, adding an X merely codifies a third gender, but there is no static definition of trans, and no limit to the number of gender identities in existence, thus ensuring a formal exclusion of new, emergent, gender

²²¹ Rachel Savage, *Nonbinary? Intersex? 11 U.S. States Issuing Third Gender IDs*, REUTERS (Jan. 31, 2019), <https://www.reuters.com/article/us-us-lgbt-lawmaking/nonbinary-intersex-11-u-s-states-issuing-third-gender-ids-idUSKCN1PP2N7> [<https://perma.cc/GP5M-PECH>]; Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J. L. & GENDER 491 (2016); Ragini Gupta, *'Nonbinary Genders are Valid': Washington State Begins Issuing Licenses with Gender Marker 'X'*, CROSSCUT (Nov. 14, 2019), <https://crosscut.com/2019/11/nonbinary-genders-are-valid-washington-state-begins-issuing-licenses-gender-marker-x> [<https://perma.cc/8DY4-4PLN>].

²²² 6 C.F.R. § 37.17(c) ("Gender, as determined by the State").

²²³ Spade, *supra* note 34, at 738, 804.

identities and descriptions.²²⁴ While one’s status as a trans person is accurately understood as an immutable characteristic,²²⁵ it is also true that gender fluidity is a common way that trans people experience their identities.²²⁶

Third, it assumes that everyone has a gender, which necessarily erases agender people.²²⁷

Fourth, for many Black trans people, there is a fear that the X will increase their proximity to transphobic police interactions.²²⁸ And more generally, they feel that a nonbinary marker is more likely to out them when using their IDs for essential life tasks.²²⁹

Fifth, it often creates more administrative hurdles than it resolves. Until federal agencies like the Social Security Administration also change their policies, a third gender option will continue to restrict trans folks’ abilities to take advantage of various state programs.²³⁰ That said, the fact that there are so many administrative hurdles involved when changing one’s gender identity demonstrates the need for more flexible approaches.

The best version of this policy likely leaves gender as an open box to be written in by the recipient of the ID card, but even this solution assumes that all trans people have access to the same resources, and that there is

²²⁴ *Id.* at 803 (“Gender, then, is not just unstable on the documents of transgender people who are directly impacted by the inconsistent policies described in Part III, but is unstable and unreliable as an indicator of any particular ‘truth’ across the entire system.”)

²²⁵ See Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 542–43 (2016).

²²⁶ BIANCA D.M. WILSON ET AL., THE WILLIAMS INST. AND UCLA CTR. FOR HEALTH POL’Y RSCH., CHARACTERISTICS AND MENTAL HEALTH OF GENDER NONCONFORMING ADOLESCENTS IN CALIFORNIA (2017).

²²⁷ Papisova, *supra* note 205.

²²⁸ Kristin Lam, *More than 7,000 Americans have gender X IDs, a victory for transgender rights. Is it a safety risk, too?*, USA TODAY (Aug. 8, 2019), <https://www.usatoday.com/story/news/nation/2019/08/08/nonbinary-gender-ids-momentum-intersex-state-driver-licenses/1802059001/> [<https://perma.cc/MPD6-LESG>].

²²⁹ *Id.*

²³⁰ Beauchamp, *supra* note 16, at 359; Spade, *supra* note 34, at 761–64.

some benefit to the government having access to some of the most intimate information about us.

D. Municipal ID Programs

A final option involves municipal ID programs. Several cities across the United States have a municipal ID program.²³¹ These programs allow for residents in their municipal territory to obtain a special ID, often with enhanced benefits.

These programs have the highest potential for flexibility because they can be tailored to the needs of their residents.²³² For example, in New York City the program explicitly names its goal to ensure that all New Yorkers, regardless of gender identity or immigration status, have access to identification with their correct names and gender marker.²³³

Compared to state identification documents, the barriers to signing up for municipal IDs are significantly decreased. New York City allows unhoused community members to pick up their ID card at an official office location²³⁴ and has considered setting up registration sites inside of jails and prisons to support formerly incarcerated people with re-entry.²³⁵ The required

²³¹ Vicky Gan, *How Municipal ID Cards Make Cities More Inclusive*, BLOOMBERG CITYLAB (June 4, 2015), <https://www.bloomberg.com/news/articles/2015-06-04/municipal-id-cards-are-sensitive-to-gender-identity-and-immigration-status> [<https://perma.cc/3BKJ-KXNL>] (listing San Francisco, New Haven, New York City, Washington, D.C., Los Angeles, and others).

²³² See, e.g., Michael D. Bonanno, *Municipal Identity (Card) Crisis: U.S. Citizenship Values and the San Francisco Municipal I.D. Program*, 7 GEO. J.L. & PUB. POL'Y 545, 555–57 (2009); Amy C. Torres, “I Am Undocumented and A New Yorker”: *Affirmative City Citizenship and New York City’s IDNYC Program*, 86 FORDHAM L. REV. 335, 357–60 (2017).

²³³ Sam Stanton, *Here’s Why Every Trans Person Deserves Access to a Corrected ID*, OUT MAGAZINE (Nov. 20, 2019), <https://www.out.com/transgender/2019/11/20/why-every-single-trans-person-needs-corrected-id> [<https://perma.cc/5YFL-5RLH>].

²³⁴ Matt Flegenheimer, *New York City to Formally Start Its Municipal ID Card Program*, N.Y. TIMES (Jan. 11, 2015), nytimes.com/2015/01/12/nyregion/new-york-city-to-formally-start-its-municipal-id-card-program.html [<https://perma.cc/DJ89-X325>].

²³⁵ Julio Medina, *Out of Jail or Prison? Get an IDNYC: To Ease Reentry, People Need Government Identification Cards*, N.Y. DAILY NEWS (Sept. 17, 2020),

documentation for municipal IDs is generally less invasive, reducing the likelihood of retraumatization that can happen when Black trans folks are forced to subject themselves to state offices.²³⁶ In some cities, residents holding a municipal ID also receive special discounts on items like prescription drugs and at local businesses.²³⁷ In others, they have begun to increase accessibility for people with disabilities, like NYC's use of Braille.²³⁸ New York has also refused to store the information on city ID recipients to ensure protection for the families of certain immigrants.²³⁹

City governments could create a municipal ID program that intentionally refuses to be a part of the dominant antiblack and transphobic regime of surveilling gender by creating an ID that leaves categories like race and gender off entirely.²⁴⁰ This has already been done in New York and in Philadelphia, where they accept the self-determination of the individual applying for the ID, rather than requiring more invasive medical information.²⁴¹ Designing similar municipal ID programs would mitigate

<https://www.nydailynews.com/opinion/ny-oped-out-of-rikers-get-an-idnyc-20200917-fq6qcsfh4rbq3cknkdxdyq5uq-story.html> [<https://perma.cc/H7BC-R92D>].

²³⁶ JAMES ET AL., 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF BLACK RESPONDENTS, 20 (Sept. 2017), <https://www.transequality.org/sites/default/files/docs/usts/USTSBlackRespondentsReport-Nov17.pdf> [<https://perma.cc/6926-TH85>].

²³⁷ Rachel Vick, *City Expands Benefits for IDNYC Cardholders*, QUEENS DAILY EAGLE (Jan. 17, 2020), <https://queenseagle.com/all/2020/1/17/city-expands-benefits-for-idnyc-cardholders> [<https://perma.cc/C9Y3-AKH6>].

²³⁸ *Id.*

²³⁹ Rebeca Ibarra, *City Will No Longer Keep Personal Data of IDNYC Applicants*, WNYC (Dec 7, 2016), <https://www.wnyc.org/story/city-will-no-longer-keep-personal-data-idnyc-applicants/> [<https://perma.cc/2S4W-U5MS>].

²⁴⁰ Sam Stanton, *Here's Why Every Trans Person Deserves Access to a Corrected ID*, OUT MAGAZINE (Nov. 20, 2019), <https://www.out.com/transgender/2019/11/20/why-every-single-trans-person-needs-corrected-id> [<https://perma.cc/CX4Y-BDXR>]; Spade, *supra* note 34, at 806–07.

²⁴¹ Stanton, *supra* note 240; Managing Director's Office, *PHL City ID Cards Now Available to the Public*, CITY OF PHILA. (Apr. 4, 2019), <https://www.phila.gov/2019-04-04-phl-city-id-cards-now-available-to-the-public/> [<https://perma.cc/7P6J-KEXJ>]; cf Gabriel Arkles, *How Alabama's Driver's License Law Injures Transgender People*, ACLU LGBT & HIV PROJECT (Feb. 6, 2018), [SEATTLE JOURNAL FOR SOCIAL JUSTICE](https://www.aclu.org/blog/lgbt-</p>
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social barriers, and signal to Black trans people that their lives matter and that they are more seen in their community.²⁴² Overall, municipal ID programs have the potential to create an enormous sense of community for their residents.²⁴³

Ultimately, however, this solution does not decrease the federal government's ability to surveil gender. States would still be required to comply with the REAL ID Act, and the municipal ID's effectiveness would be limited to the city that issues it. Municipal IDs cannot be used when a REAL ID is required, such as to vote in federal elections, travel by plane, or enter federal buildings. Furthermore, it does nothing to destabilize the broader social investments in surveillance.

V. INTERVENTIONS

I believe that we will win when we truly allow ourselves to envision a genderless world where we can do what the hell we want to do with our bodies and not rely on the state to validate or affirm us.²⁴⁴

I believe that we will win when we begin to embrace our blackness and our black history in its totality and use it as the framework for our navigation and interrogation of transness.

I believe that we will win when we become committed to holding ourselves accountable and working to dismantle the systems of oppression that we have so subconsciously created and invested in this movement.²⁴⁵

- L'Ierrét Jazelle Ailith

rights/transgender-rights/how-alabamas-drivers-license-law-injures-transgender-people/
[<https://perma.cc/J99J-FUC2>].

²⁴² JAMES ET AL., *supra* note 35, at 20.

²⁴³ Vick, *supra* note 237.

²⁴⁴ *Id.*

²⁴⁵ Ailith, *supra* note 109.

Ultimately, the above strategies fail because they rely on status quo understandings of humanity—that is, one that leaves the genre of Man as a stand in for all human experience. Instead, we might take the challenge this comment posits as an opportunity to sit at home in those genres of being that reside in moments of critique. Through Wynter’s concept of sociogeny, we can enact new and relational ways of being that allow us to reframe our subjective understanding of the processes of racialization that produce gender as knowable and fixed. This will require new cognitive mappings about our relationship to the earth and the very constitutive terms by which we think of ourselves as individuated selves—a deconstruction of the notion of self-possession and its fiction of non-dependence—and the genre of Man.²⁴⁶

Here, I want to remind legal communities that “it’s okay not to have this prescriptive list of what it will look like, right, because we have to collectively build it together. And at any given time, there are so many things sitting on our imaginations, which make it kind of impossible to see through what we have now.”²⁴⁷

This paper has attempted to trace the archipelagos of surveillance present in the REAL ID Act and its proposed reforms in the hopes that my analysis might also help us to think through even the most mundane choices. This requires us to work to undo the socialization we have received from the initiation systems of traditional societies, such as the kinds of learning we often receive in legal communities, which is designed to reproduce the order of society.²⁴⁸ We might be able to trace the histories of corporations profiting off the development of surveillance technology, as Angela Davis and others have recorded, and recognize the transformation of those same

²⁴⁶ Che Gossett et al., *Revolution is Not a One-Time Event*, THE WHITE REV. (June 2020), <https://www.thewhitereview.org/feature/revolution-is-not-a-one-time-event-2/> [<https://perma.cc/3A42-849K>].

²⁴⁷ *Id.*

²⁴⁸ Thomas & Wynter, *supra* note 6, at 6.

companies into the Targets and Amazons of today, who cooperate with police to criminalize poverty.²⁴⁹

Whatever we do, it must “[d]isrupt the everyday social order.”²⁵⁰ This requires that we abandon normative concepts of safety and deservedness, which tell us that “some people deserve to have a claim to a liveable life, have a claim to a family, a safe place to be, care, and others deserve to be disappeared by the state.”²⁵¹

We might begin to think of justice and accountability as contextual, we can craft processes that specifically speak to the suffering of whole communities, and we can speak to the suffering of individuals. When we come to terms with the fact that some people can live only because other people die, we can start to push ourselves to develop new ways of protecting our communities.²⁵² On a practical level, if we look through the lens of Black trans experience, we know that communities can thrive without aid from state institutions. For example, the Combahee River Collective distributed care packages that included materials on self-defense, ways of protecting each other, and ways to combat violence that did not hinge on a kind of politics of rescue but rather a kind of nurturing self-sufficiency.²⁵³

Now, what was really interesting to see, when these spaces were occupied was what grew up around them. There were educational classes for kids. There was political education, there was amazing artwork. There was food being served to everyone who came. There were history lessons, amazing sculptures. So all of this is something which is not only very inspiring, but possibly a blueprint and something which we should be learning from.²⁵⁴

²⁴⁹ See ANGELA DAVIS, ARE PRISONS OBSOLETE?, 89–95 (2003).

²⁵⁰ Gossett et al., *supra* note 246.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

These stories remind us of what is possible when we move outside of biocentric models of humanity.

Ultimately, it takes a massive investment in restorative processes to correct for massive acts of violence. Only a radical disinvestment away from status quo reforms could begin to prevent us from dragging the bad decisions of the past into the future.