

## LAWS AS TACTICS

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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<sup>1</sup>

This symposium invites us to consider the impact of Judith Butler's work on legal scholarship in the area of gender and sexuality. I am interested in reflecting particularly on trans politics and law for two reasons. First, because Butler's work has had such a significant impact on the emergence of the current iteration of trans politics of the 1990s and 2000s. Second, because I believe there is a great deal more that Butler's work can offer to significant questions facing trans resistance formations as the field of trans legal rights advocacy institutionalizes and as trans legal scholarship engages and responds to that institutionalization. In particular, I am interested in how Butler's work has provided analytical models for considering the role that norms and normalization play in both

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<sup>1</sup> NOAM CHOMSKY MICHEL FOUCAULT, THE CHOMSKY-FOUCAULT DEBATE: ON HUMAN NATURE 41 (New Press 2006) (1974).

disciplinary and biopolitical modes of governance relating to gender. This analysis is essential to understanding the limitations of certain legal rights frameworks for addressing harms created by racialized and gendered systems of meaning and control.

Broadly speaking, I want to think about how the work of both Butler and Foucault directs legal scholars and activists to reject a limited framework of fighting for our rights under the law. Instead, we are invited to consider how we come to understand ourselves as subjects of various legal regimes, how certain things come to be governed, how certain disciplinary and regulatory knowledges and practices congeal into institutional forms,<sup>2</sup> how the nation state formation is co-constituted with regularized categories of identity, what relations produce and reproduce racialized-gendered subjections, and how resistances can be conceived from within power relations that are never transparent or centralized. For trans politics and law scholarship, these inquiries constitute a necessary critical engagement with legal reform projects that are in conversation with Critical Race Theory, women of color feminism, queer of color critique, critical disability studies and other critical analytical methodologies that are providing key tools to the development of critical trans inquiry and practice.

This Article will look at how trans scholarship and activism have taken up disciplinary critiques of gender, often influenced by Butler, and suggest that further development of critical trans perspectives focused on sites of regularization is needed, for which Butler's work on governmentality can be useful. To start, I describe some of the key concepts from Butler's work that have been taken up in trans politics and briefly review the distinctions Foucault offers between sovereignty, discipline and biopolitics. I then examine some of the ways that trans politics has critiqued disciplinary norms, looking at resistance to the medicalization of trans identity and the response to anti-trans feminism. Next, I look at areas where the operation of racialized-gendered normalization at the population level are

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<sup>2</sup> MITCHELL DEAN, GOVERNMENTALITY 18 (1999) ("On the one hand, we govern others and ourselves according to what we take to be true about who we are, what aspects of our existence should be worked upon, how, with what means and to what ends . . . . On the other hand, the ways in which we govern and conduct ourselves give rise to different ways of producing truth.").

being examined and might be further troubled by trans scholars and activists. Here I look at critiques of identity surveillance practices that use gender as a category of identity verification and critiques of certain trans law reform projects. Using Butler's work, I raise questions about the role of law reform in resistance to various sites of gender regularization and suggest areas of further inquiry that might be taken up by scholars and activists engaging a critical trans politics rooted in a skepticism about law reform projects.

Enough cannot be said about the influence of Butler's work, especially *Gender Trouble*, on the development of contemporary trans politics. Butler's articulation of gender as "the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being"<sup>3</sup> has broadly and deeply impacted the most central conversations about what a politics of trans resistance is resisting and what claims it might make. Butler argues that, "the body is not a mute facticity."<sup>4</sup> Gender has no truth but rather is a matrix of norms and repeated practices. "[I]f the inner truth of gender is a fabrication and if a true gender is a fantasy instituted and inscribed on the surface of bodies, then it seems that genders can be neither true nor false, but are only produced as the truth effects of a discourse of primary and stable identity."<sup>5</sup> "Femininity is thus not the product of a choice, but the forcible citation of a norm, one whose complex historicity is indissociable from relations of discipline, regulation, punishment."<sup>6</sup> Butler shows that gender is not a natural fact but instead a set of congealed, repeated practices that produce a field of regulation in which all people are compelled to perform

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<sup>3</sup> JUDITH BUTLER, *GENDER TROUBLE* 33 (1990) [hereinafter *GENDER TROUBLE*].

<sup>4</sup> *Id.* at 129.

<sup>5</sup> *Id.* at 136.

<sup>6</sup> JUDITH BUTLER, *BODIES THAT MATTER* 232 (1993) [hereinafter *BODIES THAT MATTER*].

gender. Doing so is a matter of survival.<sup>7</sup> Given this understanding of gender, she suggests a framework for building an analysis of gender that is, in my view, essential to theorizing feminist and trans resistance:

A political genealogy of gender ontologies, if it is successful, will deconstruct the substantive appearance of gender into its constitutive acts and locate and account for those acts within the compulsory frames set by the various forces that police the social appearance of gender.<sup>8</sup>

Understanding gender as an effect of discourse rather than a cause and calling for an examination of disciplinary and regulatory sites of the production of gender initiates a strategic approach to resistance that departs from the production of certain truth claims that underlie liberal equality and equal opportunity arguments that are typically centered by legal reform projects.<sup>9</sup> Butler helps us to think through law and subjection from an understanding of power as productive rather than repressive, arguing that:

[S]ubject positions are always assumed in response to the reprimand of the law; acts of disobedience must always take place within the law using the terms that constitute us; subjects are always implicated in the relations of power but since they are also enabled by them they are not merely subordinated to the law. . . . [I]t would be no more right to claim

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<sup>7</sup> JUDITH BUTLER, *PSYCHIC LIFE OF POWER* 20 (1997) [hereinafter *PSYCHIC LIFE OF POWER*] (“Where social categories guarantee a recognizable and enduring social existence, the embrace of such categories, even as they work in the service of subjection, is often preferred to no social existence at all.”).

<sup>8</sup> *GENDER TROUBLE*, *supra* note 3, at 33.

<sup>9</sup> Chela Sandoval’s work describing five forms of oppositional consciousness engaged by social movements in the United States in the late 20th century is a useful tool for examining the limitations of what she calls the “equal rights” form. CHELA SANDOVAL, *METHODOLOGY OF THE OPPRESSED* 56 (2000).

that the term ‘construction’ belongs at the grammatical site of [the] subject, for construction is neither a subject nor its act, but a process of reiteration by which both ‘subjects’ and ‘acts’ come to appear at all. There is no power that acts, but only a reiterated acting that is power in its persistence and instability.<sup>10</sup>

Butler’s analysis of gender and her theory of performativity in particular provide an understanding of gender as a norm that operates in both the disciplinary and biopolitical modes that are essential terrain for law scholars and activists considering trans subjection and resistance.<sup>11</sup> Foucault describes disciplinary and biopolitical modes of power as distinct from sovereignty, providing a framework that, as I argue elsewhere, is particularly useful for examining the limitations of the understandings of power that underlie legal reform projects based in the anti-discrimination principle.<sup>12</sup> Foucault describes sovereignty as power rooted in the “right to kill” (wielded against individual heretics or other disobedient people) or in “subtraction”—the power to take away. This subtractive power is wielded by the sovereign with the aim of obedience to the law and the maintenance of sovereign power itself.<sup>13</sup> Discipline, on the other hand, establishes norms of good behavior and ideas about proper and improper categories of subjects. Foucault famously traces the invention of certain categories of sexual subjects, including

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<sup>10</sup> BODIES THAT MATTER, *supra* note 6, at 122–3.

<sup>11</sup> See PSYCHIC LIFE OF POWER, *supra* note 8, at 13 (1997). (“Power not only *acts on* a subject but, in a transitive sense, *enacts* the subject into being.”).

<sup>12</sup> DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 2011; Dean Spade, Lecture at Barnard Center for Research on Women: Trans Politics on a Neoliberal Landscape (Feb. 9, 2009) (on file with author); Dean Spade, Thomas Lecture at Yale Law School: Beyond Recognition (Jan. 2, 2010), *available at* [http://ylsqts.law.yale.edu:8080/qtmedia/lectures10/YLSThomasSpade020810\\_s.mov](http://ylsqts.law.yale.edu:8080/qtmedia/lectures10/YLSThomasSpade020810_s.mov).

<sup>13</sup> Michel Foucault, *Governmentality*, 95 in FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY: WITH TWO LECTURES BY AND AN INTERVIEW WITH MICHEL FOUCAULT (Graham Burchell, Colin Gordon & Peter Miller eds., 1991) [hereinafter *Governmentality*].

the homosexual, the reproductive couple and the masturbating child, to argue that relations of power produced these identities through an explosion of discourse about sexuality in the Victorian period.<sup>14</sup> Disciplinary practices congeal in certain institutional locations such as the school, the factory and the clinic, where proper behavior is codified at the level of detail, and subjects are formed to police ourselves and each other according to these norms. Unlike discipline and sovereignty, biopolitics is concerned with population rather than individuals. Whereas sovereignty is defined by the right of the sovereign to kill, biopolitics is concerned with the distribution of life chances and the imperative to make live, to cultivate the life of the population.<sup>15</sup> Biopolitics develops as population grows and governments become concerned with birth and death rates, public health initiatives and the management of risks inherent in the population. From a law perspective, the rise of (often administrative) population-level interventions that we can understand as serving a care-taking function signals this mode of power. Immigration enforcement, social welfare programs, or multi-dimensional campaigns like “Welfare Reform,” the “War on Drugs” or the “War on Terror” that mobilize a range of legal and administrative technologies (e.g. education policy, criminal punishment systems, methods of recordkeeping, family law doctrines, public housing regulations, surveillance technologies) are all examples of population-level interventions. These population-level interventions are mobilized in the name of promoting the life of the national population against perceived threats and drains and operate through sorting and producing regularities rather than individual targeting. This regulatory mode of power is not concerned with obedience to law and the maintenance of sovereign power, but rather has multiple and

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<sup>14</sup> MICHEL FOUCAULT, *I HISTORY OF SEXUALITY* (Robert Hurley trans., 1990) (1977).

<sup>15</sup> MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLÈGE DE FRANCE, 1975–1976 241 (David Macey trans., 2003) [hereinafter “SOCIETY MUST BE DEFENDED”].

diffuse aims, with each area being governed having a set of ends seen as convenient or desirable to those things.<sup>16</sup>

Foucault suggests that biopolitics and discipline have the norm in common:

In more general terms, we can say that there is one element that will circulate between the disciplinary and the regulatory, which will also be applied to the body and population alike, which will make it possible to control both the disciplinary order of the body and the aleatory events that occur in the biopolitical multiplicity. The element that circulates between the two is the norm. The norm is something that can be applied both to a body one wishes to discipline and a population one wishes to regularize.<sup>17</sup>

Norms of behavior that operate at the individual level and that are incorporated by subjects into their self-understanding are essential to discipline. Biopolitics mobilizes norms at the population level through sorting technologies that produce structured security and insecurity for various populations in the distribution of life chances.

Foucault's description of biopolitics as a form of power concerned with cultivating life, "making live," raises the question of how genocide, massacre and other killing can occur in the context of this life-giving biopolitical power. Foucault identifies "state racism" to answer this question. He explains that this population-focused power concerned with promoting life always includes the identification of threats and drains to the

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<sup>16</sup> See *Governmentality*, *supra* note 13, at 95 ("Government is defined as a right manner of disposing things so as to lead not to the form of the common good . . . but to an end which is 'convenient' for each of the things that are to be governed. This implies a plurality of specific aims: for instance, government will have to ensure that the greatest possible quantity of wealth is produced, that the people are provided with sufficient means of subsistence, that the population is enabled to multiply, etc. There is a whole series of specific finalities, then, which become the objective of government as such.").

<sup>17</sup> "SOCIETY MUST BE DEFENDED," *supra* note 15, at 253.

population, and that the destruction or killing of these threats in order to preserve and promote the life of the population is always present in biopolitics. Importantly, Foucault explains that killing:

[Does] not mean simply murder as such, but also every form of indirect murder: the fact of exposing someone to death, increasing the risk of death for some people, or quite simply, political death, expulsion, rejection, and so on.<sup>18</sup>

Thus, the function of biopolitical power is not the “right to kill” as in sovereignty, but the power to “make live and let die.”<sup>19</sup>

Butler’s theorization of gender, especially her description of the operation of disciplinary gender norms, has significantly influenced key debates in trans activism, law reform and legal scholarship. I believe that Butler’s work has further contributions to make to emerging conversations in trans law and politics that are examining biopolitical operations of gender as a regulatory technology in the context of neoliberalism. In this Article I want to look at a few of the debates in trans law and activism where Butler’s theorization of gender has enabled important analysis and raise some areas where further engagement with Butler’s work might be beneficial.

## **I. Gender Norms and Disciplinary Critiques**

Butler’s theorization of gender has been taken up in the critique of the medical model of transsexuality, an important topic in trans politics and law in recent decades. Butler’s assertion that sex “imposes an artificial unity on an otherwise discontinuous set of attributes”<sup>20</sup> and articulation of gender as a coagulation of repetitive acts appearing as a natural fact provides a pathway for critiquing how the production of transsexuality in medicine is category-stabilizing for sex and gender. Scholars and

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<sup>18</sup> *Id.* at 256.

<sup>19</sup> *Id.* at 241.

<sup>20</sup> GENDER TROUBLE, *supra* note 3, at 114.



activists have taken up these tools to make several important critiques of the medicalization of trans identity. We have critiqued how the diagnostic criteria of Gender Identity Disorder produces a fiction of a naturalized, untroubled binary gender identity for non-trans people, including a gender-appropriate childhood filled with gender-appropriate toys, role plays and friends.<sup>21</sup> The existence of the criteria, we have also asserted, establishes a mechanism of surveillance by creating a category of deviance that gender non-normative behavior can trigger, which has often particularly led to involuntary psychiatric treatment in young people.<sup>22</sup> We have also taken issue with the gatekeeping role that medical providers occupy in the lives of trans people on several fronts. The authorization of doctors to provide or deny a GID diagnosis and to determine eligibility for gender confirming medical treatment is reflected in the DSM, the various standards of care, and in jurisprudence and administrative policies where medical evidence is required for various forms of recognition of a trans person's gender identity or eligibility for treatment.<sup>23</sup> Trans people have contested the expert knowledges that have been developed to supposedly guide medical practitioners in determining which of us are "true" as well as the mechanisms that codify our dependence on

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<sup>21</sup> See, e.g., Franklin Romco, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the law*, 36 COLUM. HUM. RTS. L. REV. 713, 725; Dean Spade, *Resisting Medicine/Remodeling Gender*, 18 BERKELEY WOMEN'S L.J. 15 (2003). Interestingly, some of the critiques of the diagnostic criteria have made an impact on the new draft criteria for the DSM-5. See, *DSM-5 Development: Sexual and Gender Identity Disorder*, AM. PSYCHIATRIC ASSOC., <http://www.dsm5.org/ProposedRevisions/Pages/SexualandGenderIdentityDisorders.aspx> (last visited June 22, 2011).

<sup>22</sup> Spade, *supra* note 21; Kelly Winters, *Issues of Psychiatric Diagnosis for Gender Nonconforming Youth, GID Reform Advocates*, <http://www.gidreform.org/gid3026.html> (last visited June 22, 2011); Beth E. Molnar, *Juveniles and Psychiatric Institutionalization: Toward Better Due Process and Treatment Review in the United States*, 2 HEALTH AND HUM. RTS. (1997), DYLAN SCHOLINSKI, *THE LAST TIME I WORE A DRESS* (1997).

<sup>23</sup> Spade, *supra* note 21; Pooja S. Gchi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care*, 4 SEXUALITY RES. SOC. POL'Y 7, 11 (2007); Paisley Currah and Lisa Jean Moore, "We Won't Know Who You Are": *Contesting Sex Designations on New York City Birth Certificates*, 24 HYPATIA 3 (2009).

their performance of this work.<sup>24</sup> These arrangements result in the enforcement of rigid gender norms on trans bodies with doctors often requiring performances of hyper masculinity and femininity read through straight, white, upper class norms. Those who fail to meet the arbitrary, subjective criteria of their medical providers are frequently denied access to care.<sup>25</sup> Critical trans studies scholars and activists have identified these criteria and relationships of authority as technologies of the production of gender normativity in which trans bodies experience intensified surveillance and correction.<sup>26</sup>

In law these discussions have been reflected in debates about the use of medical standards and norms in various rights and recognition claims by trans people. Medical evidence is typically used to prove the realness of trans people's gender in cases that hinge on marriage recognition.<sup>27</sup> Genital surgery requirements are a common feature in policies governing change of sex designation on ID.<sup>28</sup> Medical evidence is frequently used to determine sex for purposes of accessing sex-segregated facilities.<sup>29</sup> These are examples of areas where the intertwining of legal and medical authority in trans people's lives has been subject to a critique of naturalized gender categories and the disciplinary norms that compel their perpetual performance. The debate over whether trans people should pursue disability discrimination claims, which generally hinge upon providing a medical framing of trans identity, also reflects these critical

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; see also SANDY STONE, THE EMPIRE STRIKES BACK: A POSTTRANSSEXUAL MANIFESTO (1987), available at <http://www.actlab.utexas.edu/~sandy/empire-strikes-back>; Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), but Gender Identity Might*, 15 COLUM. J. GENDER L. 90, 90-91 (2006); Alvin Lee, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J. L. GENDER 447 (2008).

<sup>27</sup> See, e.g., *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976); *Kantaras v. Kantaras*, 884 So.2d 155, (Fla. St. Ct. App. 2004).

<sup>28</sup> Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 1 (2008).

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

discussions. Many advocates on both sides of the debate engage both a critical disability studies framework, understanding disability as constructed by societal barriers to participation rather than stemming naturally from impairment, and also generally engage a feminist theorization of trans identity that problematizes individualizing the “disorder” to trans people rather than troubling the systems of gender assignment and enforced performance.<sup>30</sup> They part ways in some instances on questions of whether using disability discrimination claims eclipses opportunities to have courts decide trans cases on sex discrimination claims that might also be used and do not require medical evidence but instead focus on the discriminator’s inappropriate use of gender criteria. Sometimes the conflict emerges in an analysis of how establishing any medical evidentiary requirements disproportionately impacts those populations with the least access to medical care and trans-specific medical care in particular, especially people of color, youth, people with disabilities, immigrants, and poor people.<sup>31</sup>

As activists and scholars have examined, debated and navigated the centrality of medical authority in trans lives that stems from the medical production of the category of transsexuality and its circulation, the double bind of desiring access to care, which generally requires the existence of a diagnosable condition, while wanting to demedicalize trans identity because of the consequences of the requirements of

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<sup>30</sup> See NICK GORTON, MAKEZINE, TOWARD A RESOLUTION OF GID, THE MODEL OF DISEASE, AND THE TRANSGENDER COMMUNITY, <http://makezine.enoughenough.org/giddisease.htm> (last visited June 26, 2011); Spade *supra* note 21, at 24–35; Levi, *supra* note 26; Lee, *supra* note 26.

<sup>31</sup> For a discussion of how various medical evidentiary requirements combined with transphobic Medicaid policies impact low income trans people and trans people of color, see Gchi Arkles, *supra* note 23; See Dean Spade, *Medicaid Policy Gender-Confirming Healthcare for Trans People: An Interview with Advocates*, 8 SEATTLE J. SOC. JUST. 497 (2010) [hereinafter Spade, *Medicaid Policy*].

medical approval in so many realms has remained vexing.<sup>32</sup> Scholars and activists whose work focuses on trans people of color and trans poor people have frequently reframed this debate by pointing out that the most vulnerable trans people already lose out in both frameworks because of the overwhelming trend of denying trans health care in Medicaid programs, while at the same time requiring proof of having undergone such care in the administrative policies of the most dangerous systems and institutions.<sup>33</sup> This argument suggests that the binds of medicalization, while including inconsistent disciplinary and regulatory norms regarding trans identity and access to medical technology, have little to offer those facing the worst manifestations of compounding vectors of racialized-gendered medical neglect and surveillance. This debate, as well as the broader set of discussions about the medicalization of trans identity, benefit from the tools Butler provides to critique the naturalization of sex and gender and examine the locations and conditions of its continued reproduction. Trans people facing the requirements of performance for a medical gaze and the legal consequences of success or failure at being authorized as “real” have questioned how the production of the category of transsexuality creates a fiction of non-trans gender binarism and what it might mean to strategize against specific sites where medical criteria or authorities operate as gate keepers for various survival needs of trans people.

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<sup>32</sup> One framework for reconceptualizing this bind is to imagine gender confirming health care for trans people being treated more like other health care that has traditionally been stigmatized because of patriarchal frameworks about gender. Trans people’s needs for gender confirming health care might be treated more like pregnancy—something that happens to some bodies and requires care but is not an illness or pathology. Of course, pregnancy is often pathologized and over-medicalized, so the concerns remain, but in general the idea of placing trans health needs in the same framework as pregnancy-related care, abortion, birth control, and other care that has been politicized by feminists and exposed as a site of regulation of gender, race and ability offers a vantage point for understanding that trans identity need not be considered “disordered” in order for health services to be considered necessary. Another framework for addressing this bind is observing that gender confirming health care is already regularly provided to non-trans people and covered by both public and private insurance programs. See Spade, *Medicaid Policy*, *supra* note 31.

<sup>33</sup> Gchi & Arkles, *supra* note 23.

These critical engagements have also produced responses to the demonization of trans people by certain feminists. Anti-trans feminists have charged that trans people are gender defenders who seek to reify traditional patriarchal gender roles by mimicking them, that we are imposters (transwomen) and defectors (transmen), and that we participate in the commodification of gender and the increasing expansion of capitalist medical authority.<sup>34</sup> Responses to these arguments have often centered on the kind of analysis Butler invites, questioning the marking of trans bodies as the only bodies that mimic gender norms, that (mis)understand ourselves through traditional patriarchal gender roles, and that are produced as gendered beings through political and economic conditions. These responses to anti-trans feminism have often called on anti-trans feminists to apply the same rigor with which they critique trans performances of gender to their own performances of gender and to question the existence of such a thing as the “natural” or unmodified gendered body. Transfeminism has become a topic in academia as well as material for interactive activist workshops, zines, and propaganda. This (re)claiming of feminism operates from an analysis of gender as a disciplinary technology that mobilizes ideas of nature and realness to establish norms of proper gendered embodiment and behavior, recognizing that feminists as much as anyone else can and do establish and police those boundaries.<sup>35</sup> Scholars and activists continue to respond to the ways that organizing under the sign of “trans politics” produces norms of proper trans identity at various sites, refuting the notion that particular embodiments, performances or articulations of gender are more or less liberatory while still seeking out resistance to disciplinary regimes based in an understanding that all people exceed and fail

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<sup>34</sup> JANICE RAYMOND, *THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* (1977); Dwight Billings Thomas Urban, *The Socio-Medical Construction of Transsexualism: An Interpretation and Critique*, 29 SOC. PROBS. 3 (1982).

<sup>35</sup> Judith Butler, *Imitation and Gender Insubordination*, in *THE LESBIAN AND GAY STUDIES READER* 308 (Henry Abelove et al. eds., 1993) (“[I]dentity categories tend to be instruments of regulatory regimes, whether as the normalizing categories of oppressive structures or as the rallying points for a liberatory contestation of that very oppression.”).

at gender norms.<sup>36</sup> Butler argues that gender is an effect of discourse, a “corporeal style,” a sequence of acts, a strategy that has survival as its end because deviations are routinely, though inconsistently and unevenly, punished.<sup>37</sup> This analysis continually comes to the fore when battles rage between various iterations of trans politics that valorize either more traditional “true transsexual” identities or genderqueer and binary-resisting identities. Such an analysis invites a more complex understanding of identity, institutionalization, and conditions of subjection and resistance that allow us to avoid simplistic claims that certain gender identities are more liberatory than others.

## II. Gender Norms and the Production of Regularities

The analytical tools developed by Butler’s theorization of gender have primarily been used in trans scholarship and activism to examine disciplinary gender norms. Butler’s engagement with Foucault’s discussion of governmentality, however, and her various inquiries about “grievable life,” persons “deemed dangerous,” and the co-constitutive relationship between identity categories and the nation also offer rich terrain for scholars and activists interested in trans politics, law and resistance in the context of neoliberalism.<sup>38</sup> These conversations are emerging in trans scholarship and activism, and in this section I hope to trace a few sites of that analysis and suggest how some of the moves Butler makes in these strains of her work might be particularly useful.

Foucault explains that unlike sovereignty, which regards obedience to the law as its primary aim, governmentality is concerned with “the right manner of disposing things so as to

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<sup>36</sup> “The deconstruction of identity is not the deconstruction of politics; rather, it establishes as political the very terms through which identity is articulated.” GENDER TROUBLE, *supra* note 3, at 148. *See also* Butler, *supra* note 35.

<sup>37</sup> GENDER TROUBLE, *supra* note 3, at 139–40; *see* SARA SALIH, JUDITH BUTLER 66 (2002).

<sup>38</sup> *See, e.g.*, JUDITH BUTLER, PRECARIOUS LIFE (2004) [hereinafter PRECARIOUS LIFE].

lead to . . . an end which is ‘convenient’ to each of the things that are to be governed.”<sup>39</sup> He writes:

[W]ith government it is a question not of imposing law on men, but of disposing things: that is to say, of employing tactics rather than laws, and even of using laws themselves as tactics—to arrange things in such a way that, through a certain number of means, such and such ends may be achieved.<sup>40</sup>

This understanding of laws as tactics that are part of a decentralized context in which multiple and competing goals co-exist is exceptionally useful for conceptualizing the limitations of legal equality and inclusion claims and for accounting for the distributions that occur through certain vectors of population or identity. I take Foucault’s formulation to include a caution against taking what the law says about itself at face value and an invitation to instead interrogate what arrangement of things a given line of jurisprudence or matrix of rules might be a part of producing. Such a view allows us to suspend expectations of a certain kind of rationality or consistency and suspend a belief that irrationality or incoherence are terribly helpful charges to make in opposition to various legal regimes, which are of course decentralized and full of contradiction. Instead, we might look for the broader patterns, beyond what law says it is doing, to see how it contributes to certain arrangements that concern us.

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<sup>39</sup> *Governmentality*, *supra* note 13, at 95.

<sup>40</sup> *Id.* Butler discusses how “governmentality exposes law as a set of tactics . . . their operation is ‘justified’ by their aim, but not through recourse to any set of prior principles or legitimating functions” in her exploration of the Guantanamo Bay prisoners. *PRECARIOUS LIFE*, *supra* note 38, at 94.

For example, as immigration detention has rapidly increased in the United States,<sup>41</sup> activists including lawyers and law students have sought to document and expose the abuses faced by detainees, often demanding the creation of procedures that would hopefully reduce long stays in detention and their attendant harms. The talking points of these advocates often include the assertion that these detainees are not criminals, that they are in a civil detention system, yet they are deprived of even the basic rights afforded to people in criminal detention in the United States.<sup>42</sup> The implication is that, being non-criminals, immigration detainees deserve at least as much if not more protection and process than people in the criminal system. This analogy is troubling for at least three reasons: (1) it suggests a deserving/undeserving framework that reifies demonization of

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<sup>41</sup> INT'L HUMAN RIGHTS CLINIC, SEATTLE UNIV. SCH. OF LAW, VOICES FROM DETENTION: A REPORT ON HUMAN RIGHTS VIOLATIONS AT THE NORTHWEST DETENTION CENTER IN TACOMA, WASHINGTON, 3 (2008) [hereinafter VOICES FROM DETENTION], available at <http://www.law.seattleu.edu/documents/news/archive/2008/DRFinal.pdf> ("Detention is a very rapidly growing form of incarceration. The numbers are escalating. In 2001, the U.S. detained approximately 95,000 people. By 2007, that number tripled to over 300,000. The average daily population of detained immigrants increased six-fold from 5,000 in 1994 to nearly 30,000 in 2007. In 2004, Congress authorized 40,000 new detention beds by 2010, bringing up capacity to approximately 80,000. Immigration Customs and Enforcement (ICE) reported the average stay was 64 days in 2003, with 32% detained for 90 days or longer. Those seeking refugee status were in detention for an average of ten months, with the longest period being 3.5 years. Nearly 30,000 immigrants are detained daily across the nation.").

<sup>42</sup> *Immigrants and Crime: Setting the Record Straight*, IMMIGRATION POL'Y CTR., <http://immigrationpolicy.org/just-facts/immigrants-and-crime-setting-record-straight> (last visited June 26, 2011); *New FBI Data Confirms Falling Crime Rates in AZ*, IMMIGRATION POL'Y CTR., <http://immigrationpolicy.org/just-facts/new-fbi-data-confirms-falling-crime-rates-arizona> (last visited June 26, 2011); *Arizona's Punishment Doesn't Fit the Crime*, IMMIGRATION POL'Y CTR., <http://immigrationpolicy.org/just-facts/new-fbi-data-confirms-falling-crime-rates-arizona> (last visited June 26, 2011); *New Data of Federal Court Prosecutions Reveal Non-Violent Immigration Prosecutions Up*, IMMIGRATION POL'Y CTR., <http://immigrationpolicy.org/just-facts/new-fbi-data-confirms-falling-crime-rates-arizona> (last visited June 26, 2011) ("[T]he federal government's shift in resources has meant spending billions of dollars prosecuting non-violent immigration violators while more serious criminals involved in drugs, weapons, and organized crime face a lower probability of prosecution."); *About Detention*, DETENTION WATCH NETWORK, <http://www.detentionwatchnetwork.org/aboutdetention> (last visited June 26, 2011).



people targeted by criminal punishment systems, (2) it may intensify divisions within constituencies targeted by both immigration and criminal detention systems, and (3) it participates in a fiction that criminal systems are fair and that criminal defendants have enforceable rights, which justifies the existence and continued expansion of criminalization and imprisonment. These problems result, at least in part, from taking the law at face value, believing what it says about itself—that criminal and immigration detention systems are two different things, that two different kinds of people are captured by them, that certain rights are guaranteed as written in each process. The result is a weak demand: That people imprisoned by immigration enforcement be given the kinds of process that people imprisoned by the criminal punishment system are given.<sup>43</sup>

Viewed through an understanding of law as a tactic of governance in which we are invited to survey a broader field of conditions, we might see the sharp rise of both immigration and criminal imprisonment as a feature of neoliberalism targeting racialized communities and recognize that the deployment of racialized imprisonment in the name of law enforcement always operates to mine and control certain populations marked as drains or threats *at the population level* regardless of a window dressing articulated through individual culpability and individual rights. This analysis might be important to conceiving resistance practices for at least two reasons. First, it might help avoid producing a demand that merely tinkers with the legal processes attendant to expanding imprisonment such that it gives that expansion further legitimacy but provides no redress for the populations continually coerced through economic and political violence to migrate to the United States and made increasingly vulnerable as immigration enforcement ramps up. Second, it

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<sup>43</sup> The limitations of the demand for due process are visible in the recommendations of the VOICES FROM DETENTION, *supra* note 41. Like most legal-rights focused analyses, it makes recommendations that fundamentally retain the system of racialized immigration enforcement, making changes that are no doubt important but also fail to get at the root causes of displacement, migration, exploitation and criminalization. Within the framework of legal rights, even the most vigorous advocates doing the most front-line work for people bearing the violence of legal systems are often left with demand options limited to adjusting small features of that violence while the broader arrangements stay in tact.

might invite a strategy for resisting imprisonment that brings people vulnerable to criminal detention and people vulnerable to immigration detention into a shared struggle rather than putting them at odds with each other and placing those individuals and populations targeted by both outside of the frame of intelligibility.

Critical race theorists and other legal scholars have named these limitations by discussing the limits of “formal legal equality” demands and identifying how law reform demands often operate to transform systems facing resistance just enough to stabilize things and preserve the status quo.<sup>44</sup> The danger of merely tinkering with the legal window dressing and actually stabilizing relations of disparity attends the fiction that if we change what the law says about a vulnerable population, we will necessarily change the key conditions of vulnerability. Taking up Foucault’s formulation of governmentality and understanding its differences from sovereignty helps to reveal how the assumption that “changing what the law says about us will change our lives” inherent in so many legal reform projects operating under the “equality” banner not only relies on an overly centralized model of power but also misses how law is often one tactic that rearranges just enough to maintain the current arrangements. Critiques of neoliberalism have often conceptualized one of its hallmarks to be a turn toward legal equality and universal rights that thinly masks and supports increasing racialized-gendered disparities in wealth and life chances.<sup>45</sup> Understanding law as a

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<sup>44</sup> Angela Harris uses Reva Siegel’s formulation, “preservation through transformation,” to describe this phenomenon. “Law by its nature is conservative, and when calls for change that threaten to destabilize existing distributions of material and symbolic power are made, change through law will occur in ways that preserve existing distributions to the greatest extent possible.” *Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. MARY BILL RTS. J. 1539, 1540–42, (2006) (citing Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Form of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997)).

<sup>45</sup> LISA DUGGAN, *TWILIGHT OF EQUALITY: NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* xii (2004) (describing neoliberal hegemony as including “neoliberal ‘equality’ politics—a stripped down, nonredistributive form of ‘equality’ designed for global consumption during the 21st century, and compatible with continued upward distribution of resources”).

tactic cautions us away from centering law reform goals in resistance struggles.

Instead of believing what the law says about itself and allowing that to guide resistance strategies focused on changing what the law says about a given identity, we might look at how the nation is produced through the production of identities that constitute various populations as needing protection and cultivation (to be made to live) or as dangerous threats and drains (to be killed or abandoned). Butler asks:

How is race lived in the modality of sexuality?  
How is gender lived in the modality of race?  
How do colonial and neo-colonial nation states  
rehearse gender relations in the consolidation  
of state power? . . . To ask such questions is  
still to continue to pose the question of  
'identity,' but no longer as a pre-established  
position or a uniform entity; rather, as part of a  
dynamic map of power in which identities are  
constituted and/or erased, deployed and/or  
paralyzed.<sup>46</sup>

In my own work, I have examined the matrix of conflicting administrative policies that govern when trans people can change sex designation on different kinds of records that use sex classification and in various systems that segregate people on based on sex designation.<sup>47</sup> An obvious response to the mess of rules is the charge that it is incoherent and inconsistent, that it produces unfair results (similarly situated people not treated the same), and that these rules should be standardized under one central policy that recognizes trans people's lived identity which will result in greater accuracy in recordkeeping as well as reducing violence and barriers to employment, social services, education, health care, and other essentials. I have attempted to use an analytics of government that refuses to engage the fantasies of accuracy and fairness that underlie identity surveillance. Instead I have examined how the advent of certain

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<sup>46</sup> BODIES THAT MATTER, *supra* note 6, at 117.

<sup>47</sup> Spade, *supra* note 28.

kinds of recordkeeping is a feature of state-building projects that produce population-level caretaking programs that always entail identity surveillance.<sup>48</sup> This surveillance produces a regularized population through the use of classification systems that collect standardized data, and the terms of classification used tend to be presumed neutral.<sup>49</sup> These classification terms, however, are always highly contested by those who are difficult to classify or who are unclassifiable or who contest their classification. The cost of illegibility in these systems, of course, is any number of conditions that generally produce a shortened lifespan.

This analysis invites us to understand trans people's difficulties with gender classification in systems that rely on it in the broader context of identity surveillance and gendered detention, in particular the increase in identity surveillance and gendered detention that have attended the "War on Terror" and rapid growth of criminal punishment systems.<sup>50</sup> It suggests that a trans politics of surveillance might do more than request that we be counted and tracked in some way that we regard as more accurate to our self-identifications, but instead that we engage a broader resistance with all populations facing specific vulnerability to increased identity surveillance, meanwhile forming an analysis of the relationship between population-level caretaking programs and surveillance that might inform our

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<sup>48</sup> *Id.* at 109–19; James C. Scott et al., *Government Surnames and Legal Identities*, in NATIONAL IDENTIFICATION SYSTEMS: ESSAYS IN OPPOSITION 28–32 (Carl Watner & Wendy McElroy eds., 2004); JAMES C. SCOTT, *SEEING LIKE A STATE* 29–33, 72–73 (1998). *See also* Currah Moore, *supra* note 23.

Currah and Moore examine some of these same themes of stateness and identity surveillance, taking trans people's requests for sex designation change on birth certificates as their object of study. They ask, "[i]f the state is produced through attempting to 'render things immobile', how is a mutating trans-sexed body to be fixed, kept in place, and securely moored to the document that purports to describe its subject?" *Id.* at 113.

<sup>49</sup> GEOFFREY C. BOWKER & SUSAN LEIGH STAR, *SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES* 64–71, 195–225 (1999).

<sup>50</sup> Puar usefully takes up the broader question of sexual and gender symbolics of the current discourse about terrorism and national security in the United States, demonstrating the gendered nature of the panic about terrorism and the construction of safety and patriotism. JASBIR K. PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* (2007).

political demands. It also resists deepening the divide between those trans people who might benefit from a tinkering with the identity surveillance rules and those whose immigration status, criminal record, psychiatric detention or other factors would make the identity surveillance or gendered detention systems no less dangerous even with certain “trans fixes.”<sup>51</sup> At the same time, this analysis does not suggest that there is no role for seeking certain reforms of gender classification policies, but rather that when such reform is engaged it be with a tactical understanding of law rather than a belief that changing what the law says about us is the end goal. For example, we might seek to reduce medical evidentiary requirements in policies governing changing sex designation on ID or placement in certain sex-segregated facilities not to make these policies “fair” or “accurate” but to increase the life chances of trans people as part of a larger strategy of mobilization around demands that exceed legal reform such as prison abolition and an end to immigration enforcement. In such a context, law reform is a tactic rather than

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<sup>51</sup> The ways that equality claims can reify divides within constituencies where some stand to benefit from the falsely universal right to which they aspire to be included while others have little to gain is captured in the following passage where Butler reflects on legal inclusion campaigns that have become central to gay and lesbian politics in recent years:

One might say that the advances that are sought by mainstream liberal activists (inclusion in the military and in marriage) are an extension of democracy and a hegemonic advance to the extent that lesbian and gay people are making the claim to be treated as equal to other citizens with respect to these obligations and entitlements, and that the prospect of their inclusion in these institutions is a sign that they are at present carrying the universalizing promise of hegemony itself. But this would not be a salutary conclusion, for the instatement of these questionable rights and obligations for some lesbians and gays establishes norms of legitimation that work to remarginalize others and foreclose possibilities for sexual freedom which have also been long-standing goals of the movement. The naturalization of the military-marriage goal for gay politics also marginalizes those for whom one or the other of these institutions is anathema, if not inimical.

an end,<sup>52</sup> and resistance is theorized through mobilization strategies that include attention to the impact of legal systems, particularly administrative rules, on the survival and political participation of people targeted for racialized-gendered surveillance and imprisonment.<sup>53</sup>

Butler's work also troubles the category of the "human" in relation to rights discourse and governmentality in ways that may be particularly useful to trans interrogation of how identities are mobilized for population-level distribution projects (e.g. stateness). She writes:

There are advantages to conceiving power in such a way that it is not centered in the nation-state, but conceived, rather, to operate as well through non-state institutions and discourses, since the points of intervention have proliferated, and the aim of politics is not only or merely the overthrow of the state. A broader set of tactics are opened up by the field of governmentality, including those discourses that shape and deform what we mean by 'the human.'<sup>54</sup>

In her analysis of post 9/11 racial profiling and detention, Butler talks about how those "deemed dangerous" are:

[Taken] outside the jurisdiction of the law, depriv[ed] . . . of the legal protections to which subjects under national and international law are entitled . . . not regarded as subjects,

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<sup>52</sup> "[G]overnmentality makes concrete the understanding of power as irreducible to law." PRECARIOUS LIFE, *supra* note 38, at 94.

<sup>53</sup> For further discussion of this framing of legal reform as a tactic in the service of mass mobilization strategies for change see Dean Spade Rickke Mananzala, *The Nonprofit Industrial Complex and Trans Resistance*, 5 SEXUALITY, RES. SOC. POL'Y 1, 61–63 (2008); Elana Redfield, Pooja Gehi Gabriel Arkles, *Setting the Agenda of the Struggle for Trans Liberation Setting the Agenda of the Struggle for Trans Liberation*, SEATTLE J. SOC. JUST. (forthcoming 2011).

<sup>54</sup> PRECARIOUS LIFE, *supra* note 38, at 99.

humans . . . not conceptualized within the frame of a political culture in which human lives are underwritten by legal entitlements . . .<sup>55</sup>

In *Undoing Gender*, she suggests that gender “figures as a precondition for the production and maintenance of legible humanity.”<sup>56</sup> These and other reflections on the category of the human, along with her discussion of what constitutes grievable life and her interrogation of how certain deaths are made hyper visible and others never depicted,<sup>57</sup> establish a provocative framework for considering the relationship between rights claims, the category “human,” and state racism as conceived by Foucault.

Andrea Smith has argued that “the project of aspiring to humanity is always already a racial project.”<sup>58</sup> Smith interrogates the universality of the category of the human, arguing that the category is always constituted in relation to “affectable others”<sup>59</sup> and that this relation is always a racial one. Claims to rights and citizenship, which in Butler’s formulation are tied to what is considered human, similarly mobilize a universalism that denies its own racialized and gendered specificity. Critiques of campaigns to include “gender identity and expression” in hate crimes laws and anti-discrimination laws reflect these analyses and might be read through Foucault’s formulation of state racism. Critics of hate crimes laws have articulated several main concerns about the claim that being included in hate crimes statutes is important in responding to the high levels of violence faced by trans people and in establishing

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<sup>55</sup> *Id.* at 77.

<sup>56</sup> JUDITH BUTLER, *UNDOING GENDER*, 11 (2004). She further discusses how category of the human works by excluding and how it is thoroughly racialized and gendered. *Id.* at 13.

<sup>57</sup> *PRECARIOUS LIFE*, *supra* note 38, at 37.

<sup>58</sup> Andrea Smith, *Queer Theory and Native Studies: The Heterosexism of Settler Colonialism*, 16 *GAY LESBIAN Q.* 1, 1–2, 42.

<sup>59</sup> *Id.* at 42 (citing DENISE FERREIRA DA SILVA, *TOWARD A GLOBAL IDEA OF RACE* 169 (2007)).

that we are human.<sup>60</sup> First, hate crimes laws have never been proven to deter violence, so their effect is entirely punitive and does not increase the life chances or life spans of trans people. Second, given the rapid and massive racialized expansion of imprisonment in the United States and the disproportionate imprisonment and severe violence faced by trans people in prisons due to the fact that gender and sexual violence are foundational to imprisonment, demanding increased resources for criminalization is likely to further rather than reduce trans vulnerability to violence.<sup>61</sup> If the most significant perpetrator of violence against trans people is the criminal punishment system, what does it mean to have the murders of trans people used as fuel to build that system? What does it mean to prove our equality or humanity in terms of having a life that, when ended, triggers someone's punishment in that system? Third, critics

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<sup>60</sup> A common anecdote passed around trans communities, particularly at Day of Remembrance events and other events marking trans vulnerability to violence is that our murders, even when found guilty, frequently receive a lower sentence than what would be given for killing a dog. Whether this anecdote is reflective of one or many actual events, or none at all, it suggests this equation of being considered fully human and having your murderer punished severely. I have also seen that equation circulate in domestic violence advocacy in states where advocates are pushing for higher felony penalties for domestic violence, often aiming them to be equated with those of other "serious crimes." For useful critiques of criminalization as a response to domestic violence and the racial significance of prosecution becoming a primary strategy for addressing domestic violence promoted by white feminists see KRISTIN BUMILLER, IN AN ABUSIVE STATE (2008); KRISTIN BUMILLER, *THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* (INCITE! Women of Color Against Violence ed., 2006).

<sup>61</sup> Press Release, Sylvia Rivera L. Project, SRLP Announces Non-Support of the Gender Expression Non-Discrimination Act, (Apr. 6, 2009), *available at* <http://srlp.org/genda>; Michelle Chen, *Do Unto Others: The Moral Slope of Hate Crimes Laws*, COLORLINES.COM (Aug. 4, 2009, 10:07 PM), [http://colorlines.com/archives/2009/08/do\\_onto\\_others\\_the\\_moral\\_slope.html](http://colorlines.com/archives/2009/08/do_onto_others_the_moral_slope.html); Katherine Whitlock, *In a Time of Broken Bones: A Dialogue about Hate Violence and the Limitations of Hate Crimes Legislation* (Justice Visions Working Paper, 2001), *available at* <http://srlp.org/files/Broken%20Bones-1.pdf>; Press Release, Sylvia Rivera L. Project, SRLP Opposes Matthew Shepard James Byrd Hate Crimes Prevention Act, SYLVIA RIVERA LAW PROJECT, <http://srlp.org/fcdhatecrimclaw> (last visited June 26, 2011); Pablo Espinoza et al., *In Support of Communities Responding to Violence: A Note on the Richmond Sexual Assault Matthew Shepard Act*, COMMUNITY UNITED AGAINST VIOLENCE BLOG, <http://www.cuav.org/blogpost/9>; Dean Spade, *Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change*, 30 RUTGERS WOMEN'S RTS L. REV. 288 (2009).



charge that hate crimes laws participate in obscuring systemic racialized-gendered violence and harm by scapegoating individual perpetrators. This participates in an individualized framing of racism and transphobia, suggesting that it is a problem of a few people with bad ideas rather than that racialized and gendered norms constitute national belonging and the distribution of life chances. Finally, critics argue that the telling of transphobic violence through the lens of “hate crime” transforms this violence into a one-dimensional framework that pretends that all trans people are equally vulnerable to it and erases the race, class, ability, national origin and other vectors that produce certain trans people as especially vulnerable to murder.<sup>62</sup> Because the same populations most vulnerable to murder are those targeted for cyclical abandonment and imprisonment in neoliberalism, using hate crimes laws as the approach to violence experienced by trans people means choosing a remedy that will maximize violence to those most vulnerable and probably be most attractive to those least vulnerable (not coincidentally, those people with the most race, class and educational privilege also tend to be setting policy and law reform agendas in non-profits).<sup>63</sup>

These critical interrogations of campaigns for inclusion in hate crimes laws have parallels in critiques of anti-discrimination laws. First, critics of anti-discrimination law inclusion campaigns argue that the single-vector rhetoric of these campaigns, which focus on being deprived employment or other opportunities “just for being trans,” erase the systemic exploitation and economic marginalization that produces and

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<sup>62</sup> Sarah Lamble, *Retelling Racialized Violence, Remaking White Innocence: The Politics of Interlocking Oppressions in Transgender Day of Remembrance*, 5 SEXUALITY, RES. SOC. POL’Y 24 (2008) (noting how the narratives about trans murder victims at Transgender Day of Remembrance gatherings erase the race, class, ability, and national origin vectors of violence contributing to the victim’s vulnerability in order to create a narrow story about how they were murdered for being trans).

<sup>63</sup> For an analysis of the impact of non-profitization of social justice formations on the demands of social movements, see *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX* (INCITE! Women of Color Against Violence ed., 2009) and for a trans-focused application of this analysis see Spadé & Mananzala, *supra* note 53; Redfield, Gehi & Arkles, *supra* note 53.

maintains a racialized and gendered wealth gap and suggest that “but for” people being fired “just for being trans” equal opportunity exists and the economy is fair. Second, these campaigns generally center on stories of white, professional, patriotic,<sup>64</sup> authorized (in terms of immigration status) workers whose only barrier to gainful employment was their trans

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<sup>64</sup> One of the most celebrated legal victories in trans rights in recent years was the ACLU’s case on behalf of Diane Schroer. The press coverage and the ACLU’s advocacy and public education work about the case centered Schroer’s expertise in anti-terrorism. The ACLU, which litigated the Schroer case, framed the case as follows:

Schroer was an Airborne Ranger qualified Special Forces officer who completed over 450 parachute jumps, received numerous decorations including the Defense Superior Service Medal, and was hand-picked to head up a classified national security operation. She began taking steps to transition from male to female shortly after retiring as a Colonel after 25 years of distinguished service in the Army. When she interviewed for a job as a terrorism research analyst at the Library of Congress, she thought she’d found the perfect fit, given her background and 16,000-volume home library collection on military history, the art of war, international relations and political philosophy. Schroer accepted the position, but when she told her future supervisor that she was in the process of gender transition, they rescinded the job offer.

Schroer v. Library of Congress *Case File*, ACLU.ORG (Nov. 19, 2009), [http://www.aclu.org/lgbt-rights\\_hiv-aids/schroer-v-library-congress-case-profile](http://www.aclu.org/lgbt-rights_hiv-aids/schroer-v-library-congress-case-profile).

identity.<sup>65</sup> Such framings again produce demands for inclusion from which only the privileged few can actually benefit, and deepen race, class, national origin and ability divides. Third, critics point out that anti-discrimination laws do not seem to have resolved wealth and income disparity, disproportionate unemployment and homelessness, and other harms for other groups that have been covered by these laws for decades. Instead, these “advances” are often used to argue that because formal discrimination is now illegal, disparities in life chances must be the fault of the populations enduring them. Finally, like hate crimes laws, anti-discrimination laws posit an individualized vision of discrimination that seeks out aberrant individuals with bad ideas and leaves broader conditions of distribution unexamined.<sup>66</sup>

These critiques intersect with an analysis of the category of the human and its relationship to legal rights that interrogates claims to universality by exposing that these purportedly universal protections not only provide rare and limited protection for a small group, but also primarily operate to

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<sup>65</sup> See Dan Irving, *Normalized Transgressions: Legitimizing the Transsexual Body as Productive*, 100 RADICAL HIST. REV. 38 (2008). In *Imitation and Gender Insubordination* Butler talks about how visibility projects, as they aim to resist erasure of certain identities, tend to set the terms of those identities in ways that exclude and foreclose future possibilities.

There is no question that gays and lesbians are threatened by the violence of public erasure, but the decision to counter that violence must be careful not to reinstall another in its place. Which version of lesbian or gay ought to be rendered visible, and which internal exclusions will that rendering visible institute? . . . That any consolidation of identity requires some set of differentiations and exclusions seems clear. But which ones ought to be valorized?

*Id.* at 311. These themes are visible in the framing of cases regarding employment discrimination and in the campaigns for employment discrimination laws, where transgender identity is deployed in narrow frameworks of belonging that establish the deserving subjects of legal protection.

<sup>66</sup> See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978); Dean Spade, *Keynote Address: Trans Law Politics on a Neoliberal Landscape*, 18 TEMP. POL. CIV. RTS. L. REV. 353 (2009).

stabilize and uphold relations of disparity that will not be overcome by declarations of equality within a legal system founded on and maintained by racialized-gendered property relations<sup>67</sup> and a racialized distribution of vulnerability to premature death.<sup>68</sup> Critics of hate crimes laws make a move parallel to Butler's interrogation of what constitutes grievable life when they question how grievability is entwined with becoming a population that produces increased punishing power for the criminal punishment system, and when they examine how trans murder victims' lives and deaths are mobilized as grievable through the erasure of their actual conditions of vulnerability (including homelessness, poverty, racialization) so that their stories can be told through a narrow narrative that can justify criminalization as a response.

These critiques illuminate law's tactical role in an era where formal legal equality constitutes a window dressing for growing material inequality and expanding state capacities for racialized-gendered surveillance, caging, and war-making. They show how little the most vulnerable trans people have to gain from becoming enfolded into the "equality" and "humanity" frameworks offered by these law reforms, and they expose how these identities are reconstituted to become productive for ongoing projects of nationmaking founded in heteropatriarchal slavery and settler colonialism and continued through criminalization, immigration enforcement, displacement and occupation. These critiques demonstrate how theories of change based in the idea that if we change what the law says about a group ("make it say we are good and not bad!") changes in life chances will result misunderstand power. These law reform-centered theories of change rely on a kind of centralized power that assumes obedience to the law that has not been evidenced, as anti-discrimination laws have failed to reduce health, income, housing and criminalization disparities corresponding to race, gender, indigeneity, disability or national origin. Instead, we

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<sup>67</sup> See Cheryl Harris, *Whiteness as Property*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 276–91 (Kimberlé Crenshaw et al. eds., 1995).

<sup>68</sup> See RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 28 (Earl Lewis et al. eds., 2007).

come to understand the decentralized nature of governance and the superficial role of legal declarations of formal equality. It turns out that even if we pass anti-discrimination laws that purport to protect trans people from discrimination, not only do they not work where they are supposed to work (employment, sometimes public accommodations, housing, social services), but they also do not even touch the key issues that may determine trans people's life chances. Even where gender identity and expression discrimination is barred by law, trans women are still placed in men's prisons, arrested for doing sex work, denied access to domestic violence shelters, denied gender confirming healthcare by Medicaid, deported, and subjected to all manner of other conditions that attend the racialized-gendered distribution of life chances.

To analyze the impacts of and potential resistance to the existing distribution of life chances, a different theorization of power from what is offered by most law reform projects is required. Foucault's formulation of state racism and biopolitics helps us to grasp how the production of populations deemed dangerous and lives that are ungrievable is a necessary element of the project of producing a population made to live. Legal equality projects often mobilize disciplinary norms to frame deserving and undeserving populations with the aim of obtaining inclusion. Penney describes Butler's articulation of this phenomenon:

Butler admirably underscores how official forms of social legitimization—like marriage—associated with regimes of state power create a kind of shadowy “parallel universe” of invisible and voiceless subjects who are not only concretely oppressed by such instances of normative control, but who also, more radically, remain fundamentally culturally unintelligible; underneath the threshold of representation, in other words, defining the acceptable forms of life.<sup>69</sup>

A critique of trans legal equality inclusion projects calls for a

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<sup>69</sup> Penney, *supra* note 69, at 11.

different politics, one that centers the experiences of people facing multiple vectors of vulnerability to violence and reduced life chances, so that an analysis of the forces producing those conditions will avoid misunderstandings of power and subjection that attend legal equality demands.

Butler's discussion of the limitations of the military tribunals that are demanded for Guantanamo prisoners who are not understood to have a right to a trial suggests an analytical method that may be useful. She interrogates the demand for trials by questioning the quality of the proceedings, pointing out the severe flaws in the process that produce a "mockery" rather than any process that could be said to allow a meaningful right to defense.<sup>70</sup> Butler's refusal to believe what the law says about itself (that these military tribunals constitute trials, that these prisoners are not prisoners<sup>71</sup> and therefore do not deserve trials) is a move that a critical trans legal scholarship must adopt. Rather than uncritically demanding rights, our work must be to examine what the content of those guarantees is, and whether they constitute window dressing, papering over actual operations of population management that produce and distribute vulnerability through vectors of race, national origin, religion, ability, and gender under a pretense of universal individual rights.

Andrea Smith's critique of Butler's analysis of Guantanamo is also useful here. Smith critiques Butler and other scholars who frame certain "War on Terror" developments as exceptional and decried Bush's "lawlessness." Smith suggests that these framings rely on the U.S. Constitution as their origin, "presuming the US nation-state even as they critique it."<sup>72</sup> Smith's analysis suggests that there is nothing exceptional about the detention at Guantanamo both because the U.S. Constitution

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<sup>70</sup> See PRECARIOUS LIFE, *supra* note 38, at 69.

<sup>71</sup> *Id.* at 85.

<sup>72</sup> Andrea Smith, *American Studies without America: Native Feminisms and the Nation State*, 60 AM. Q. 309, 311(2008).

permits it<sup>73</sup> and because we would be naïve to think that obedience to Constitutional mandates would deliver fairer or less violent results given that the U.S. legal system is rooted in genocide. She cites Luana Ross' observation that "genocide has never been against the law in the United States."<sup>74</sup>

Smith's intervention invites us to take Butler's invitation to question what the law says about itself even further, and we might raise questions like those Butler raises about military tribunals about criminal trials, welfare hearings, public transportation fare hikes, administrative rulemaking processes, immigration raids, state budgetary processes, "private" philanthropic grantmaking decisions, taxation schemes, foundings of charter schools and any other site of governance. When we release the fantasy of formal legal equality in the face of an understanding of the United States as a racial project,<sup>75</sup> and legal rights as often no more than window dressing or theater, how do we begin to develop a tactical engagement with law? If we follow Foucault's assertion that "politics is war by other means"<sup>76</sup> and understand that theories of social contract only "erase the conquest,"<sup>77</sup> inclusion claims in legal equality frameworks can be seen to both misunderstand how law is deployed as a tactic in the context of governmentality and how the production of killable populations to sustain the nation requires analysis that moves beyond the level of the individual. When our analysis turns to governmentality, administrative functions in law take on a much more significant role, and the regularization of the population through gathering of standardized data and other mechanisms of sorting become central questions. Thus far, trans legal scholarship and activism

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<sup>73</sup> *Id.* (citing Sora Han, Bonds of Representation: Vision, Race, and Law in Post-Civil Rights America (2006) (unpublished Ph.D. dissertation, University of California Santa Cruz)).

<sup>74</sup> *Id.* at 310.

<sup>75</sup> HOWARD WINANT & MICHAEL OMI, RACIAL FORMATION IN THE UNITED STATES (2d ed. 1994).

<sup>76</sup> HISTORY OF SEXUALITY, *supra* note 14, at 93.

<sup>77</sup> Mariana Valverde, *Genealogies of European States: Foucauldian Reflections*, 36 ECON. SOC'Y 1, 166 (2007).

has focused far more attention on disciplinary norms than the deployment of regulatory norms at the level of population, and an analysis of both operations and their interrelation is necessary to properly theorize and strategize resistance.

I am hopeful that such analysis may also open up critical interrogation of various data gathering practices taken up within trans resistance frameworks, not limited to client databases at social service agencies, needs assessments of communities, demands for inclusion in government data collecting tools like the Census, and assertion of statistics about trans experiences of violence and discrimination. How do these strategies mobilize static categories of identity that produce regulatory norms that might require critique? More broadly, taking up a governmental analysis may bring trans politics to the questions that Foucault raises at the end of *"Society Must Be Defended"* when he argues that state racism inherent in biopolitics is present in the various alternatives to capitalism that are proposed by people seeking to transform economic and political systems.<sup>78</sup> If we understand all projects of redistribution to produce forms of stateness, and state racism to be inherent to those projects, what might a trans politics formed in an Foucauldian analysis of power and applying Butler's theorization of gender envision when we dream of alternatives to neoliberalism? Smith suggests a need to think about more just forms of governance, and to imagine "visions of nation and sovereignty that are separate from nation-states."<sup>79</sup> What will those visions look like from the vantage point of a trans politics centered in an understanding of racialized-gendered subjection and a critique of liberation projects that embraces failure and excess while demanding attention to the material conditions of existence and the distribution of life chances?

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<sup>78</sup> "SOCIETY MUST BE DEFENDED", *supra* note 15, at 262–63.

<sup>79</sup> Smith, *supra* note 72, at 312.