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What's Wrong with Trans Rights?

“Rights discourse in liberal capitalist culture casts as private potentially political contests about distribution of resources and about relevant parties to decision making. It converts social problems into matters of individualized, dehistoricized injury and entitlement, into matters in which there is no harm if there is no agent and no tangibly violated subject.”

Wendy Brown, *States of Injury*

As the concept of trans rights has gained more currency in the last two decades, a seeming consensus has emerged about which law reforms should be sought to better the lives of trans people.ⁱ Advocates of trans equality have primarily pursued two law reform interventions: anti-discrimination laws that list gender identity and/or expression as a category of non-discrimination, and hate crime laws that include crimes motivated by the gender identity and/or expression of the victim as triggering the application of a jurisdiction's hate crime statute. Organizations like the National Gay and Lesbian Task Force (NGLTF) have supported state and local organizations around the country in legislative campaigns to pass such laws. Thirteen states (California, Colorado, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington) and the District of Columbia currently have laws that include gender identity and/or expression as a category of anti-discrimination, and 108 counties and cities have such laws. NGLTF estimates that 39 percent of people in the United States live in a jurisdiction where such laws are on the books.ⁱⁱ Seven states now have hate crime laws that include gender identity and/or expression.ⁱⁱⁱ In 2009 a federal law, the [Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act](#), added gender identity and/or expression to federal hate crime law. An ongoing battle regarding if and how gender identity and/or expression will be included in the Employment Non-Discrimination Act (ENDA), a federal law that would prohibit discrimination the basis of sexual orientation, continues to be fought between the conservative national gay and lesbian organization, the Human Rights Campaign (HRC), legislators, and a variety of organizations and activists seeking to push an inclusive bill through Congress. These two legal reforms, anti-discrimination bills and hate crime laws, have come to define the idea of “trans rights” in the United States and are

presently the most visible efforts made by nonprofit organizations and activists working under this rubric.

The logic behind this law reform strategy is not mysterious. Proponents argue that passing these laws does a number of important things. First, the passage of anti-discrimination laws can create a basis for legal claims against discriminating employers, housing providers, restaurants, hotels, stores, and the like. Trans people's legal claims when facing exclusion in such contexts have often failed in the past, with courts saying that the exclusion is a legitimate preference on the part of the employer, landlord, or business owner.^{iv} Laws that make gender identity/expression-based exclusion illegal have the potential to influence courts to punish discriminators and provide certain remedies (e.g., back pay or damages) to injured trans people. There is also a hope that such laws, and their enforcement by courts, would send a preventative message to potential discriminators, letting them know that such exclusions will not be tolerated; these laws would ultimately increase access to jobs, housing, and other necessities for trans people.

Hate crime laws are promoted under a related logic. Proponents point out that trans people have a very high murder rate and are subject to a great deal of violence.^v In many instances, trans people's lives are so devalued by police and prosecutors that trans murders are not investigated or trans people's murderers are given less punishment than is typical in murder sentencing. Proponents believe that hate crime laws will intervene in these situations, making law enforcement take this violence seriously. There is also a symbolic element to the passage of these laws: a statement that trans lives are meaningful, often described by proponents as an assertion that trans people are human. Additionally, both proponents of anti-discrimination laws and hate crime laws argue that the processes of advocating the passage of such laws, including media advocacy representing the lives and concerns of trans people and meetings with legislators to tell them about trans people's experiences, increases positive trans visibility and advances the struggle for trans equality. The data-collection element of hate crime statutes, through which certain government agencies keep count of crimes that fall into this category, is touted by proponents as a chance to make the quantity and severity of trans people's struggles more visible.

The logic of visibility and inclusion surrounding anti-discrimination and hate crime laws campaigns is very popular, yet there are many troubling limitations to the idea that these two reforms comprise a proper approach to problems trans people face in both criminal and civil law contexts. One concern is whether these laws actually improve the life chances of those who are purportedly protected by them. Looking at categories of identity that have been included in these kinds of laws over the last several decades indicates that these kinds of reforms have not eliminated bias, exclusion, or marginalization. Discrimination and violence against people of color have persisted despite law changes that declared it illegal. The persistent and growing racial wealth divide in the United States suggests that these law changes have not had their promised effects, and that the structure of systemic racism is not addressed by the work of these laws.^{vi} Similarly, the twenty-year history of the Americans with Disabilities Act (ADA) demonstrates disappointing results. Courts have limited the enforcement potential of this law with narrow interpretations of its impact, and people with disabilities remain economically and politically marginalized by systemic ableism. Similar arguments can be made about the persistence of national origin discrimination, sex discrimination, and other forms of pervasive discrimination despite decades of official prohibitions of such behavior. The persistence of wage gaps, illegal terminations, hostile work environments, hiring/firing disparities, and bias-motivated violence for groups whose struggles have supposedly been addressed by anti-discrimination and hate crime laws invites caution when assuming the effectiveness of these measures.

Hate crime laws do not have a deterrent effect. They focus on punishment and cannot be argued to actually prevent bias-motivated violence. In addition to their failure to prevent harm, they must be considered in the context of the failures of our legal systems and, specifically, the violence of our criminal punishment system. Anti-discrimination laws are not adequately enforced. Most people who experience discrimination cannot afford to access legal help, so their experiences never make it to court. Additionally, the Supreme Court has severely narrowed the enforceability of these laws over the last 30 years, making it extremely difficult to prove discrimination short of a signed letter from a boss or landlord stating, "I am taking this negative action against you because of your [insert characteristic]." Even in cases that seem as obvious as that, people experiencing

discrimination often lose. Proving discriminatory *intent* has become central, making it almost impossible to win these cases when they are brought to court. These laws also have such narrow scopes that they often do not include action taken by some of the most common discriminators against marginalized people: prison guards, welfare bureaucrats, workfare supervisors, immigration officers, child welfare workers, and others who have significant control over the lives of marginalized people in the United States. In a neoliberal era characterized by abandonment (reduction of social safety net and infrastructure, especially in poor and people of color communities) and imprisonment (increased immigration and criminal law enforcement), anti-discrimination laws provide little relief to the most vulnerable people.

In addition to these general problems with law reforms that add gender identity/expression to the list of prohibited characteristics, trans litigants have run into specific challenges when seeking redress from discrimination under these laws. Even in jurisdictions where these laws have been put in place, trans litigants have lost discrimination cases about being denied access to a sex-segregated facility.^{vii} In the employment context, this often means that even when a worker lives in a jurisdiction where discriminating against trans people is supposedly illegal, denying a trans person access to a bathroom that comports with their gender identity at work is not interpreted as a violation of the law. Of course, given the staggering unemployment of trans populations emerging from conditions of homelessness, lack of family support,^{viii} violence-related trauma, discrimination by potential employers, effects of unmet health needs, and many other factors,^{ix} even if the legal interpretations of trans people's bathroom access demands were better it would not scratch the surface of trans poverty.^x However, these interpretations in employment cases involving bathrooms are particularly dangerous because they can be applied by courts to other high-stakes settings where trans people struggle in systems that rely on sex-segregation. Because trans people frequently face violence and discrimination in the context of sex-segregated spaces like shelters, prisons, and group homes, and because bathroom access is often the most contentious issue between trans workers and their employers, these anti-trans legal interpretations take the teeth out of trans-inclusive laws and are an example of the limitations of seeking equality through courts and legislatures.

Critical race theorists have developed analyses about the limitations of anti-discrimination law that are useful in understanding the ways these law reforms have and will continue to fail to deliver meaningful change to trans people. Alan Freeman's critique of what he terms the "perpetrator perspective" in discrimination law is particularly helpful in conceptualizing the limits of the common trans rights strategies.^{xi} Freeman's work looks at laws that prohibit discrimination based on race. He exposes how and why anti-discrimination and hate crime statutes do not achieve their promises of equality and freedom for people targeted by discrimination and violence. Freeman argues that discrimination law misunderstands how racism works, which makes it fail to effectively address it.

Discrimination law primarily conceptualizes the harm of racism through the perpetrator/victim dyad, imagining that the fundamental scene is that of a perpetrator who irrationally hates people on the basis of their race and fires or denies service to or beats or kills the victim based on that hatred. The law's adoption of this conception of racism does several things that make it ineffective at eradicating racism and help it contribute to obscuring the actual operations of racism. First, it individualizes racism. It says that racism is about bad individuals who intentionally make discriminatory choices and must be punished. In this (mis)understanding, structural or systemic racism is rendered invisible. Through this function, the law can only attend to disparities that come from the behavior of a perpetrator who intentionally considered the category that must not be considered (e.g., race, gender, disability) in the decision she was making (e.g., hiring, firing, admission, expulsion). Conditions like living in a district with underfunded schools that "happens to be" 96 percent students of color,^{xii} or having to take an admissions test that has been proven to predict race better than academic success^{xiii} or any of a number of disparities in life conditions (access to adequate food, healthcare, employment, housing, clean air and water) that we know stem from and reflect long-term patterns of exclusion and exploitation cannot be understood as "violations" under the discrimination principle, and thus remedies cannot be won. This narrow reading of what constitutes a violation and can be recognized as discrimination serves to naturalize and affirm the status quo of maldistribution. Anti-discrimination law seeks out aberrant individuals with overtly biased intentions.^{xiv} Meanwhile, all the daily disparities in life chances that shape our world along

lines of race, class, indigeneity, disability, national origin, sex, and gender remain untouchable and affirmed as non-discriminatory or even as fair.

The perpetrator perspective also obscures the historical context of racism. Discrimination is understood as the act of taking into account the identity that discrimination law forbids us to take into account (e.g., race, sex, disability) when making a decision, and it does not regard whether the decision-maker is favoring or harming a traditionally excluded group. In this way, the discrimination principle has been used to eviscerate affirmative action and desegregation programs.^{xv} This erroneously conceptualized “colorblindness” undermines the possibility of remedying the severe racial disparities in the United States that are rooted in slavery, genocide, land theft, internment, and immigration exclusion, as well as racially explicit policies that historically and presently exclude people of color from the benefits of wealth-building programs for US citizens like Social Security, land grants, and credit and other homeownership support.^{xvi} The conditions that created and continue to reproduce such immense disparities are made invisible by the perpetrator perspective’s insistence that any consideration of the prohibited category is equally damaging. This model pretends the playing field is equal, and thus any loss or gain in opportunity based on the category is harmful and creates inequality, again serving to declare the racial status quo neutral. This justification for systemic racism masquerading as a logic of equal opportunity gives rise to the myth of “reverse racism,” a concept that misunderstands racism to suggest parallel meanings when white people lose opportunities or access through programs aiming to ameliorate impacts of racism and when people of color lose opportunities due to racism.

Discrimination law’s reliance on the perpetrator perspective also creates the false impression that the previously excluded or marginalized group is now equal, that fairness has been imposed, and the legitimacy of the distribution of life chances restored. This declaration of equality and fairness papers over the inequalities and disparities that constitute business as usual and allows them to continue. Narrowing political resistance strategies to seeking inclusion in anti-discrimination law makes the mistaken assumption that gaining recognition and inclusion in this way will equalize our life chances and allow us to compete in the (assumed fair) system. This often constitutes a forfeiture of other critiques, as if the economic system is fair *but for* the fact that bad discriminators are

sometimes allowed to fire trans people for being trans.^{xvii} Constituting the problem of oppression so narrowly that an anti-discrimination law could solve it erases the complexity and breadth of the systemic, life-threatening harm that trans resistance seeks to end. Not surprisingly, the rhetoric accompanying these quests for inclusion often casts “deserving workers” —people whose other characteristics (race, ability, education, class) would have entitled them to a good chance in the workforce were it not for the illegitimate exclusion that happened.^{xviii} Using as examples the least marginalized of the marginalized, so to speak, becomes necessary when issues are framed so narrowly that a person who faces intersecting vectors of harm would be unlikely to benefit from anti-discrimination law. This framing permits—and even necessitates—that efforts for inclusion in the discrimination regime rely on rhetoric that affirms the legitimacy and fairness of the status quo. The inclusion-focus of anti-discrimination law and hate crime law campaigns relies on a strategy of simile, essentially arguing “we are just like you; we do not deserve this different treatment because of this one characteristic.” To make that argument, advocates cling to the imagined norms of the US social body and choose poster people who are symbolic of US standards of normalcy, whose lives are easily framed by sound bites that resound in shared notions of injustice. “Perfect plaintiffs” for these cases are white people with high-level jobs and lawful immigration status. The thorny issues facing undocumented immigrants, people experiencing simultaneous discrimination through, for example, race, disability and gender identity, or people in low-wage jobs where it is particularly hard to prove discrimination, are not addressed by anti-discrimination law. Laws created from such strategies, not surprisingly, routinely fail to protect people with more complicated relationships to marginality. These people, who face the worst economic vulnerability, are not lifted up as the “deserving workers” that anti-discrimination law advocates rally to protect.

Hate crime laws are an even more direct example of the limitations of the perpetrator perspective’s conception of oppression. Hate crime laws frame violence in terms of individual wrongdoers. These laws and their advocates portray violence through a lens that oversimplifies its operation and suggests that the criminal punishment system is the proper way to solve it. The violence targeted by hate crime laws is that of purportedly aberrant individuals who have committed acts of violence motivated by bias. Hate crime advocacy advances the fallacy that such violence is especially reprehensible in the eyes of

an equality-minded state, and thus must be punished with enhanced force. While it is no doubt true that violence of this kind is frequent and devastating, critics of hate crime legislation argue that hate crime laws are not the answer. First, as mentioned above, hate crime laws have no deterrent effect: people do not read law books before committing acts of violence and choose against bias-motivated violence because it carries a harsher sentence. Hate crime laws do not and cannot actually increase the life chances of the people they purportedly protect.

Second, hate crime laws strengthen and legitimize the criminal punishment system, a system that targets the very people these laws are supposedly passed to protect. The criminal punishment system was founded on and constantly reproduces the same biases (racism, sexism, homophobia, transphobia, ableism, xenophobia) that advocates of these laws want to eliminate. This is no small point, given the rapid growth of the US criminal punishment system in the last few decades, and the gender, race, and ability disparities in whom it targets. The United States now imprisons 25 percent of the world's prisoners although it has only 5 percent of the world's population.^{xix} Imprisonment in the United States has quadrupled since the 1980s and continues to increase despite the fact that violent crime and property crime have declined since the 1990s.^{xx} The United States has the highest documented rate of imprisonment per capita of any country.^{xxi} A 2008 report declared that the United States now imprisons one in every 100 adults.^{xxii} Significant racial, gender, ability, and national origin disparities exist in this imprisonment. One in nine black men between the ages of 20 and 34 are imprisoned. While men still vastly outnumber women in prisons, the rate of imprisonment for women is growing far faster, largely the result of sentencing changes created as part of the War on Drugs, including the advent of mandatory minimum sentences for drug convictions. An estimated 27 percent of federal prisoners are non-citizens.^{xxiii} While accurate estimates of rates of imprisonment for people with disabilities are difficult to obtain, it is clear that the combination of severe medical neglect of prisoners, deinstitutionalization of people with psychiatric disabilities without the provision of adequate community services, and the role of drug use in self-medicating account for high rates.^{xxiv}

In a context of mass imprisonment and rapid prison growth targeting traditionally marginalized groups, what does it mean to use criminal punishment-enhancing laws to

purportedly address violence against those groups? This point has been especially forcefully made by critics who note the origins of the contemporary lesbian and gay rights formation in anti-police activism of the 1960s and 70s, and who question how current lesbian and gay rights work has come to be aligned with a neoliberal “law and order” approach.^{xxv} Could the veterans of the Stonewall and Compton’s Cafeteria uprisings against police violence have guessed that a few decades later LGBT law reformers would be supporting passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, a law that provides millions of dollars to enhance police and prosecutorial resources? Could they have imagined that the police would be claimed as protectors of queer and trans people against violence, while imprisonment and police brutality were skyrocketing? The neoliberal reframing of discrimination and violence that have drastically shifted and undermined strategies of resistance to economic exploitation and state violence produce this narrow law reform agenda that ignores and colludes in the harm and violence faced every day by queer and trans people struggling against racism, ableism, xenophobia, transphobia, homophobia, and poverty.

These concerns are particularly relevant for trans people given our ongoing struggles with police profiling, harassment, violence, and high rates of both youth and adult imprisonment. Trans populations are disproportionately poor because of employment discrimination, family rejection, and difficulty accessing school, medical care, and social services.^{xxvi} These factors increase our rate of participation in criminalized work to survive, which, combined with police profiling, produces high levels of criminalization.^{xxvii} Trans people in prisons face severe harassment, medical neglect, and violence in both men’s and women’s facilities. Violence against trans women in men’s prisons is consistently reported by prisoners as well as by researchers, and court cases and testimony from advocates and formerly imprisoned people reveals trends of forced prostitution, sexual slavery, sexual assault, and other violence. Trans people, like all people locked up in women’s prisons, are targets of gender-based violence, including sexual assault and rape, most frequently at the hands of correctional staff. Prisoners housed at women’s facilities who are perceived as too masculine by prison staff are often at significantly increased risk of harassment and enhanced punishment, including psychologically-damaging isolation, for alleged violations

of rules against homosexual contact. These prisoners also face a greater risk of assault motivated by an adverse reaction to gender nonconformity.^{xxviii}

Since the criminal punishment system itself is a significant source of racialized-gendered violence, increasing its resources and punishment capacity will not reduce violence against trans people. When advocates of hate crime laws frame the criminal punishment systems as a solution to the violence trans people face, they participate in the false logic that criminal punishment produces safety, when it is clear that it is actually a site of enormous violence. Criminal punishment cannot be the method we use to stop transphobia when the criminal punishment system is the most significant perpetrator of violence against trans people. Many commentators have used this support of the expansion of punishment regimes through the advent of hate crime advocacy as an example of cooptation, where resistance struggles that have named certain conditions or violences come to be used to prop up the very arrangements that are harming the people who are resisting. A new mandate to punish transphobic people is added to the arsenal of justifications for a system that primarily locks up and destroys the lives of poor people, people of color, indigenous people, people with disabilities, and immigrants, and that uses gender-based sexual violence as one of its daily tools of discipline against people of all genders.^{xxix}

Much of the thinking behind the need for hate crime and anti-discrimination legislation, including by advocates who recognize how limited these interventions are as avenues for increasing the life chances of trans people, is about the significance of having our experiences of discrimination and violence named in law. The belief that being named in this way has a benefit for the well-being of trans people has to be reexamined with an understanding that the alleged benefits of such naming provides even greater opportunity for harmful systems to claim fairness and equality while continuing to kill us. Hate crime and anti-discrimination laws declare that punishment systems and economic arrangements are now non-transphobic, yet these laws not only fail to eradicate transphobia but also strengthen systems that perpetrate it.

This analysis illuminates how law reform work that merely tinkers with systems to make them look more inclusive while leaving their most violent operations intact must be a concern of many social movements today. For example, prison abolitionists in the United States argue that the project of prison reform, which is usually aimed at reducing certain

kinds of violence or unfairness in the prison system, has always functioned to maintain and expand imprisonment.^{xxx} Prison reform efforts aimed at a reducing a variety of harms, such as gender and sexual violence, medical neglect and abuse, and overcrowding, to name but a few, have often been made by well-meaning people who wanted to address the horrors of prison life. But these reform efforts have been incorporated into the project of prison expansion, mobilized as rationales for building and filling more and more prisons. Abolitionists caution that a system designed from its inception as a technology of racialized control through exile and punishment will use any rationale necessary to achieve that purpose. [A recent example of particular interest to feminism and trans politics](#) is the 2003 National Prison Rape Elimination Act (NPREA). While passed in the name of preventing sexual assault, the NPREA has been used to further enforce and increase penalties against prisoners for consensual sexual activity, including activities such as handholding. Abolitionist activists doing prisoner support work have pointed out that because some of the main tools the Act uses are punishment tools, those tools have become just another part of the arsenal used by punishment systems to increase sentences, target prisoners of color and queer and trans prisoners, and expand imprisonment. It is unclear whether the new rules have reduced sexual violence, but it *is* clear that they have increased punishment.^{xxxi} Activists considering using law reform as a tool, then, have to be extraordinarily vigilant to determine if they are actually strengthening and expanding various systems' capacities to harm, or if our work is part of dismantling those capacities.^{xxxii}

In both prison and immigration reform contexts, trans activists are raising concerns about the danger of dividing affected populations by mobilizing ideas about who constitutes a “deserving” or “undeserving” subject. Campaigns that focus on immigrants portrayed as “hard-working” (racist, anti-poor code for those who do not need support like public benefits or housing) and “law-abiding,” (not caught up in the criminal punishment system) or that frame immigration issues in terms of family unity relying on heteropatriarchal constructs further stigmatize those who do not fit the “deserving” frame, and create policies that only benefit a narrow swath of affected people. Similarly, campaigns about imprisonment that only focus on people convicted of nonviolent crimes, “political” prisoners, or on people exonerated by the introduction of new evidence, risk refining the system in ways that justify and legitimize the bulk of its continued operation by eliminating its most obvious contradictions.

Three concerns about law reform projects permeate many sites of resistance. First, these projects change only what the law says about what a system is doing, but not its actual impact. Second, they refine a system in ways that help it continue to target the most vulnerable people, while only partially or temporarily removing a few of the less vulnerable from its path. And finally, law reform projects often provide rationales and justifications for the expansion of harmful systems.

Freeman's critique of the perpetrator perspective helps us understand how a discrimination-focused law reform strategy that aims to prohibit the consideration of certain categories of identity in the context of certain decisions (who to hire, fire, evict, house, or assault) misconceives how the violences of racism, ableism, xenophobia, transphobia, sexism, and homophobia operate. Freeman's work shows how discrimination law fails to remedy the harms it claims to attend to, and actually can empower systems that maldistribute life chances. Reconceptualizing the theory of power and struggle that underlies such law reforms allows us to turn our attention to other systems in law that produce structured insecurity and shortened life spans for trans people, and consider alternative avenues of intervention.

Examining the operation of legal systems that administer life changes at the population level, such as welfare systems, punishment systems, healthcare systems, and immigration systems, can expose how law operates to sort people into subpopulations facing different exposures to security and insecurity. Looking at sites of the legal administration of societal norms, we can see how certain populations come to have such pervasive experiences with both abandonment and imprisonment. From that vantage point we can strategize about how to use legal reform tools as part of a broader strategy to dismantle capitalism's murderous structures while we build alternative methods of meeting human needs and organizing political participation. Because of the obvious failures of the most popular contemporary law reform strategies to address harms trans people are facing, trans experience can offer a location from which to consider the broader questions of the neoliberal cooptation of social movements through law reform and the institutionalization of resistance, and from which to reframe the problems of violence and poverty that impact marginalized populations in ways that give us new inroads to intervention.

If we shift our framework from trans rights to critical trans resistance, we find ourselves with new analysis of the harms that people who defy gender norms face, and new

ideas for how we might dismantle systems that produce and enforce gender norms. Such a shift means that we move from demands for recognition and inclusion in law to demands for material changes to our lives. We recognize formal legal equality as a window dressing for harmful and violent political and economic arrangements (settler colonialism, white supremacy, capitalism, heteropatriarchy), and we come to understand that what we want and need will never be won through a legal system founded in and dedicated to preserving racialized-gendered property statuses. Our social movement strategies, then, become centered in mobilization, and our targets become the sites of violence we see producing trans death. The demands for wealth redistribution, prison abolition and an end to immigration enforcement that are emerging from trans communities suggest an emergent critical trans politics guided by the urgent circumstances we face and a desire to center those living under the most severe forms of coercive violence as a guide for prioritization. The social movement infrastructure we need to win these demands is far more participatory, democratic, and decentralized than what has emerged in law-reform centered rights-seeking formations. The loud concerns raised within social movements in the last decade about the roles non-profitization and professionalization have played in containing and undermining transformative social change are useful to trans politics as we perceive the current push to institutionalize our work in those same hierarchical, elitist, undemocratic, unaccountable forms to push for the same narrow status-quo affirming agenda.^{xxxiii} Across the US, local communities are proposing and creating different tools, forms and agendas to address these concerns and to innovate infrastructure for trans resistance. This resistance refuses to make itself legible in a neoliberal framework, to articulate demands for rights that reproduce racist, ableist, anti-poor, xenophobic frameworks of deservingness and undeservingness, to sell off transformative goals for funding opportunities, or to endorse violent institutions for a chance at being nominally invited to be part of them. Co-developing this critical trans politics requires all of us to tap our creativity, imagination, bravery, compassion, humility, self-reflection, patience, generosity, and perseverance, as we seek change deep enough to dismantle the violences that are foundational to our current conditions.

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- ⁱ This text of this chapter is excerpted from my forthcoming book, *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law* (Brooklyn: South End Press, 2011).
- ⁱⁱ National Gay and Lesbian Task Force, “Jurisdictions with Explicitly Transgender-Inclusive Non-Discrimination Laws,” (2008), http://thetaskforce.org/downloads/reports/fact_sheets/all_jurisdictions_w_pop_8_08.pdf (accessed November 27, 2010).
- ⁱⁱⁱ National Center for Transgender Equality, “Hate Crimes,” (2008), www.nctequality.org/Hate_Crimes.asp.2008 (accessed January 4, 2009).
- ^{iv} See *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984), where the Seventh Circuit Court of Appeals found that a transwoman who was dismissed from her job as an airline pilot was not protected under the sex discrimination clause of Title VII of the Civil Rights Act of 1964, holding that “Title VII does not protect transsexuals”; and *Oiler v. Winn Dixie, Louisiana Inc.*, No.Civ.A. 00-3114, 2002 WL 31098541(E.D.La. Sept. 16, 2002), where the US District Court for the Eastern District of Louisiana found that a man who was fired from his job for occasionally cross-dressing outside of work was not protected under Title VII sex discrimination, even though his behavior had nothing to do with his job performance.
- ^v Rebecca L. Stotzer, “Gender Identity and Hate Crimes: Violence Against Transgender People in Los Angeles County,” *Sexuality Research and Social Policy: Journal of NSRC*, Vol. 5 (March, 2008). [please note—page numbers not included bc its an online journal]
- ^{vi} Angela P. Harris, “From Stonewall to the Suburbs? Toward a Political Economy of Sexuality,” *William and Mary Bill of Rights Journal* 14 (2006): 1539–1582.
- ^{vii} See *Goins v. West Group*, 619 N.W.2d 424 (Minn. App. Ct. 2000), where the Minnesota Supreme Court held that employers may restrict bathroom and locker room access based on birth sex; and *Hispanic Aids Forum v. Estate of Bruno*, 16 Misc.3d 960, 839 N.Y.S.2d 691, N.Y. Sup., 2007 where a New York Supreme Court judge ruled in favor of a nonprofit organization that was facing eviction based on its failure to comply with a landlord’s demands that it disclose the birth-sex of its clients, holding that the physical anatomy of trans people is not relevant to gender identity. In *Ettsity v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir.2007) the Tenth Circuit held that a trans woman bus driver who was fired because she used women’s restrooms as needed at various stops on her bus route was not protected by Title VII’s prohibition against sex discrimination and gender stereotyping.
- ^{viii} A recent survey of 6,450 transgender and gender-nonconforming people in the United States found that 57 percent had experienced significant family rejection. Jamie M. Grant, Lisa A. Mottet, and Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. Executive Summary. (Washington, DC: National Gay and Lesbian Task Force and National Center for Transgender Equality, 2011). www.thetaskforce.org/downloads/reports/reports/ntds_summary.pdf.
- ^{ix} The same study found that 19 percent of transgender and gender non-conforming people had been refused medical treatment due to their gender, 28 percent had postponed medical care when they were sick or injured due to discrimination, and 48 percent had postponed care when they were sick or injured because they could not afford it. The study also found that respondents reported a rate of HIV infection over four times the national average, with rates higher among trans people of color. National Gay and Lesbian Task Force and National Center for Transgender Equality, “Injustice at Every Turn.”
- ^x The study also confirmed that trans people live in extreme poverty. Respondents were nearly four times more likely to have a household income of less than \$10,000/year compared to the general population. National Gay and Lesbian Task Force and National Center for Transgender Equality, “Injustice at Every Turn.”
- ^{xi} Alan David Freeman, “Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine,” in *Critical Race Studies: The Key Writings that Formed the Movement*, ed. Kimberlé Crenshaw, Neil Gotanda, Garry Peller, and Kendall Thomas. (New York: The

New Press, 1996), 29–45.

^{xii} See *San Antonio Independent School District v. Rodriguez*, 411 US 1 (1973) where the US Supreme Court held that the severe imbalance in a school district’s funding of its primary and secondary schools based on the income levels of the residents of each district is not an unconstitutional violation of Equal Protection rights under the Fourteenth Amendment.

^{xiii} David M. White, “The Requirement of Race-Conscious Evaluation of LSAT Scores for Equitable Law School Admission,” *Berkeley La Raza Law Journal* 12 (2000–2001): 399; Susan Sturm and Lani Guinier, “The Future of Affirmative Action: Reclaiming the Innovative Ideal,” *California Law Review* 84 (July 1996): 953.

^{xiv} Freeman, “Legitimizing Racial Discrimination Through Anti-Discrimination Law.”

^{xv} *Milliken*, 418 U.S. 717; 87 *Parents Involved in Community Schools*, 551 U.S. 701.

^{xvi} Mazher Ali, Jeanette Huezo, Brian Miller, Wanjiku Mwangi, and Mike Prokosch, *State of the Dream 2011: Austerity for Whom?* (Boston: United for a Fair Economy, 2011) www.faireconomy.org/files/State_of_the_Dream_2011.pdf

^{xvii} Dan Irving, “Normalized Transgressions: Legitimizing the Transsexual Body as Productive,” *Radical History Review*, Vol. 2008 (2008) 38-59.

^{xviii} Irving, “Normalized Transgressions.” Several significant famous trans discrimination cases follow this pattern, with both media and advocates portraying the assimilable characteristics of the trans person in order to emphasize their deserving nature. One example is the highly publicized case of Diane Schroer who won a lawsuit after she lost a job at the Library of Congress when disclosed her trans identity. Time magazine described her as,

“An ex-Special Forces colonel . . . Schroer was a dream candidate, a guy out of a Tom Clancy novel: he had jumped from airplanes, undergone grueling combat training in extreme heat and cold, commanded hundreds of soldiers, helped run Haiti during the U.S. intervention in the '90s — and, since 9/11, he had been intimately involved in secret counterterrorism planning at the highest levels of the Pentagon. He had been selected to organize and run a new, classified antiterror organization, and in that position he had routinely briefed Defense Secretary Donald Rumsfeld. He had also briefed Vice President Cheney more than once. Schroer had been an action hero, but he also had the contacts and intellectual dexterity to make him an ideal congressional analyst.”

Schroer’s public persona as a patriot and terrorist-fighter was used by advocates to promote the idea of her deservingness in ways that those concerned about the racist, anti-immigrant, imperialist War on Terror might take issue with. Critics have similarly pointed out dynamics of deservingness that determine which queer and trans murder victims become icons in the battle for hate crime legislation. White victims tend to be publicly remembered (e.g., Harvey Milk, Brandon Teena, Matthew Shepard), their lives memorialized in films and movies (*Milk*, *Boys Don’t Cry*, *Larabee*), and laws named after them (Matthew Shepard Local Law Enforcement Enhancement Act). The names of these white victims and the struggles for healing and justice on the part of their friends and family are in greater circulation than victims of color through media and nonprofit channels even though people of color lose their lives at higher rates. Sanesha Stewart, Amanda Milan, Marsha P. Johnson, Duanna Johnson, Ruby Ordeñana are just a few of the trans women of color whose murders have been mourned by local communities but mostly ignored by media, large nonprofits and lawmakers.

^{xix} Roy Walmsley, “World Prison Population List,” (7th edition), (London: International Centre for Prison Studies, 2005

^{xx} US Department of Justice, “Key Crime and Justice Facts at a Glance,” (2009), www.ojp.usdoj.gov/bjs/glance.htm.

^{xxi} Walmsley, “World Prison Population List.”

^{xxii} The PEW Center on the States, *One in 100: Behind Bars in America 2008* (2008), www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf

^{xxiii} Government Accounting Office, “Information on Criminal Aliens Incarcerated in Federal and State

Prisons and Local Jails,” Congressional briefing, March 25, 2005,
<http://gao.gov/new.items/d05337r.pdf>.

^{xxiv} Lauraet Magnani, Harmon L. Wray, *Beyond Prisons: A New Interfaith Paradigm for Our Failed Prison System*, A report by the American Friends Service Committee, Criminal Justice Task Force, (Minnesota: Fortress Press, 2006).

^{xxv} Anna M. Agathangelou, D. Morgan Bassichis, and Tamara L. Spira, “Intimate Investments: Homonormativity, Global Lockdown, and the Seductions of Empire,” *Radical History Review* no. 100 (Winter 2008): 120–43; Morgan Bassichis, Alex Lee, and Dean Spade, “Building an Abolitionist Trans Movement with Everything We’re Got,” in *Captive Genders*, ed. Nat Smith and Eric A. Stanley (Oakland: AK Press, 2011); Magnani, Wray *Beyond Prisons System*; Kristina Wertz and Masen Davis, “When Laws Are Not Enough: A Study of the Economic Health of Transgender People and the Need for a Multidisciplinary Approach to Economic Justice,” *Seattle Journal of Social Justice*, Vol. 8, 467-489.

^{xxvi} Dean Spade, “Documenting Gender,” *Hastings Law Journal* 59 (2008):731; Chris Daley and Shannon Minter, *Trans Realities: A Legal Needs Assessment of San Francisco’s Transgender Communities* (San Francisco: Transgender Law Center, 2003).

^{xxvii} Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice* (Boston: Beacon Press, 2011).

^{xxviii} D. Morgan Bassichis, “‘It’s War in Here’: A Report on the Treatment of Transgender & Intersex People in New York State Men’s Prisons,” (New York: Sylvia Rivera Law Project, 2007), <http://srlp.org/files/warinhere.pdf>; Alexander L. Lee, *Gendered Crime & Punishment: Strategies to Protect Transgender, Gender Variant & Intersex People in America’s Prisons* (pts 1 & 2), Gender Identity Center Trans in Prison J. (Summer 2004), Gender Identity Center Trans in Prison J. (Fall 2004) (old issues of the journal can be requested through the Gender Identity Center of Colorado, Gender Identity Center Trans in Prison, and an earlier version of this paper is available at

www.justdetention.org/pdf/nowheretogobutout.pdf); Christopher D. Man and John P. Cronan, “Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for ‘Deliberate Indifference,’” *Journal of Criminal Law and Criminology* 92 (2002):127); Alex Coolman, Lamar Glover, and Kara Gotsch, *Still in Danger: The Ongoing Threat of Sexual Violence Against Transgender Prisoners*, (Los Angeles: Stop Prisoner Rape and the ACLU National Prison Project, 2005), www.justdetention.org/pdf/stillindanger.pdf {updated link}; Janet Baus and Dan Hunt, *Cruel and Unusual* (New York: Reid Productions, 2006).

^{xxix} Morgan Bassichis, Alex Lee, and Dean Spade, “Building an Abolitionist Trans Movement with Everything We’re Got,” in *Captive Genders: Transembodiment And The Prison Industrial Complex*, ed. Nat Smith and Eric A. Stanley, (Oakland: AK Press, 2011). Agathangelou, Bassichis, and Spira, “Intimate Investments”; Dean Spade and Craig Willse, “Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique,” *Chicano-Latino Law Review*, 21 (2000): 38; Sarah Lamble, “Retelling Racialized Violence, Remaking White Innocence: The Politics of Interlocking Oppressions in Transgender Day of Remembrance,” *Sexuality Research and Social Policy* 5 (March 2008): 24–42.

^{xxx} Angela Y. Davis, *Are Prisons Obsolete?* (New York, Seven Stories Press: 2003).

^{xxxi} Gabriel Arkles’ scholarship has explored how rules that purport to protect prisoners from sexual violence are frequently used to punish consensual sexual or friendship relationships, prohibit masturbation, and target queer and gender non-conforming prisoners. The existence of such rules can also increase risks of sexual behavior and create opportunities for blackmail and abuse by corrections officers. See letter from Chase Strangio and Z Gabriel Arkles to Attorney General Holder, May 10, 2010, page 9, <http://srlp.org/files/SRLP%20PREA%20comment%20Docket%20no%20OAG-131.pdf>; Gabriel Arkles, *Transgender Communities and the Prison Industrial Complex*, Northeastern University School of Law, February 2010. {not sure what this cite is—conference talk? presentations? It was a lecture} Arkles offers as an example of this type of problematic policymaking Idaho’s Prison Rape Elimination Provision, (Control No. 325.02.01.001, 2004, www.idoc.idaho.gov/policy/int3250201001.pdf) which includes a prohibition on “male” prisoners having a “feminine or effeminate hairstyle.” Email from Gabriel Arkles, February 21, 2011 (on file with the author).

^{xxxii} Further controversy has emerged around the NPREA since the Department of Justice proposed national standards “for the detection, prevention, reduction, and punishment of prison rape, as mandated by” the NPREA which exclude immigration facilities. See, National Juvenile Defender Center & the Equity Project, Transgender Law Center, Lambda Legal Education and Defense Fund, National Center for Lesbian Rights, American Civil Liberties Union, Sylvia Rivera Law Project, National Center for Transgender Equality, “Protecting Lesbian, Gay, Bisexual, Transgender, Intersex, and Gender Nonconforming people from Sexual Abuse and Harassment in Correctional Settings,” Comments Submitted in Response to Docket No. OAG-131; AG Order No. 3244-2011 National Standards to Prevent, Detect, and Respond to Prison Rape April 4, 2011, 47-48 (on file with the author); Human Rights Watch, ACLU Washington Legislative Office, Immigration Equality, Just Detention International, National Immigrant Justice Center, National Immigration Forum, Physicians for Human Rights, Prison Fellowship, Southern Center for Human Rights, Texas Civil Rights Project, Women’s Refugee Commission, “[US: Immigration Facilities Should Apply Prison Rape Elimination Act Protections](#): Letter to US President Barack Obama,” Feb 15, 2011, <http://www.hrw.org/es/news/2011/02/15/us-immigration-facilities-should-apply-prison-rape-elimination-act-protections>.

^{xxxiii} See, *The Revolution Will Not Be Funded: Beyond the non-profit industrial complex*, ed. INCITE! Women of Color Against Violence (Cambridge, MA: South End Press, 2007); Dean Spade and Rickke Mananzala, “The Non-Profit Industrial Complex and Trans Resistance,” *Sexuality Research and Social Policy: Journal of NSRC* Vol. 5 no. 1 (March 2008): 53–71.