

KEYNOTE ADDRESS

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Reflecting on the title of this symposium, I was thinking about the metaphor of “the frontier” and what it means to place our conversations about gender and US law in the context of US law as a project of settler-colonialism. In particular, the title of this symposium made me think about how the theorization and practice of resistance to coercive gender norms is often invested in narratives of citizenship and belonging that undergird colonialism and white supremacy. How does an understanding of genocide and slavery as the conditions of the creation of the US nation-state and US law impact our analysis of the relationship between law and gender?¹ The title of this symposium evokes the most basic questions that legal scholars and activists must ask ourselves as we seek to transform systems that we understand as harmful or violent. What is the law? What is violence? Are racialized-gendered distributions of harm and violence incidental to American law and the US nation-state or co-constitutive with it?

One theme that has been touched on by today’s discussions is the concern over cooptation and how resistance struggles can be co-opted into narratives of citizenship and belonging in law that actually reinforce conditions of subjection. Some of the most interesting work emerging in trans studies and trans activism is taking up critiques of universalism that underlie rights claims. Scholars and activists are questioning what it means to make rights claims that frame trans resistance in terms of demands for privacy, inclusion, recognition and liberty. We are examining how such claims can end up legitimizing and strengthening conditions of subjection and violence. These inquiries bring to light significant questions about what role law reform should have in resistance struggles and require us to

¹ See generally, ANDREA SMITH, CONQUEST (2005); Andrea Smith, *Heteropatriarchy and the Three Pillars of White Supremacy: Rethinking Women of Color Organizing*, in COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 66 (2006); Jared Sexton, *People-of-Color-Blindness, Notes on the Afterlife of Slavery*, SOCIAL TEXT, Summer 2010 at 31; SAIDIYA HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY AND SELF-MAKING IN NINETEENTH CENTURY AMERICA (1997).

center an understanding of the racialized and gendered violence that is produced by and constitutes American law

For example, some of us have been questioning whether it is wise to use privacy arguments to talk about what is wrong with the experiences trans people are having with various policy changes that are emerging out of the “War on Terror.” Since 2001, a range of policies and administrative practices have emerged in the US that have increased identity surveillance. Many of these operate by comparing pools of data that are collected for different reasons and had not previously been compared in order to look for inconsistencies.² Others operate by adding more data requirements to various documents and systems.³ Because the laws and policies that govern when trans people can change their gender markers on various forms of ID and in various agencies’ records are inconsistent both in writing and in application, because most of these policies inappropriately demand medical evidence not available to most trans people, and because most trans people have a difficult time navigating this matrix of inconsistent policies, most trans people cannot get their gender markers changed with all of the agencies and institutions that track their identity information. The result is that many trans people are having increasing problems doing any of the activities that can involve having to present ID: working, driving, navigating airports, dealing with police, dealing with immigration authorities, dealing with financial institutions, and other essentials. One way to frame these conditions and the broader problem of policies that require medical evidence about trans people’s bodies in order to change gender on government documents and records is to articulate it as a violation of the privacy rights of trans people. We can argue

² For a more detailed discussion, see Dean Spade, *Documenting Gender*, 59 HASTINGS L. J. 731 (2008).

³ For example, gender markers were recently added to plane tickets with the purported aim of increasing security. See Susan Stellin, *Flying? Don’t Book Under a Nickname*, N.Y. TIMES, June 8, 2009, available at http://www.nytimes.com/2009/06/09/business/09security.html?_r=1&scp=1&sq=nicknames&st=csc; see also Dean Spade, *Ma’am, I mean, um, Sir, um um Ma’am?*, CASES & CONTROVERSIES BLOG (June 11, 2009, 8:13 AM), <http://lawfacultyblog.scattlcu.edu/2009/06/11/maam-um-i-mean-sir-um-um-maam/>.

that being required to provide detailed medical documentation about our bodies and histories in order to access drivers licenses, Social Security records, birth certificates, immigration documents and the like deprives us of a universal right to privacy. However, there are significant concerns about what this argument participates in obscuring. Disability activists, women of color feminists, poor people's movements and other resistant formations have long critiqued the idea of a universal right of privacy in American law. They have argued that privacy has operated as a false universal and that this false promise actually reproduces and supports racialized-gendered violence. The notion that there are separate public and private spheres has often made violence and exploitation of vulnerable people impossible to address in the law.⁴ The history and contemporary realities of permitting rape and other violence within the home and of denying labor rights and benefits like social security to domestic workers are examples of this.⁵ The private/public distinction has also operated to justify the targeting of certain populations for abuse and detention. Its logic has obscured how law structures dependency and the distribution of life chances such that certain populations, such as welfare recipients, women, and people with disabilities are constructed as forgoing their right to privacy because they cannot meet arbitrary norms of independence that hide the forces that subsidize and support the lives of white men, high wage earners and the wealthy, and people constructed as able-bodied. The universality of privacy has also been questioned by populations targeted by law enforcement as they experience high levels of state intrusion into

⁴ See, e.g., Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539 (2006); LISA DUGGAN, *TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* (2004).

⁵ See Terri Nilliasca, *Some Women's Work: Domestic Work, Class, Race, Heteropatriarchy, and the Limits of Legal Reform*, 16 MICH. J. RACE & L. 377 (2011). Nilliasca juxtaposes the refusal of labor rights to domestic workers, predominantly black and immigrant women, which is sometimes articulated as a right to privacy for the employers of domestic workers with the high levels of state intervention in the families of families of color, which are disproportionately targeted by child welfare systems. See Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 19–22 (1993).

realms that have been labeled “private” for those privileged populations who are protected and enriched by law enforcement. They cite the forced sterilization of women of color and people with disabilities, the disproportionate intervention of child welfare services in the families of people of color,⁶ the routine strip searches of arrestees and detainees,⁷ the frequent home invasions of police and immigration authorities in communities of color,⁸ and the disproportionate sexual violence experienced by women of color at the hands of police,⁹ as examples of how the “right to privacy” is contingent on whiteness, maleness, and wealth. Their critiques have shattered the illusion of a universal right to privacy and have suggested that invoking such a right participates in a reproducing a fantasy about the fairness, neutrality and universality of law that undergirds white supremacy, ablism, sexism and economic injustice.

When we consider using privacy claims to resist the conditions trans people are experiencing under the increased identity surveillance regimes that are part of the War on Terror, the limitations of universal rights claims are particularly visible. The identity surveillance practices in question are designed to target immigrants and have been part of policy changes that have

⁶ “More than a half million children taken from their parents are currently in foster care. African Americans are the most likely of any group to be disrupted in this way by government authorities. Black children make up nearly half the foster care population, although they constitute less than one fifth of the nation’s children. In Chicago, 95 percent of children in foster care are Black. Once removed from their homes, Black children remain in foster care longer, are moved more often, receive fewer services, and are less likely to be either returned home or adopted than other children.” DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* vi (2002).

⁷ See DVD: *VISIONS OF ABOLITION: FROM CRITICAL RESISTANCE TO A NEW WAY OF LIFE* (2010) (available at <http://www.visionsofabolition.org/>).

⁸ Soniya Munshi, *Negotiations of Safety and Precariousness: Section 287 (g) and Domestic Violence in Immigrant Communities*, Presentation at UCLA’s School of Law’s Critical Race Studies Annual Symposium, Intersectionality: Challenging Theory, Reframing Politics, Transforming Movements (Mar. 2010).

⁹ Andrea J. Ritchie, *Law Enforcement Violence Against Women of Color*, in *COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* 138 (2006).

severely harmed immigrant communities by massively increasing the criminalization and imprisonment of immigrants, exposing immigrants to increased violence, deportation, and economic exploitation.¹⁰ To take up arguments that assert the privacy rights of trans people usually means to articulate the problems that trans people are running into with these policies as separate from the problems that these policies were designed to create for trans and non-trans immigrants and to fail to contest those designs. Articulating a privacy argument that demands a fix for some of the ways that trans people are getting caught up because of inconsistent gender designation change policies suggests that identity surveillance in general and immigrant scapegoating and targeting in the name of national security are not problems and are not concerns of trans politics. Such a strategy both participates in affirming those policy priorities and in dividing trans communities into those who will benefit from fixing the trans-specific issues with these policies and those whose immigration status, disabilities, imprisonment or other vectors of vulnerability will mean that such fixes will not reduce the harm of War on Terror policy changes they experience. Claims of universal rights tend to carry this danger—they both obscure the conditions under which such rights are anything but universal, and they divide the populations in whose name the right is being articulated into those whose race, class, gender, immigration and ability characteristics might make the right seemingly applicable and those who will remain outside the scope of protection. Rights claims articulate a demand for belonging in the national population encompassed in the “us” of the nation, and because that “us” has always been and remains

¹⁰DEEPA FERNANDES, *The Immigration Industrial Complex*, in TARGETED: HOMELAND SECURITY AND THE BUSINESS OF IMMIGRATION 169 (2007); DAVID BACON, *Displacement and Migration*, in ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS 51 (2008).

constituted by the designation of “others,”¹¹ those claims to belonging necessarily shore up the arrangements that produce populations targeted for abandonment and violence.¹²

In contemporary trans politics, the most visible articulation of universal rights claims frameworks emerge in the

¹¹ Andrea Smith employs Denise Ferreira da Silva’s critique of universalism in her article, *Queer Theory and Native Studies: The Heteronormativity of Settler Colonialism*. The enlightenment subject Smith and Silva are discussing is the individual subject of universal legal rights claims that concerns me here. Smith’s text is helpful for understanding how this purportedly universal subject is actually racialized. Smith writes, “...Silva argues that the Western subject is fundamentally constituted through race. ...[and] demonstrates that the post-Enlightenment version of the subject as self-determined exists by situating itself against “affectable others” who are subject to natural conditions as well as to the self-determined power of the Western subject. The central anxiety with which the Western subject struggles is that it is, in fact, not self-determining. The Western subject differentiates itself from conditions of “affectability” by separating from affectable others—this separation being a fundamentally racial one. The Western subject is universal, while the racialized subject is particular, but aspires to be universal.” Andrea Smith, *Queer Theory and Native Studies: The Heteronormativity of Settler Colonialism*, 16 GLQ: A JOURNAL OF LESBIAN AND GAY STUDIES 41, 42 (2010). This discussion of the focus on self-determination is also reminiscent of Angela Harris’ discussion of structural liberalism. Harris writes, “By structural liberalism, I mean two interrelated political-philosophical commitments: (1) the separation of family, market, state, and civil society into separate and independent “spheres” which should in principle be governed differently; and (2) a commitment to the ideal of the self-governing subject, through which individuals and groups deemed incapable of self-government may be subjected to kinds of regulation that would otherwise be deemed incompatible with liberty.” See Harris, *supra* note 4, at 1542. Harris describes structural liberalism as the belief in separate public and private spheres and the notion that all subjects are self-governing, except those who cannot be. She demonstrates how the combination of these ideas produces the rationale for intensive state intervention in the lives of those who are deemed in need of governance. Those so deemed cannot avail themselves of the protection purportedly provided by the separate spheres of public and private. Contemporary examples of populations deemed outside of privacy rights include low-income mothers and mothers of color, prisoners, foster youth and youth in criminal detention, low-income people with disabilities, welfare recipients, and others perceived to forfeit privacy because of their membership in a reviled subpopulation perceived to be too criminal or too dependent to be self-governing.

¹² See Anna M. Agathangelou, D. Morgan Bassichis, & Tamara L. Spira, *Intimate Investments: Homonormativity, Global Lockdown, and the Seductions of Empire*, RADICAL HIST. REV. Winter 2008 at 120–143.

quest for trans-inclusive anti-discrimination laws and hate crimes laws. The demands to be included in these laws possess the same limitations described above. First, although anti-discrimination laws and hate crimes laws have not eliminated or even made a significant dent in employment discrimination or targeted violence faced by those who have been formally included in them for decades, these demands are made as if what the law says about marginalized groups actually determines their fates. A common belief exists that the main target of resistance movements by marginalized populations should be to get the law to say “good” things about that group and to get the law to not say “bad” things about that group.¹³ In fact, legal inclusion and recognition demands may, at times, reinforce the logics of harmful systems by justifying them, contributing to an illusion of fairness and equality, or reinforcing the targeting of certain “drains” or “internal enemies” by carving the group into “the deserving” and “the undeserving” and addressing only the issues of the favored sector. The relationship of lesbian and gay law reform projects to the field of criminal law provides an obvious example.¹⁴ The two major interventions of lesbian and gay law reformers in criminal law have been advocating the

¹³ For a more thorough discussion, see Dean Spade, *Laws as Tactics*, 21 COLUM. J. GENDER & L. 442 (2011).

¹⁴ This example is instructive for thinking about trans politics both because it cautions against the common assumption that trans politics should follow the model of lesbian and gay politics and take up its law reform strategies, and because the realm of criminal law is particularly relevant to emergent trans politics given both the high rate of criminalization and imprisonment of trans people and the significance of racialized criminalization and prison expansion to contemporary American politics. See generally DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW* (2011); Letter from Chase Strangio and Z Gabriel Arkles to Attorney General Eric Holder (May 10, 2010) (on file with author); Gabriel Arkles, *Transgender Communities and the Prison Industrial Complex* (lecture) (Feb. 2010); Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 515–16 (2009); Morgan Bassichis, “It’s War in Here”: *A Report on the Treatment of Transgender & Intersex People in New York State Men’s Prisons*, SYLVIA RIVERA LAW PROJECT (2007), available at <http://srp.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), GIC TIP J., Summer 2004, & GIC TIP J., Fall 2004.

decriminalization of sodomy and the passage of sexual orientation-inclusive hate crimes laws. The choice of these two targets demonstrates the “what the law says about us” focus of the work. If the aim were to reduce the number of lesbian and gay people in prisons and jails or to reduce the violence, medical neglect, nutritional deprivation and other conditions faced by lesbian and gay people in prison, the legal strategy would have been different. Joining and creating lawsuits focused on prison conditions, opposing sentencing enhancements for drugs and other criminalized behaviors that are responsible for the bulk of imprisonment for all people including lesbian and gay people, joining campaigns to decriminalize sex work, opposing policies that criminalize poverty, and generally opposing prison expansion and criminalization would have been ideal targets. Instead the goal of these interventions is to change the parts of criminal law that explicitly name gay and lesbian people as criminal solely for behavior associated with homosexuality and to put them on the list of people explicitly protected by criminal law. Such an approach concerns itself solely with the explicit, intentional operations of homophobia when written into law, but leaves out a broader understanding of criminal punishment that would inspire interventions that actually decarcerate gay and lesbian people or improve the life chances of gay and lesbian people who are imprisoned. These strategies have the danger of not only failing to actually improve the life chances of the people in whose name they operate, but also of strengthening the criminal punishment system by allowing it to appear fair and neutral, and even adding to its capacity to criminalize. Does the end of sodomy criminalization and the addition of sexual orientation to hate crimes laws mean that the criminal punishment system is no longer homophobic? Producing such a narrow criminal law reform agenda suggests so. When the hate crimes banner is taken up alongside the push to decriminalize sodomy, the message becomes “we are not the criminals, we are the victims.” This message affirms the legitimacy of criminalization, failing to question criminal law enforcement as an articulation of white supremacy in the US.¹⁵ It articulates a claim to belonging for a certain population of gay and lesbian people—those who feel comfortable calling the police, those

¹⁵ ANGELA DAVIS, *ARE PRISONS OBSOLETE?* (2003).

who do not live in communities targeted by police violence, those not facing the violence of jails and prisons and juvenile punishment systems—by framing those people as properly protected by criminal punishment systems.

The other danger of such a strategy is that it is produced by and enhances race and class divides amongst gays and lesbians that correlate to experiences in and views of the criminal punishment system. For those lesbian and gay people living in white communities and upper-class not targeted for policing and imprisonment, the criminal punishment system may appear to be a protector and its perceived flaws may be limited to these narrow explicit inclusions and exclusions. For those lesbian and gay people—often people of color, immigrants and poor people—who have survived ongoing experiences of violence, loss of family members, and targeting by the juvenile and adult punishment systems, the elimination of more explicit homophobic inclusions or exclusions may be a small and possibly insignificant demand. Those people may crave interventions that do more to reduce or end imprisonment and/or protect prisoners. People who are part of campaigns to dismantle systems based on an understanding of those systems as articulating racialized-gendered control at the population level may understand reforms that are solely concerned with how those systems describe themselves as misguided. As many activists, scholars and organizations have pointed out, the hate crimes legislation demand builds and expands the criminal

punishment system by enhancing penalties and resources.¹⁶ For groups organizing to oppose policing and imprisonment, including people of color, people with disabilities and poor people, such reforms run in opposition to their work.

Similar controversies have emerged in other instances where (usually white-led) lesbian and gay (and sometimes trans) reform organizations have sought inclusion or recognition from systems that feminist, racial justice, and disability activists and scholars have identified as key nodes of maldistribution of life chances. The quests for inclusion in US military service as well as inclusion in the institution of marriage have generated these same rifts. For those who believe that the US military is a primary force of systematized rape, colonization, land and resource theft, genocide and other imperialist violence, the creation of a gay and lesbian political stance on the military aimed at inclusion rather than demilitarization is a mistake. For those who have long articulated opposition to state sanction and reward for some forms of sexuality and family structure and punishment for others, the idea that gay and lesbian people should seek marriage recognition rather than aim to abolish marriage and achieve more just methods of distribution is

¹⁶ The 2009 controversies around the addition of the death penalty to the federal hate crime statute brought these tensions to the surface. The National Coalition of Anti-Violence Projects released a statement critiquing the addition of the death penalty clause specifically, while other groups, such as Communities United Against Violence in San Francisco, the Audre Lorde Project, the American Friends Service Committee, and the Sylvia Rivera Law Project in New York City, had critiqued the hate crime law strategy from the start. The controversy brought attention to the real dangers of trying to ally with the criminal punishment system, given its relentless drive to expand itself by adding more and harsher punishments wherever possible. Rebecca Waggoner-Klock & Sharon Stapel, *Statement of the National Coalition of Anti-Violence Programs* (2009), available at www.avp.org/documents/NCAVPShepardAct9.24.09.pdf; Letter from Sylvia Rivera Law Project, FIERCE, Queers for Economic Justice, Peter Cicchino Youth Project, and the Audre Lorde Project, to Members of the GENDA Coalition (Apr. 6, 2009), available at <http://srlp.org/genda> (announcing SLRP non-support of the Gender Employment Non-Discrimination Act); *SLRP Opposes the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, SYLVIA RIVERA LAW PROJECT, <http://srlp.org/fedhatecrimlaw> (last visited Nov. 23, 2011).

similarly problematic.¹⁷ Similar racial- and economic-justice centered critiques have been made regarding hate crimes laws and anti-discrimination laws sought by some trans activists. Critics have observed that both of these legislative reforms have demonstrated little impact on the violence and discrimination that plague trans populations, yet both add to the illusion of a neutral state that protects trans people, meanwhile state institutions remain the most common perpetrators of violence and discrimination against trans people. Critics have further argued that hate crimes legislation, in particular, is part of a larger trend of expanding criminalization and imprisonment that takes up transphobic violence as an opportunity to expand the criminal punishment system, meanwhile that system is a central location of racialized and gendered violence and harm for marginalized populations like trans people.¹⁸ These interventions, then, do not get at the root causes of trans unemployment, poverty, homelessness and imprisonment, are not proven to prevent harm against trans people, but do legitimize harmful and violent criminal punishment and economic systems by adding a window dressing of fairness and neutrality. This kind of analysis of the limits of rights discourse and the ways that rights discourse in social movements tends to reproduce race, class, ability, immigration and gender divisions is visible across many contemporary social movements. The emergence of “reproductive justice,” “food justice,” and “environmental justice” frameworks indicate this kind of critical engagement. In each of these instances, the addition of “justice” indicates a critique of narrower framings and an analysis of the issues in question that centers racial and economic justice.

¹⁷ Katherine M. Franke, *The Politics of Same-sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006); Dean Spade & Craig Willse, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309 (2005); Kenyon Farrow, *Is Gay Marriage Anti-Black?*, KenyonFarrow.com (June 14, 2005), <http://kenyonfarrow.com/2005/06/14/is-gay-marriage-anti-black/>; Priya Kandaswamy, Mattie Udora Richardson, & Marlon M Bailey, *Is Gay Marriage Racist?*, in THAT'S REVOLTING: QUEER STRATEGIES FOR RESISTING ASSIMILATION 87-93 (Mattilda Sycamore ed., 2006); *Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships*, http://beyondmarriage.org/full_statement.html.

¹⁸ See *supra*, note 16.

Reproductive justice is a women-of-color-centered response to white feminist articulations of reproductive rights that have centered the experiences of white women with pro-natalist US policy and culture while ignoring how women of color have been targeted for forced sterilization and removal of children by child welfare systems. Reproductive justice activists have questioned the narrow focus on abortion rights and the “choice” framework, providing a broader understanding of what poor women, immigrant women, women with disabilities and women of color need in order to have meaningful self-determination in all areas related to sexuality, family, pregnancy, childbirth, and abortion. As a result, the framing of reproductive justice includes attention to economic disparity, white supremacy, labor, and health care access and centers attention to state violence.¹⁹ The demands of such a framework are far broader than an individual “right to choose” to terminate pregnancy and instead encompass questions of distribution of wealth and life chances. This “justice” framework, increasingly suggested by movements demanding that white supremacy and wealth disparity be at the center of analysis of social justice issues, necessarily include a critique of legal rights strategies. They demonstrate how in various realms, narrow single issues articulated as legal rights often offer little to those facing the most dire conditions and often divide constituencies along lines of race and class since race and class correlate to ability to avail oneself of legal rights and to vulnerability to state violence. Rights claims articulated through American law inevitably inherit the limitations and relationships that stem from American law’s basis in genocide and slavery and role in maintaining relations of white supremacy, exploitation, heteropatriarchy and warfare.

Many scholars, activists and organizations are discussing and experimenting with how to create trans political resistance centered in racial and economic justice that understands the crucial relationship between law reform and the maintenance of systems of subjection. Many are raising questions about the proper role of lawyers and law reform in trans struggles that have demands that exceed formal legal

¹⁹ Loretta J. Ross, *The Color of Choice: White Supremacy and Reproductive Justice*, in *COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* 53 (2006).

equality. With a critical analysis of universal rights frameworks accompanied by an understanding of the crucial role of legal systems in producing violence and shortened life spans for trans populations, we come to understand the careful attention and continued evaluation that is needed to discern when law reform work makes sense as a tactic and when it presents significant dangers. A few questions are useful to ask as part of this assessment. First, will this reform work yield actual improvement to the conditions of the lives of vulnerable trans people? This question helps avoid taking on law reform work that is merely symbolic, changing what the law says about us and legitimizing its operation, but having no actual impact on conditions of harm and violence and the immediate needs of trans people. Second, does this reform compromise one part of the constituency for the benefit of another? This question can help us avoid taking up work where we seek change that benefits only those with particular kinds of privilege, or where we affirm or build systems that are targeting some of us because we want those systems to include or recognize others of us. Third, to what degree does this reform legitimize or build the capacity of violent systems? This question, considered with the rest, helps us to assess whether our work is helping dismantle systems that we think are fundamentally harmful such as criminal punishment and immigration enforcement systems while making incremental reforms or whether it is strengthening them and how our understanding of that strengthening or dismantling relates to the other criteria. It helps us remember to ensure that the reform strategy moves us toward our long-term goals, which is especially important because of how reform opportunities often emerge unexpectedly, sometimes in response to our initial success at raising attention about an issue, and advocates often feel pressured to act fast and win a victory. This question reminds us to slow down and examine longer-term implications of the reform. Finally, we ask, does this reform work build the capacity the impacted population to mobilize for larger systemic change that addresses the root causes of harm and violence? This question helps us pick reform opportunities that will bring more people into the struggle, develop more leaders, shift paradigms, build coalition with key allies, and generally grow the size and depth of the resistance work.

Asking these questions about when and how to engage law reform work with a recognition that legal rights struggles

tend to inherit the conditions of belonging and citizenship that American law produces and is produced by require us to also examine the structures that produce trans resistance work. It is essential to evaluate social movement infrastructure to understand how decisionmaking structures and resource distribution often produce support for narrow legal reform demands and squelch or contain more transformative work. Such an analysis can help us to develop infrastructure and practices that center redistribution within the work and that produce a space for political demands to emerge from the bottom up. As we let go of elite liberal notions that getting the right article placed in the New York Times or winning the right lawsuit will create equality, we can visualize broader social movement infrastructure that leads to transformation of the root causes of the maldistribution of life chances. Rather than narrow inclusion demands that appeal to people experiencing single vectors of subjection, demands for deeper transformation emerge when we build participatory movements based in racial and economic justice and centralize the leadership of those most vulnerable to multiple vectors of control.

In trans political spaces led by low-income people and people of color, demands are emerging that exceed the possibilities of legal reform. Calls for racial and economic justice that centralize prison abolition, full housing and health care for all and access to income are significantly different than the inclusion and recognition-focused demands that typify legal and legislative strategy. These demands focus on the radical transformations required to change the life chances of those facing intersecting vulnerabilities. They are shaped by a commitment to refuse compromises that divide constituencies with reforms that offer either solely symbolic protection, or at best increased access to people with certain privileges, yet leave others without access or even worse off than before. This politics is particularly emerging from membership-based organizations that have developed shared values about building participatory movements and are innovating and building on structures for that work modeled in various historical and contemporary movements in the US and abroad. These organizations share certain key principle for structuring their work to make it participatory and centered in racial and economic justice and to

resist some of the tropes of the nonprofitization trend described above.²⁰

Some of the key principles that underlie and shape this work are:²¹

- the work should be led by those directly impacted
- it should use an intersectional framework for understanding the multiple vectors of vulnerability converging in the issues (racism, sexism, xenophobia, transphobia, homophobia, ablism)
- the work should aim to model its own politics, to practice its vision in its day to day operations
- it should be process-oriented, using ongoing critical reflection rather than assuming that there is a moment of finishing or arriving
- it should continually develop new leaders, ever-expanding participation and focusing on building leadership of those who face the greatest barriers to participation and leadership
- the work should be based in an understanding that meaningful change comes from below (rather than top-down change granted by elites)

²⁰ Morgan Bassichis, Alex Lee, & Dean Spade, *Building an Abolitionist Trans Movement with Everything We've Got*, in *CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX* (Nat Smith & Eric & Stanlet eds. 2011).

²¹ The following points are based on an analysis of data gathered by a research group of which I was a part that interviewed nine membership-based organizations during 2008-2009 to learn more about their membership models and the reasons for their use of them. A report about that research is forthcoming from the Sylvia Rivera Law Project in 2012 and may include text I drafted that is similar to what is listed here. Beginning at this footnote, some of the text included in the rest of these remarks was later adapted and included in Chapter 5 of *NORMAL LIFE*, *supra* note 14.

- it should strive for accountability and transparency within organizations, between organizations, to its constituency, and to allied organizations and movements
- it should strengthen and build relationships as the underlying support system of the work and the change it seeks.

Several key strategies are being taken up by the organizations that are shaping their work with these shared values, including some emergent trans organizations. First, the use of non-hierarchical governance models, including collective structures, is valued over the concentration of decisionmaking power in a smaller number of leaders.²² Consensus decisionmaking is often a feature of such structures because it focuses on maximum participation and rejects the majority-rules approach that so often creates barriers for people experiencing intersecting vectors of vulnerability. Consensus decisionmaking can help a group focus its process on building shared understanding and ensuring no important concerns are ignored simply because they are held by a minority of people.²³ Second, many organizations are experimenting with flattening payscales, eliminating positions that do not come with benefits, and working to ensure that the workplace and the benefits are accessible to people who frequently face barriers to participation in social justice-related employment, such as people without formal education, people with criminal convictions, people with disabilities, people of color, trans people and immigrants. This

²² The Sylvia Rivera Law Project is an example of a racial and economic justice-focused organization using a collective governance model. Its model was developed based on researching other collectively-run organizations such as Sista Il Sista, Manavi, the Asian Women's Shelter and the May First Technology Collective. See *Why a Collective?*, SYLVIA RIVERA LAW PROJECT, <http://srlp.org/about/collective> (last visited Nov. 23, 2011); *Collective Handbook*, SYLVIA RIVERA LAW PROJECT, [http://srlp.org/files/collective handbook 2009.pdf](http://srlp.org/files/collective%20handbook%202009.pdf) (last visited Nov. 23, 2011).

²³ The book, *On Conflict and Consensus*, is a tool often used by organizations to learn consensus decision-making and to train members on how to participate in it. The full text is available online at <http://www.consensus.net/ocaccontents.html>.

includes making sure that trans healthcare, reproductive healthcare and mental healthcare are covered by insurance, creating flexible schedules for people with disabilities or dependents, eliminating higher education requirements where possible and providing extensive job training rather than requiring that applicants already have professional skills.²⁴ The aim of these initiatives is to avoid bringing the disparities in educational, health care, and other systems into social justice organizations and replicating their harms.

Third, many of these organizations have implemented highly structured leadership development models and programs aimed at increasing the leadership and governance capacities of their constituents.²⁵ These programs work to identify potential leaders from the constituency, especially focusing on members whose experiences of intersectional vulnerability give them particular insight into the operation of systems of control, and providing political and skills development training to deepen their capacity to lead. Some organizations stipend “freedom school” programs so that low-income and youth members can afford the time to come learn political history and analysis and organizing strategy.²⁶ Some stipend internships where members can learn skills by doing projects with the organization. Many such leadership development programs are tiered, providing initial

²⁴ See Sylvia Rivera Law Project, Employee Manual (on file with the author); American Friends Service Committee, *Workplace Transitions: Effective Advocacy for Transgender-Inclusive Employee Health Benefit Plans* (2005), available at transhealth.transadvocacy.org/Insurance/healthletter.pdf; R. Nick Gorton, *Transgender Health Benefits: Collateral Damage in the Resolution of the National Health Care Financing Dilemma*, 4 SEXUALITY RES. & SOC. POL’Y 81 (2007).

²⁵ FIERCE! in New York City is an example of this strategy. Their Education for Liberation Project stipends trans and queer youth of color to participate in political development workshops and internships with the organization to build their skills and analysis to govern the organization and go on to develop new leaders.

²⁶ Outstanding examples of organizations using the “freedom school” model include FIERCE! in New York City (fiercenyc.org) and the School of Unity and Liberation (SOUL) in Oakland (www.schoolofunityandliberation.org/).

low-commitment entry points for new members to get involved and deeper, more committed roles for members to take up as their knowledge of the issues and connection with the organization grows. These models are focused on maximizing the participation of directly impacted people and deepening their leadership skills and capacities through the work.²⁷

Many of these organizations aim to be staffed entirely by members and to have staffing consistently turn over as new members rise to leadership, so that the organization itself becomes a vehicle for developing skilled leaders even while it undertakes the campaigns, services, advocacy and other work. Some organizations create explicit criteria that guide the group in ensuring governance by directly affected people. Some have race, ability, gender, gender identity, immigration status or other quotas to guide in hiring or membership growth.²⁸ These guidelines help concretize organizational commitments about governance and leadership that can often erode because many organizations are contacted by many volunteers with privilege who want to help and who end up taking over and leading due to their increased access to skills, free time, and professional development. Grassroots fundraising is highly valued by these organizations as an alternative and/or supplement to foundation funding.²⁹ Raising money in small amounts from the directly impacted population and individual politically-aligned allies and through revenue generating activities (thrift stores, bake sales, for-pay services) can increase the autonomy of organizations from the limitations created by foundations. Some organizations use membership dues, often available on a sliding scale for low-income members, as a fundraising tool that also contributes to

²⁷ Detailed examples of these strategies at work can be found in the forthcoming SRLP report described in footnote 21.

²⁸ For example, the Sylvia Rivera Law Project Collective Manual requires the organization to have the staff, the collective, and each specific team within the organization be at least 50% plus one person people of color and at least 50% plus one person trans, intersex or gender non-conforming.

²⁹ See, Dean Spade, *Getting It Right from the Start: Building a Grassroots Fundraising Program*, GRASSROOTS FUNDRAISING J., January/February 2005 at 10–12.

organizational accountability because members feel ownership over the work and a commitment to govern.³⁰

These strategies reflect an awareness of the ways that non-profitization, philanthropic control, and the replication of racist, sexist, ablist, transphobic and classist models of organization and governance restrict and neutralize social justice work. As trans politics continues institutionalizing in various ways, these models may provide a way to avoid replicating the pitfalls of gay and lesbian rights and other political formations that have centralized leadership in people with privilege and formulated strategies and demands that have little effect on the life chances of those most vulnerable to poverty, detention and violence. Political work based on a commitment to democratic participation and to centering the experiences of those most vulnerable rather than those most assimilable, and focused on practicing resistance values at all levels, is less likely to be co-opted by legal reform agendas that strengthen and legitimate systems of control and derail demands for meaningful transformation.

The critiques of nonprofitization and the innovative methods of building movement infrastructure that many people are engaged in developing are particularly important given an analysis of neoliberalism.³¹ First, the context of neoliberalism has shifted and contained resistance in many ways, including by making social movement work a source of ideas and

³⁰ Two examples of grassroots organizations using a membership dues model to generate revenue are the Ontario Coalition Against Poverty (OCAP), who “mount campaigns against regressive government policies as they affect poor and working people [and] provide direct-action advocacy for individuals against welfare and ODSP [Ontario Disability Support Program], public housing and others who deny poor people what they are entitled to; believ[ing] in the power of people to organize themselves,” www.ocap.ca; and Desis Rising Up and Moving (DRUM), a “multigenerational, membership led organization of working class South Asian immigrants” founded to “build power of South Asian low wage immigrant workers, families fighting deportation and profiling as Muslims, and youth in New York City,” www.drumnation.org.

³¹ A particularly influential text addressing the perils of nonprofitization in recent years has been *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX* (INCITE! Women of Color Against Violence ed., 2007).

justifications for harmful state/corporate projects like the expansion of criminalization and imprisonment. Social justice work has been shaped into “shadow state” work that keeps people in their places and stabilizes and legitimizes the maldistribution of life chances. As Paul Kivel points out, nonprofit work often operates as a “buffer zone.” This work provides very minimal services to those most disserved by the enormous wealth divide, “mask[ing] the inequitable distribution of jobs, food, housing and other valuable resources . . . shift[ing] attention from the redistribution of wealth to the temporary provision of social services to keep people alive.” It also “keeps people in their place in the hierarchy” by directing dissatisfaction with or resistance to unfair conditions into narrow channels that do not fundamentally disrupt the status quo.³² For these reasons, there is an urgent necessity to create movement infrastructure that has critical capacities to examine sites of cooptation, to interrogate impact rather than focusing on intent, and to avoid siloed and divisive methods and strategies.

At the same time, we can see that the very operations of power we critique in the broader world also need to be constantly examined within movement organizations and other resistance formations. Institutionalization of any kind includes dangers of stagnation of leadership, ideas, ways of knowing, and distributionary mechanisms. As we create social movement infrastructure, we consistently risk falling into practices that we critique in state and corporate formations. Many resistant and self-declared “revolutionary” movements and formations have demonstrated that the capacity to create an imagined population in need of protection and imagined “threats” and “drains” is not solely an activity of nation-states and governments. Organizations and movements also frame deserving and undeserving populations, also frequently collect standardized

³² Paul Kivel, *Social Service or Social Change?*, in *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX* 129-150 (INCITE! Women of Color Against Violence ed., 2007); Ruth Wilson Gilmore, *In the Shadow of the Shadow State*, in *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX* 41-52 (INCITE! Women of Color Against Violence ed., 2007).

data that makes certain populations inconceivable or impossible, and also establish modes of distribution that make some people more secure at the expense of others.³³ Whenever we build shared understandings of the world, propose new systems of distribution, and imagine a better world we also, often unknowingly, establish norms that place someone outside.

Women of color feminism is a political tradition that has tried to confront this danger head-on by analyzing the difficulties that differences of all kinds present in politics that is based on universalizing experiences.³⁴ Women of color feminists have developed resistant practices focused on process, evaluation, consensus, transparency, and a healthy suspicion of universal claims about what constitutes liberation. These values and practices have been passed down to and heavily influenced much of the people of color-led queer and trans activism discussed above. These organizations are often aiming to operate with the assumption that their work is imperfect, that they have are likely to be overlooking or excluding highly vulnerable groups, that their strategies and structures need perpetual re-evaluation and adjustment. Self-critique and non-defensiveness are highly valued in these settings. A critique of institutionalization has become a central feature of the women-of-color-led critique of nonprofitization. Many scholars and activists have asserted that we need to examine whether we are working to keep an organization going, or whether we are working toward a social movement vision, and to recognize when those two goals are at odds. They have suggested that we have to be careful of the business models approach to organizational growth that encourages us to follow any opportunities for funding and to sustain and grow the

³³ At the end of his March 17, 1976 lecture, Foucault warns that socialists have not dealt with the problem that the kind of population-focused power their models of governance wield has an inherent "state racism"—his term for the ways that power mobilized to cultivate the life of the population always includes identifying threats and drains to the population who must be killed through abandonment, massacre or other means. MICHEL FOUCAULT, *SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE, 1975-76*, 256, 262–63 (David Macey trans., 2003).

³⁴ CHELA SANDOVAL, *METHODOLOGY OF THE OPPRESSED* 45–47 (2000).

organization by any means, even if we lose sight of our missions and visions. They have offered the reminder that social service organizations, in particular, should be aiming to put themselves out of business because, ideally, their work aims to reach the root causes of the need for services.³⁵

Prison abolition activists have offered an important analysis of how the norms and values that uphold practices of mass imprisonment in the US also impact the interpersonal and activist realms. The framing of harm as a problem of bad individuals who need to be exiled is one that appears again and again, not just in our criminal punishment systems, but in schools, employment settings, organizations, neighborhoods, friend groups, activist groups, and families. Abolitionists are trying to build models for dealing with harm that do not rely on exile, expulsion and caging, but instead look at the root causes of harm and seek healing and restoration for both people experiencing harm and people responsible for harm. This strategy is visible in “transformative justice” work that seeks alternative processes that do not use policing or criminal courts to address harm, but many are also working to develop these principles in other settings, including in social and activist communities and networks.³⁶ This principle of refusing to exile people is challenging to implement in a context where most of us have been socialized to find identifying and punishing individuals for any identifiable harm and caging people targeted for exile as key methods of organizing society. Resisting exile and building practices to address harm without it is the kind of

³⁵ See generally, THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX (INCITE! Women of Color Against Violence ed., 2007).

³⁶ See, e.g., COMMUNITIES UNITED AGAINST VIOLENCE, www.cuav.org; GENERATIONFIVE, www.generationfive.org; generationFIVE, *Towards Transformative Justice: Why a Liberatory Response to Violence Is Necessary for a Just World*, RESIST, September/October 2008, available at <http://www.resistinc.org/newsletters/articles/towards-transformative-justice>.

seemingly impossible³⁷ political project that has deep transformative potential.

Racial, gender, disability and economic justice activists around the US are working on innovative organizational structures and practices that resist many of the worst dangers presented to activists working in the context of neoliberalism. These methods of analysis and models of organizing suggest the possibility of developing practices that might help build transformative change that does not fall into traps that have caught many large-scale resistance projects. Focusing our critical political analysis on our own daily work and lives just as rigorously as we focus it on the large-scale operations of government and corporate systems is essential to building resistance work that has the potential to meaningfully transform the existing distribution of life chances.³⁸ An emerging critical trans politics must take up these calls for innovation and creative engagement and offer our particular perspectives on the operations of power and normalization to the understandings that are emerging.

Trans resistance is developing in a context of neoliberal politics where the choice to struggle for nothing more than

³⁷ In 2010, I attended a "Safety Lab" organized by Communities United Against Violence at the US Social Forum in Detroit. At one point, the facilitator asked the group "How many people here have ever been involved in addressing harm without calling the police, instead resolving it some other way?" This question offered an opportunity for participants in the workshop to reflect on the fact that we have all had experiences of resolving harm without calling the police, and to imagine that those experiences might provide clues to how we can move toward responding to and resolving other instances of harm without resorting to criminalization.

³⁸ "It seems to me that the real political task in a society such as ours is to criticize the workings of institutions that appear to be both neutral and independent; to criticize and attack them in such a manner that political violence that has always exercised itself through them will be unmasked so that one can fight against them. If we want right away to define the profile and the formula of our future society without criticizing all the forms of political power that are exerted in our society, there is a risk that they reconstitute themselves..." Michel Foucault, from Foucault-Chomsky debate. See *Noam Chomsky - Noam vs. Michel Foucault (Eng. subs).mpg*, Google Video, <http://video.google.com/videoplay?docid=-1634494870703391080#docid=2226778800073250396>.

incorporation in the neoliberal order is the most obvious option. We are continually invited to participate in building and growing the systems of control that shorten trans lives. The inclusion and recognition offered by these invitations is not just disappointingly symbolic, it also legitimates and expands conditions of subjection and harm. We can translate the pain of having community members murdered every month into a demand for more punishing power for the criminal system that targets us. We can fight to have the state declare us equal through anti-discrimination laws, yet watch as the majority of trans people remain unemployed, incapable of getting ID, kept out of social services and health care, and consigned to prisons that guarantee sexual assault and medical neglect. Structured abandonment and imprisonment remain the offers of neoliberalism for all but a few trans people, yet law reform strategies beckon us to join the neoliberal order. The paths to equality laid out by the “successful” lesbian and gay rights model to which we are assumed to aspire have little to offer us in terms of concrete change to our life chances, and our inclusion in that model legitimizes systems that harm us and further obscures the causes and consequences of that harm.

The political and economic conditions we are experiencing both shorten trans lives and threaten to subsume trans resistance. Trans people are told by legal systems, state agencies, employers, schools, and our families that we are impossible people who are not who we say we are, cannot exist, cannot be classified, and cannot fit anywhere. We have been told by lesbian and gay rights organizations, as they continually opt to leave us aside, that we are not politically viable and our lives are not a political possibility that can be conceived. At the same time, the norms of non-profit governance dictate that we must run our organizations like businesses, that more participatory or collective models of governance are inefficient and unfeasible, that we need to tailor our messages to what the media can understand, that our demands need to fit within the existing goals of the institutions on which we seek to intervene. The demands that are emerging from vulnerable trans communities for prison abolition, an end to immigration enforcement, full trans-inclusive health care, and economic justice are the kinds of demands that are incomprehensible to rights-claims-focused reform movements. These are demands that cannot be won in

courts. These demands are emerging from those for whom narrow legal reform demands have little to offer. The perceived impossibility of the very lives of trans people, especially those who experience multiple vectors of subjection of which trans identity is only a part, and the perceived impossibility of the demands and methods of resistance emerging from those populations are symptomatic of the inherent conflicts and divides produced (and often hidden) by neoliberalism.

Many activists and organizations are working to address conditions faced by trans and gender non-conforming people in ways that are part of a broad politics of racial and economic justice and that recognizes the central role of criminalization, immigration enforcement and poverty in trans subjection. This work prioritizes building leadership and membership on a “most vulnerable first” basis. At the same time that these projects are emerging, many are doing work to challenge the structures of LGBT rights frameworks and formations that are reproducing harmful conditions. Many are challenging the prioritization of and resource concentration in marriage reform work. Many are questioning the hate crimes law strategy as a way to address violence and opposing hate crimes laws “inclusion” campaigns. Organizations like the Sylvia Rivera Law Project and the Peter Cicchino Youth Project have challenged the lawyers-only, behind-closed-doors agenda setting and decisionmaking that has been typical of lesbian and gay rights and is being emulated in emerging transgender legal circles.³⁹ Additionally, around the US and the world, people are innovating models of mobilizing about trans politics that are deeply rooted in and connected to social movements for racial and gender justice, wealth redistribution, and opposition to imperialism.

In a moment in which trans identity is called to become a location for reproducing the exile logic of neoliberal fervor for criminalization and the “equal opportunity” logic that legitimates market-based distribution of life chances, the fruitlessness of those developments for most trans people opens

³⁹ Gabriel Arkles, Pooja Gehi, & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579.

key strategy questions. The call to formal legal equality through hate crimes laws and employment-focused anti-discrimination laws beckons trans populations to claim and embrace a kind of recognition that not only fails to offer respite from the brutalities of poverty and criminalization but also lends our struggle to the “inclusiveness” framework that justifies and expands the structures that produce those conditions. We are invited to demand that trans people are “human” when “human” is still defined through norms of race, ability, and immigration status that actually limit the invitation to a very small part of the trans population.⁴⁰ A growing dissent from this politics of recognition and inclusion is articulating a trans politics that refuses the invitation and articulates demands that conflict with the abandonment and imprisonment regimes that neoliberalism centers. These other trans politics, that appear impossible, incomprehensible, unviable in the context of recognition and inclusion-focused non-profitized social movements, include a critical engagement with the infrastructure of social change. Rejecting elite strategies centering law reform and mainstream media messaging, these locations of resistance offer models of participatory mass-based struggle led by those working at the intersections of multiple vectors of subjection. Such politics is unrecognizable as “LGBT” politics in the current moment in which formal legal equality and single-issue framing have claimed this realm for an agenda that centers “family” and “law and order” in conservative terms. The existence of critical practices that resist the beckoning of recognition despite the enormous pressures of neoliberal framing and nonprofitization suggests the fierce desire for trans political practices that actually address trans survival. It is that space, where questions of survival and distribution are centered, where the well-being of the most vulnerable will not be compromised for a promise of legal or media recognition, and where the difficult work of building participatory, de-professionalized resistance is taken up, where we can seek the emergence of deeply transformative trans resistance.

⁴⁰ “Aspiring to humanity is always a racial project.” Andrea Smith, *Queer Theory and Native Studies: The Heteronormativity of Settler Colonialism*, 16 GLQ: A JOURNAL OF LESBIAN AND GAY STUDIES 41, 42 (2010).

