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## Trans Rights Will Not Protect Us: the Limits of Equal Rights Discourse, Antidiscrimination Laws, and Hate Crime Legislation

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# Trans Rights Will Not Protect Us: the Limits of Equal Rights Discourse, Antidiscrimination Laws, and Hate Crime Legislation

## **Abstract**

This paper investigates how employing neoliberal discourses of equal rights, anti-discrimination laws, and hate crime legislation limits the advancement of equality and protection for trans persons under the law. The push for the legal recognition of trans persons, through the addition of "gender identity" and "gender expression" to anti-discrimination and hate crime laws relies on neoliberal discourses of biological determinism and medicalization. This approach ultimately pathologizes trans persons and precludes their self-determination. As the trans community continues to gain rights in Canada and the United States, a backlash of anti-trans "bathroom bills" threaten to restrict trans persons from sex-segregated spaces that align with their gender identity. Moreover, hate crime legislation focuses on individual perpetrators, reinforcing systemic forms of transphobia and state-sanctioned violence against trans persons. In order to guarantee that trans persons have equal access to state services and are protected from discrimination and violence, systems of power must be dismantled and reimagined.

## **Keywords**

Equal rights discourse, trans rights, anti-discrimination law, hate crime law, gender regulation, medicalization, neoliberalism, public law

# TRANS RIGHTS WILL NOT PROTECT US: THE LIMITS OF EQUAL RIGHTS DISCOURSE, ANTI- DISCRIMINATION LAWS, AND HATE CRIME LEGISLATION

EVAN VIPOND\*

## INTRODUCTION

In June of 2014, Time Magazine released a groundbreaking edition that featured an openly transgender person on its front cover for the first time in its publication history.<sup>1</sup> Laverne Cox is an actress and an African-American transwoman. She portrays a male-to-female (MTF) transgender prisoner, Sophia Burset, on the popular Netflix drama series *Orange is the New Black*. Cox consistently uses her celebrity status to speak out for the transgender community, focusing on those who are the most marginalized within this group. These include trans persons of colour, trans persons living in poverty, and trans persons in prison. With the sudden explosion of sympathetic trans<sup>2</sup> characters in mainstream media (along with the increase in public figures coming out or transitioning), many believe the time for trans rights and equality has arrived. Indeed, Time Magazine declared a “transgender tipping point” occurred as trans persons are finally receiving the public recognition they deserve.<sup>3</sup> Yet, despite this pivotal moment in social consciousness, trans persons remain disproportionately affected by poverty, unemployment, criminalization, harassment and assault, and police brutality.<sup>4</sup>

In this paper, it is argued that the fight for trans rights and inclusion in state institutions relies on neoliberal ideology. Ultimately, this ideology reinforces social inequalities and further marginalizes trans persons who do not belong to the hegemonic white middle-class. Political and legal discourses, state policies, and legislation will be examined to illuminate the limits and contradictions of trans rights in Canada and the

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<sup>1</sup> 183:22 (9 June 2014) [*Time*].

<sup>2</sup> *Trans* is an umbrella term that refers to persons whose gender identity does not align with the sex they were assigned at birth, as well as those who do not conform to or identify within the gender binary. Other key terms include: male-to-female (MTF), female-to-male (FTM), and sex reassignment surgery (SRS).

<sup>3</sup> *Time*, *supra* note 1.

<sup>4</sup> Jamie M Grant et al, “Injustice at Every Turn: A Report of the National Transgender Discrimination Survey” (2011) *National Center for Transgender Equality and National Gay and Lesbian Task Force*, online: <[http://www.thetaskforce.org/static\\_html/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf)> [NTDS].

United States. The cumulative effect is that some trans persons are precluded from achieving equality and protection under the law.<sup>5</sup>

The first part of this paper explores how neoliberalism depends on white middle-class notions of productivity, allowing only those who are affluent or “productive” enough to medically transition. This is because organizations that regulate trans health care, mainly medical and government institutions, determine who is allowed to medically transition based on who can afford it. This paper demonstrates that the quest for trans rights remains dependent on medicalization, since government policies and anti-discrimination laws focus on biological factors to legitimize the need for protection. This article contends that medical treatment is a right that must be available to all trans persons and should not be dependent on pathologization. Pathologization refers to the medical practitioner’s treatment of a patient as psychologically abnormal or unhealthy.<sup>6</sup> Notably, although not all trans persons desire to medically transition, the medicalization of trans rights appears to presuppose that all do. This paper argues that this process of medicalization precludes self-determination and reinforces the pathologization of trans persons as suffering from the mental disorder gender dysphoria.<sup>7</sup>

In the second part of this paper, it is argued that current equal rights and anti-discrimination laws fail to protect trans persons from transphobia<sup>8</sup> and violence. As more anti-discrimination laws are passed—securing the rights of trans persons to employment, housing, medical care, and education—anti-trans legislation continues to gain momentum. The notorious “bathroom bills,” which require that the bathroom used must align with one’s biological sex, are analyzed and presented as examples of such anti-trans legislation. This paper demonstrates that, as a result, trans persons must navigate the contradictions within the laws that protect them from discrimination while denying them access to sex-segregated spaces.

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<sup>5</sup> Policies and legal decisions from Canada and the United States are drawn on to place these laws and discourses in conversation with each other, and to further highlight the common struggles trans persons face. This is particularly relevant for trans persons traveling between Canada and the United States, or those who hold dual citizenship. When providing Canadian examples, Ontario-based data and legislation is primarily drawn upon, as it is the most readily available and comprehensive. Furthermore, reference to U.S.-based studies and statistics are used when such data is unavailable for Canada.

<sup>6</sup> *The Oxford English Dictionary*, 3rd ed, *sub verbo* “pathologize”.

<sup>7</sup> Gender dysphoria is a clinical term from the American Psychiatric Society’s *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, which diagnoses transgender and/or transsexual persons within a psychiatric framework. This diagnosis is often required to undergo medical transition. Although the DSM-V specifically states that the diagnosis exists to “ensure access to treatment for individuals who continue to undergo hormone therapy, related surgery, or psychotherapy or counselling to support their gender transition,” it remains a contested term. It is asserted to be problematic because it pathologizes, trans persons as suffering from a mental disorder.

<sup>8</sup> Transphobia refers to individual prejudice, hatred, and/or fear of trans persons, as well as the systemic discrimination and oppression of trans persons at the institutional level, including government, education, medical care, social services, law enforcement, and the justice system.

The final part of the paper contends that hate crime laws are more symbolic than effective because they focus on individual perpetrators without attending to systemic discrimination and oppression. This perpetuates state-sanctioned violence and fails to acknowledge intersectional forms of oppression such as racism, classism, ableism, and heterosexism. In conclusion, it is argued that an alternative approach to trans politics would be more effective than the current neoliberal system. This would support self-determination while challenging the systemic violence and oppression that marginalized persons are subjected to.

## I. NEOLIBERAL DISCOURSES AND (TRANS)GENDER REGULATION

To date, the advancement of rights and legal protection for trans persons has relied on neoliberal discourses of individualism and equality. Neoliberalism is a set of economic processes and political ideologies that has evolved out of and replaced the liberal ideology Western society was founded upon. Emerging over the last forty years, neoliberal policies encourage the diminishment of social assistance and public services in favour of privatization and the deregulation of markets.

The entrenchment of neoliberal policies in North America is often associated with the social and economic conservatism that emerged in the 1980s and early 1990s in response to the financial crisis of the 1970s. Free trade agreements were established in pursuit of market liberalization, while funding for social services was drastically cut, placing greater economic strain on the working class and marginalized communities. Political scientist David Harvey explained that these neoliberal policies “began the momentous shift towards greater social inequality and the restoration of economic power to the upper class.”<sup>9</sup> Consequently, class disparity has increased, and it continues to increase. This has resulted in the upward redistribution of wealth, the deterioration of the welfare state, and the privatization of medical and social services.

Neoliberalism calls for a shift in economic and social responsibility from the government to its citizens in the name of individual rights, free choice, and social progress. Ultimately, this shift in responsibility exacerbates social and economic inequalities.<sup>10</sup> This has resulted in trans persons who are affluent enough to medically transition having their rights secured, but trans persons who cannot afford to—or who do not wish to—medically transform have been further disenfranchised.

In Canada, the onset of neoliberal policies has resulted in the slow erosion of public services, leaving individuals to shoulder the financial burden of inflation, job

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<sup>9</sup> David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005) at 26. This paper draws on prominent trans lawyer and scholar Dean Spade’s definition and critique of neoliberalism. Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Brooklyn: South End Press, 2011) [Normal]. See especially “Chapter 1: Trans Law and Politics on a Neoliberal Landscape”.

<sup>10</sup> Normal, *supra* note 9 at 50.

instability, and lower wages.<sup>11</sup> As explained by Canadian political scientist Tim Fowler, “The liberalism of neoliberalism has highlighted ‘individual rather than collective approaches to economic and social problems.’”<sup>12</sup> Neoliberal policies privilege persons from the upper-middle-class, who are affluent enough to afford private services and health care, while casting out those who are unable to afford necessary services as “unproductive.” These individuals are further stigmatized as undeserving. This concept of “productivity” is central to the neoliberal individual—a person purported to be self-sufficient and not dependent on the state.<sup>13</sup>

Trans persons who depend on social services to survive are framed as drains on the system and, consequently, further disenfranchised.<sup>14</sup> Systemic oppression, discrimination, and state-sanctioned violence are justified as a means to uphold the status quo of the white middle-class.<sup>15</sup> Trans persons are blamed for their inability to participate meaningfully in the current economic structure due to structural transphobia and systemic discrimination. Trans persons are told that they, too, can achieve success if they just “try hard enough.”<sup>16</sup> This attitude discounts the significance of the systemic barriers and oppression that prevent trans persons from succeeding in the first place. As a result, trans persons who are affluent enough to medically transition have their rights secured, but trans persons who cannot afford to—or who do not wish to—medically transform have been further disenfranchised.

Neoliberalism often states that biology, rather than social construct, is the only legitimate basis for protection under the law.<sup>17</sup> Trans persons who undergo medical treatment can appeal to civilians, politicians, and lawmakers for equal rights and protection from discrimination on the basis that transsexuality is a genetic predisposition or disability. With the onset of technological advances in medicine and psychiatry, “[t]rans persons are now searching for a ‘trans gene’ or the ‘transsexual brain’ in hopes of legitimizing their gender identity as biologically determined and thus deserving of protection under the law.”<sup>18</sup> Brain scans are now being conducted to determine whether or not transgender and cisgender<sup>19</sup> brains are, in fact, biologically

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<sup>11</sup> Tim Fowler, ed, *From Crisis to Austerity: Neoliberalism, Organized Labour, and the Canadian State* (Ottawa: Red Quill Books, 2013) at 12 [Fowler].

<sup>12</sup> *Ibid* at 14-15.

<sup>13</sup> Dan Irving, “Normalized Transgressions: Legitimizing the Transsexual Body as Productive” in Susan Stryker and Aren Z Aizura, eds, *The Transgender Studies Reader 2* (New York: Routledge, 2013) 15 at 25.

<sup>14</sup> Normal, *supra* note 9 at 24.

<sup>15</sup> *Ibid*.

<sup>16</sup> See generally Dean Spade, “Chapter 3: Rethinking Transphobia and Power—Beyond a Rights Framework” in Normal, *supra* note 9.

<sup>17</sup> Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (Cambridge: Harvard University Press, 1999) at 9-10.

<sup>18</sup> Evan Vipond, “Resisting Transnormativity” (2015) 8:2 *Theory in Action* 21 at 32 [Vipond].

<sup>19</sup> *Cisgender* refers to persons whose gender identity aligns with the sex they were assigned at birth.

different.<sup>20</sup> This rights-based approach to inclusion creates a paradox: trans persons are only granted and guaranteed rights if they are pathologized.

If transsexuality is not conceptualized as a mental disorder or medical condition, then transsexuality can be reclassified as a “choice” or “lifestyle,” which would no longer require—or be worthy of—protection under the law. However, under the medical model, which reaffirms that trans persons suffer from a mental illness, trans persons remain pathologized and subject to medical and legal regulation.<sup>21</sup> Trans persons who do not identify with or fulfill the requirements of the medical model can be denied treatment altogether.<sup>22</sup> This regulatory effect maintains the perceived naturalness of the sex-and-gender binary and infers that all trans persons wish to transition from one side of the binary to the other.<sup>23</sup>

While sex reassignment surgery (SRS) is upheld as the pinnacle of transition, seventy-seven percent of MTF transwomen and ninety-six percent of female-to-male (FTM) transmen in the United States have not undergone SRS procedures.<sup>24</sup> This is largely due to the fact that SRS is unaffordable and rarely covered by the government or insurance companies. For low-income trans persons, such as those who may be without health insurance or benefits, hormones and surgery may be difficult to obtain. Many trans youth and trans persons of colour cannot afford to medically transition and may rely on sex work to fund hormone therapy and procedures.<sup>25</sup> Medical treatment is restricted to those who can afford to be trans, which ties transsexuality to productivity and good citizenship. Dan Irving, a Canadian trans scholar, explains that “[a]cceptance into the Gender Identity Program at [Toronto’s] CAMH will most likely be granted to individuals from privileged social locations who demonstrate, or have the potential to

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<sup>20</sup> Vipond, *supra* note 18 at 32. See the following medical studies: Alicia Garcia-Falgueras and Dick Swaab, “A sex difference in the hypothalamic uncinate nucleus: relationship to gender identity” (2008) 131:12 *Brain: A Journal of Neurology* 3132; D. F. Swaab, “Sexual differentiation of the human brain: relevance for gender identity, transsexualism and sexual orientation” (2004) 19:6 *Gynecological Endocrinology* 301; E. Luders et al, “Regional gray matter variation in male-to-female transsexualism” (2009) 46:4 *NeuroImage* 904; F. P. Kruijver et al, “Male-to-female transsexuals have female neuron numbers in a limbic nucleus” (2000) 85.5 *Journal of Clinical Endocrinology and Metabolism* 2034; Giuseppina Rametti et al, “White matter microstructure in female to male transsexuals before cross-sex hormonal treatment” (2011) 45:2 *Journal of Psychiatric Research* 199; L. Gooren, “The biology of human psychosexual differentiation” (2006) 50:4 *Hormones and Behavior* 589.

<sup>21</sup> Vipond, *supra* note 18 at 33.

<sup>22</sup> *Ibid* at 25.

<sup>23</sup> Not all trans persons identify within the sex and gender binary. While some trans persons do wish to undergo medical transition and sex reassignment surgery, others may wish to partially transition (through hormones or surgical procedures) or not to medically transition at all.

<sup>24</sup> NTDS, *supra* note 4. Data is unavailable for Canada.

<sup>25</sup> Janet Mock, *Redefining Realness: My Path to Womanhood, Identity, Love & So Much More* (New York: Atria Books, 2014).

demonstrate, degrees of material success.”<sup>26</sup> This implies that transsexuals must prove their worth, both literally and figuratively, by demonstrating that they will not be a burden to the system by contributing to the economy. Trans persons who live up to this expectation and undergo medical treatment are implicitly rewarded for their good citizenship with identification documents that accurately reflect their gender. Low-income and poverty-stricken trans persons who cannot afford to transition or who do not have proper identification documentation to begin with may be precluded from obtaining medical treatment. Medically transitioning, therefore, is not granted based on a person’s need or desire to undergo physical transition. Instead, it is dependent on the merits, performance (as a transsexual), and affluence of the patient.

Medical treatment is often required before trans persons can legally transition.<sup>27</sup> Legal regulations, which determine whether a person can change the gender designation<sup>28</sup> on identification documents, are intrinsically linked to the medical model, reaffirming that trans persons suffer from a medical condition or illness.<sup>29</sup> In order to legally change one’s sex, the governing body may require a letter from a doctor or psychiatrist, proof of medical treatment, or even SRS.<sup>30</sup> Those who cannot afford or wish to medically transition, and those who do not identify within the gender binary, may be unable to acquire identification documents that reflect their gender identity.<sup>31</sup>

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<sup>26</sup> Dan Irving, “Elusive Subjects: Notes on the Relationship between Critical Political Economy and Trans Studies” in Anne Enke, ed, *Transfeminist Perspectives: In and Beyond Transgender and Gender Studies* (Philadelphia: Temple University Press, 2012) 153 at 166.

<sup>27</sup> Argentina, Columbia, Denmark, and Malta, have self-determining models that do not require medical documentation to change one’s legal gender designation. On July 15, 2015, Ireland passed legislation allowing trans persons to self-identify. See “Press Release: Gender Recognition Bill Complete Passage Through the Oireachtas” *Transgender Equality Network Ireland* (15 July 2015), online: <<http://www.teni.ie/news-post.aspx?contentid=1408>>.

<sup>28</sup> The terms gender and sex are often used interchangeably on identification documents. Some documents designate *gender* while others designate *sex*.

<sup>29</sup> While the regulations for changing one’s gender designation on identification documents in Ontario and Canada have been discussed (see Vipond, *supra* note 18), some of the regulations have since changed. This paper discusses the latest policies in Ontario and Canada, as well as in the United States.

<sup>30</sup> Vipond, *supra* note 18 at 29-30. In Canada and the United States, SRS is no longer required to change gender designation on passports. See *Canadian Passport Order*, SI/81-86, s 8, online: Justice Laws Website <<http://laws-lois.justice.gc.ca/eng/regulations/SI-81-86/FullText.html>>; Bureau of Public Affairs, “New Policy for on Gender Change in Passports Announced” *U.S. Department of State* (9 June 2010), online: U.S. Department of State <<http://www.state.gov/r/pa/prs/ps/2010/06/142922.htm>>; “Gender Reassignment Applicants” *U.S. Passports & International Travel*, online: U.S. Department of State <<http://travel.state.gov/content/passports/english/passports/information/gender.html>>.

<sup>31</sup> Canada and the US currently have two gender designations: female (F) or male (M). In 2012, the addition of a third sex marker (X) was reviewed by Passport Canada. The decision to include a third sex designation on passports was ultimately rejected in 2014. See RJ Vandrish, “Passport Canada Rejects Sex-Unspecified Passports” *Xtra* (4 October 2014), online: Daily Xtra

<<http://www.dailyxtra.com/canada/news-and-ideas/news/passport-canada-rejects-sex-unspecified-passports-93929>>. In Australia and New Zealand, trans and intersex persons can obtain an unspecified sex designation (X) on their passports without changing their birth certificates or undergoing SRS. See “Information about Changing Sex/Gender Identity,” online: *New Zealand Passports* <<http://www.passports.govt.nz/Transgender-applicants>>; “Sex and Gender Diverse Passport Applicants”



Lacking identification that accurately reflects one's gender can result in the denial of social services and restricted social mobility, which can have a negative impact on one's mental health.

The regulations to change one's legal sex vary within Canada and the United States depending on the province or state that issues the document. Passports, for example, fall under federal jurisdiction in both Canada and the United States, while birth certificates and driver's licenses fall under provincial or state jurisdiction. Consequently, the requirements to change one's gender designation can vary from province to province or from state to state.<sup>32</sup> In some US states, the sex designation on birth certificates cannot be changed at all.<sup>33</sup> While SRS is no longer a prerequisite for changing the gender designation on a passport, a valid birth certificate that reflects the desired change in gender designation is still required. Since SRS is necessary to amend birth certificates in certain provinces and states, some trans persons who have not undergone SRS may be unable to change the gender designation on their passports. In cases where SRS is no longer required, a letter from a medical practitioner and proof of medical treatment is still necessary.

These contradictions in state and federal policy prevent some trans persons from obtaining identification documents that match their gender identity. This disproportionately affects working-class trans persons, trans persons of colour, and trans persons living in poverty. Ultimately, it is only trans persons who desire and are able to transition who are rewarded with access to medical and social services and who can obtain documentation that accurately reflects their gender. Meanwhile trans persons of colour, working-class and poor trans persons, and non-normative or gender nonconforming trans persons have become further disenfranchised.

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*Australian Passport Office*, online: Australian Passport Office <<https://www.passports.gov.au/web/sexgenderapplicants.aspx>>. Supreme Court rulings in Australia, India, and Nepal have declared the addition of a third legal gender marker. See *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11. *National Legal Services Authority v Union of India* (2013), Writ Petition No 400 of 2012 with Writ Petition No 604 of 2013. *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD).

<sup>32</sup> For provincial regulations, see: *Canadian Civil Liberties Association Change of Sex Designation FAQ* (May 2015), online: Canadian Civil Liberties Association <<https://ccla.org/cclanewsites/wp-content/uploads/2015/05/CCLA-Change-of-Sex-Designation-FAQ.pdf>>. For state-by-state regulations, see: "Changing Birth Certificate Sex Designations: State-By-State Guidelines" *Know Your Rights: Transgender* (3 February 2015), online: Lambda Legal <<http://www.lambdalegal.org/know-your-rights/transgender/changing-birth-certificate-sex-designations>> [State-by-State].

<sup>33</sup> State-by-State, *supra* note 32. Idaho, Kansas, Ohio, and Tennessee have legislation that does not allow trans persons who have changed their sex by surgical procedure (SRS) to change the gender designation on their birth certificates. Thus, trans persons from these states may be unable to change the gender designation on their passports.

## II. TRANS RIGHTS AND ANTI-TRANS “BATHROOM BILLS”

In Canada, trans persons are gaining equal rights and access to state services through anti-discrimination laws. Ontario’s *Human Rights Code*,<sup>34</sup> which was updated in April 2014, now protects trans persons from discrimination on the basis of their gender identity and gender expression. According to the *Code*, “people are protected from discrimination and harassment because of gender identity and gender expression in employment, housing, facilities and services, contracts, and membership in unions, trade or professional associations.”<sup>35</sup> The *Code* states that “trans people should have access to washrooms, change rooms and other gender specific services and facilities based on their *lived* gender identity.”<sup>36</sup> This seeks to provide equal access to services and to protect trans persons and gender non-conforming persons from discrimination. While this is viewed as a win for the trans community, anti-discrimination laws are not all-encompassing. Therefore, the trans community still remains vulnerable to discrimination.

Although the *Code* advances trans rights, discriminatory laws continue to target trans persons. In September 2011, Member of Parliament Randall Garrison, who represents the New Democratic Party, introduced Bill C-279.<sup>37</sup> The proposed bill would amend the *Canadian Human Rights Act*<sup>38</sup> and the *Criminal Code*.<sup>39</sup> The proposed bill makes it illegal to discriminate against trans persons on the basis of gender identity and would “require courts to recognize and penalize hate crimes against trans people.”<sup>40</sup> In March 2013, the House of Commons passed Bill C-279 in a vote of 149 to 137, allowing it to proceed to the Senate.<sup>41</sup> The bill was essentially frozen in the Senate due to opposition from the Conservative Party of Canada. In the Senate, Bill C-279 shifted from an anti-discriminatory bill that sought to protect trans persons to a transphobic bill that perpetuates the policing and criminalization of trans persons. On February 26,

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<sup>34</sup> *Human Rights Code*, RSO 1990, c H-19 [Code].

<sup>35</sup> “Policy on Preventing Discrimination Because of Gender Identity and Gender Expression” *Ontario Human Rights Code* (14 April 2014), online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression>>.

<sup>36</sup> *Ibid* (emphasis added).

<sup>37</sup> Bill C-279, *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity)*, 1st Sess, 41st Parl, 2013. Similar bills have been introduced in previous sessions but failed to pass. “Private Member’s Bill” *LEGISinfo*, online: Parliament of Canada <<http://www.parl.gc.ca/legisinfo/BillDetails.aspx?billId=5122660&Language=E&Mode=1&View=3>>.

<sup>38</sup> *Canadian Human Rights Act*, RSC 1985, c H-6.

<sup>39</sup> *Criminal Code*, RSC 1985, c C-46.

<sup>40</sup> “Bill C-279, the Gender Identity Bill” *Egale Canada*, online: Egale Canada <<http://egale.ca>>.

Currently, there is no federal legislation protecting trans persons from discrimination. However, in 2011, the Canadian Human Rights Tribunal held that discriminating against a person based on his or her status as a transgender individual is discrimination on the basis of sex or disability under section 5 of the Canadian Human Rights Act. See *Kavanagh v. Canada (AG)* (2011 CanLII 8496, 41 C.H.R.R. D/119 (C.H.R.T.)).

<sup>41</sup> *House of Commons Debates*, 41st Parl, 1st Sess, Vol 146, No 225 (20 March 2013) at 1910.

2015, the Standing Senate Committee on Legal and Constitutional Affairs proposed three amendments to the bill before the Senate, one of which would require trans persons to use sex-segregated facilities that match their sex assigned at birth.<sup>42</sup>

When introducing the committee's amendments in the Senate, Senator Donald Plett, a member of the Conservative Party, distinguished between gender-segregated facilities and sex-segregated facilities. He argued that while trans persons should not be denied access to gender-segregated spaces that align with their identity, they should be denied access to sex-segregated spaces based on their sex assigned at birth. Plett did not elaborate on the differences between gender-segregated and sex-segregated spaces, creating a false binary that suggests partial inclusion based on gender identity. Speaking about the addition of gender identity to the *Canadian Human Rights Act*, Senator Plett argued that, "without this amendment, operators of sex-specific facilities would never be able to restrict or limit access."<sup>43</sup> Essentially, Senator Plett agrees trans persons should not be discriminated against based on their gender identity—just their biological sex. This not only reinforces the sex-equals-gender binary, but also reduces trans persons to their sex assigned at birth, making one's genitalia the classifying characteristic.

The proposed amendments could thus prevent trans persons from accessing sex-segregated spaces—including prisons, crisis centres, homeless shelters, public washrooms, and change rooms—congruent with their gender identity. Ironically, these are the spaces where trans persons are often at their most vulnerable because of the increased possibilities of harassment or assault, and are therefore the places where trans persons need the greatest protection.<sup>44</sup> Plett argued that the amendments are not caused by transphobic attitudes but stem from concern for public safety.<sup>45</sup> This argument relies on scare tactics, contending that, without the amendment, sex offenders and pedophiles would pervert the law, using it to enter sex-segregated spaces by claiming to be trans-identified.<sup>46</sup> Plett's comments echo the historical narrative that transsexuals are perverts and deceivers who misrepresent their gender in order to trick others.<sup>47</sup> The belief that

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<sup>42</sup> Canada, Parliament, Senate, The Standing Senate Committee on Legal and Constitutional Affairs, *Twenty-Fourth Report*, 41st Parl, 2nd Sess, No 40 (26 February 2015).

<sup>43</sup> *Debates of the Senate*, 41st Parl, 2nd Sess, Vol 149, No 140 (12 May 2015) at 1540 (Hon Donald Neil Plett) [Plett].

<sup>44</sup> Sheila L. Cavanagh, *Queering Bathrooms: Gender, Sexuality, and the Hygienic Imagination* (Toronto: University of Toronto Press, 2010) [Cavanagh]. Jody L. Herman, "Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives" (2013) 19:1 *Journal of Public Management & Social Policy* 65.

<sup>45</sup> Plett, *supra* note 43 at 1550.

<sup>46</sup> *Ibid.*

<sup>47</sup> Janice Raymond's *The Transsexual Empire* is a notorious example of anti-trans rhetoric that depicts transwomen as deceivers who are a threat to cisgender women. See Janice Raymond, *The Transsexual Empire: The Making of the She-Male* (Boston: Beacon Press, 1979). For critical analyses of trans persons as deceivers, see Talia Mae Bletcher, "Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion" in Susan Stryker and Aren Z. Aizura, eds, *The Transgender Studies Reader 2*

trans persons are a threat to those who are cisgender justifies the harassment of trans persons in washrooms. This conflates trans and gender nonconforming persons with criminal behaviour and sexual deviance. This leads to the nonsensical conclusion that being trans is a factor in, or a cause for, criminalization. If Bill C-279 passes with the committee's amendment, trans persons would not be protected from discrimination in public washrooms or change rooms and could be legally denied access to them. The amendment would consign FTM and transmasculine<sup>48</sup> persons to the women's washroom, and MTF and transfeminine<sup>49</sup> persons to the men's washroom, endangering the lives of the trans persons that the original version of the bill sought to protect.

The *Code's* declaration that gender identity and expression are worthy of protection contradicts the proposed amendment to Bill C-279. While the changes to the *Code* seek to protect trans persons, the amendment to Bill C-279 upholds state-sanctioned discrimination.<sup>50</sup> Unfortunately, these contradictions are not unique to Canada and are demonstrative of a broader trend. In the United States, legal gains for the trans community are often followed by attacks on trans rights. For example, in March 2015, a federal court ruled<sup>51</sup> that the *Affordable Care Act*<sup>52</sup> (more commonly referred to as Obamacare) "prohibits discrimination against trans patients."<sup>53</sup> The Department of Health and Human Services issued new guidelines that would prevent doctors and insurers from denying trans persons "sex-specific recommended preventive

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(New York: Routledge, 2013) 278; Kate Bornstein, *Gender Outlaw: On Men, Women, and the Rest of Us* (New York: Routledge, 1994); Cavanagh, *supra* note 44; Viviane K. Namaste, "Genderbashing: Sexuality, Gender, and the Regulation of Public Space" in Susan Stryker and Stephen Wittke, eds, *The Transgender Studies Reader* (New York: Routledge, 2006) 584; Bobby Noble, "Trans. Panic. Some Thoughts towards a Theory of Feminist Fundamentalism" in Anne Enke, ed, *Transfeminist Perspectives: In and Beyond Transgender and Gender Studies* (Philadelphia: Temple University Press, 2012) 45.

<sup>48</sup> *Transmasculine* is used as an umbrella term that includes a spectrum of masculine identities, including transmen and FTM transsexuals, as well as those who may not fall within the binary categories of male/man.

<sup>49</sup> *Transfeminine* is used as an umbrella term that includes a spectrum of feminine identities, including transwoman and MTF transsexuals, as well as those who may not fall within the binary categories of female/woman.

<sup>50</sup> The following provinces and territories explicitly include protection from discrimination on the basis of "gender identity" under their *Human Rights Code*: Alberta, Manitoba, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Ontario, Prince Edward Island, and Saskatchewan. British Columbia, New Brunswick, Quebec, and Yukon Territory implicitly protect trans persons from discrimination under the grounds of "sex." See "Fact Page: Human Rights Across Canada" *Trans Equality Society of Alberta*, online: [tesaonline.org <http://www.tesaonline.org/human-rights-across-canada.html>](http://www.tesaonline.org/human-rights-across-canada.html).

<sup>51</sup> *Rumble v. Fairview Health Services*, No. 14-CV-2037 (SRN/FLN), 2015 WL 1197415, online: <https://www.crowell.com/files/Rumble-v-Fairview-Health-Servs.pdf>.

<sup>52</sup> *Patient Protection and Affordable Care Act*, Pub. L. No. 111-148, 124 Stat. 119 (2010), online: <http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf> [ACA].

<sup>53</sup> Mitch Kellaway, "Federal Gov: No, Insurers Can't Deny Transgender Patients Preventive Care" *Advocate.com* (11 May 2015), online: <http://www.advocate.com/health/2015/05/11/federal-gov-health-insurers-cant-deny-transgender-patients-preventive-care>.

services,” such as cancer screenings or preventative services.<sup>54</sup> However, these new provisions only apply to health care providers that accept federal funds.<sup>55</sup> Therefore, trans persons who are covered by federally funded health care providers are protected from discrimination, whereas trans persons who are not fortunate enough to have coverage or who have a private insurance provider can still be refused coverage for medical services and procedures.

While the *ACA* does provide trans persons some protection from discrimination, they may still be subject to transphobic actions or comments by service providers while seeking medical care. One trans patient recalls, “I was forced to have a pelvic exam by a doctor when I went in for a sore throat. The doctor invited others to look at me while he examined me and talked to them about my genitals.”<sup>56</sup> Sadly, many trans patients face this kind of discrimination at the hands of health care professionals.

A survey of American citizens conducted by the National Centre for Transgender Equality and the National Gay and Lesbian Task force revealed that: nineteen percent of trans persons have been refused medical care due to being transgender or gender nonconforming; twenty-eight percent have experienced harassment in medical settings; and fifty percent of trans patients reported having to teach their medical providers about trans health care.<sup>57</sup> With figures such as these, it is unsurprising that trans persons often prefer not to disclose their status to medical professionals and may postpone or avoid medical treatment altogether.<sup>58</sup>

Legislated coverage is not likely to assure the physical safety and mental well-being of trans patients if they are subjected to discriminatory medical practices. While trans patients are now “protected” from discrimination under the *ACA*, it only addresses the issue of financial coverage for health care procedures and does not address issues of harassment or disrespect in medical institutions (by practitioners and other patients). Further, the *ACA* does not legislate mandatory education on trans health care for practitioners who are inexperienced with trans patients.

In 2013, the state of California passed the *School Success and Opportunity Act*, which provides guidance to schools on how to support transgender students.<sup>59</sup> The law

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<sup>54</sup> United States Department of Labor, “Coverage of Sex-specific Recommended Preventative Services” *FAQs About Affordable Care Act Implementation (Part XXVI)* (11 May 2015), online: United States Department of Labor <<http://www.dol.gov/ebsa/faqs/faq-aca26.html>>.

<sup>55</sup> National Center for Transgender Equality, “Court: Obamacare Protects Trans People in Health Care Settings” *NCTE Blog* (17 March 2015), online: National Center for Transgender Equality <<http://transequality.org/blog/court-obamacare-protects-trans-people-in-health-care-settings>>.

<sup>56</sup> NTDS, *supra* note 4 at 74.

<sup>57</sup> *Ibid* at 72.

<sup>58</sup> *Ibid* at 76.

<sup>59</sup> AB 1266, *An act to amend Section 221.5 of the Education Code, relating to pupil rights*, California State Legislature, 2013, online:

<[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB1266](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1266)> [SSOA]. See

requires that California public schools “respect students’ gender identity and ensure that students can fully participate in all school activities, sports teams, programs, and facilities that match their gender identity.”<sup>60</sup> The *SSOA* allows trans students to use school washrooms and change rooms according to their gender identity, rather than their sex assigned at birth. While the passing of this act can indeed be considered a victory, it shares similar shortcomings with the anti-discrimination clause of the *ACA* because it only protects students attending public schools. Consequently, students receiving a private education are not guaranteed the same protection. A little over a year after this historic act came into effect, other states introduced anti-trans bills akin to Bill C-279 that sought to ban trans persons from using the washroom corresponding to their gender identity. At least six US state legislatures have tabled these anti-trans “bathroom bills.”<sup>61</sup> In these states, if trans persons use the washroom they feel most comfortable in, they may face criminal charges.

In January 2015, Kentucky introduced the *Student Privacy Act*<sup>62</sup> in response to a policy that was introduced by a local school that allowed transgender students to use the washroom that corresponded with their gender identity. Kentucky’s bathroom bill targets transgender students, barring them from using “school bathrooms designated for the opposite biological sex.”<sup>63</sup> Students are able to request accommodations, such as single-user washrooms and change rooms; however, such students remain banned from using the same facilities as their peers.

Segregating trans students from the rest of the school’s population can have a detrimental effect on their mental health. One study found that seventy-eight percent of trans students face harassment.<sup>64</sup> Consigning trans students to private washrooms reinforces the notion that trans students are a threat to their peers, justifying the segregation of trans students from cisgender students. The *Student Privacy Act* goes as far as encouraging the monitoring of trans students by offering a reward of up to \$2,500 to those who report trans students who violate the law.<sup>65</sup> Effectively, fellow students

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also “About/FAQ” *Support All Students*, online: Support All Students <<http://www.supportallstudents.org>>.

<sup>60</sup> Transgender Law Center, “Victory! CA Bill Will Ensure the Success and Well-being of Transgender Students” *Transgender Law Center*, online: Transgender Law Centre <<http://transgenderlawcenter.org/archives/3544>>.

<sup>61</sup> Michael Cade Hughes, “Update: Status of Anti-Trans Bathroom Bills” *Huffington Post Gay Voices* (15 May 2015), online: Huffington Post <[http://www.huffingtonpost.com/michael-cade-hughes/update-status-of-antitrans\\_b\\_7280574.html](http://www.huffingtonpost.com/michael-cade-hughes/update-status-of-antitrans_b_7280574.html)>.

<sup>62</sup> HB 76, *An act relating to student privacy*, Kentucky State Senate, 2015, online: <<http://www.lrc.ky.gov/record/15rs/SB76.htm>>.

<sup>63</sup> Mike Wynn, “Transgender Bathroom Bill Passes Ky Senate” *The Courier-Journal* (1 March 2015), online: The Courier-Journal <<http://www.courier-journal.com/story/news/politics/ky-legislature/2015/02/27/transgender-bathroom-bill-passes-kentucky-senate/24130083/>>.

<sup>64</sup> NTDS, *supra* note 4 at 33.

<sup>65</sup> “Kentucky ‘Trans Bounty’ Bathroom Bill Fails” *Pink News* (25 March 2015), online: Pink News <<http://www.pinknews.co.uk/2015/03/25/kentucky-trans-bounty-bathroom-bill-fails/>>.

would become bounty hunters, receiving money from the government for reporting trans persons. This type of peer surveillance, known as gender policing, is a frequently deployed strategy to sanction trans persons and persons who do not align with the gender binary.<sup>66</sup> Notably, the *Student Privacy Act* failed in the House of Representatives; nonetheless, it is indicative of the structure and content of anti-trans legislation that may one day pass and become law.

Texas also introduced an anti-trans bathroom bill<sup>67</sup> that would allow students to sue their school district for up to \$2,000 in damages “if they encounter a peer of the opposite sex in the bathroom or locker room,”<sup>68</sup> further reinforcing the policing of trans students as necessary to protect the mental well-being of cisgender students. This contributes to public “trans panic” by suggesting that encountering a trans person in the washroom is so emotionally distressing that the witness, or “victim,” must be compensated. In contrast, the mental and emotional distress trans persons often endure in sex-segregated spaces remains unaddressed. The Texas bill goes as far as defining sex according to one’s chromosomes, stating, “A male is an individual with at least one X chromosome and at least one Y chromosome, and a female is an individual with at least one X chromosome and no Y chromosomes.”<sup>69</sup> Defining a person’s sex based on their chromosomes is not as straightforward as it sounds; there are, in fact, more than two chromosomal configurations.<sup>70</sup>

Intersex persons cannot be classified according to the strict male–female sex binary and thus could also be denied access to public washrooms. For example, intersex persons with Androgen Insensitivity Syndrome are often assigned female at birth despite having XY chromosomes.<sup>71</sup> Persons with this condition may be raised female, ignorant of the fact they possess “male” chromosomes. Intersex persons with congenital adrenal hyperplasia may have an enlarged clitoris and be assigned male at birth even

<sup>66</sup> Cavanagh, *supra* note 44 at 10.

<sup>67</sup> HB 1748, *An Act relating to the use of publiclocker rooms, shower facilities, and toilet facilities; creating a criminal offense*, Texas State Senate, 2015, online: <<http://www.legis.state.tx.us/tlodocs/84R/billtext/html/HB01748I.htm>>.

<sup>68</sup> kxan, “Texas Lawmaker Delays Transgender School ‘Bathroom Bill’” *Associated Press* (15 April 2015), online: kxan <<http://kxan.com/2015/04/15/texas-lawmaker-delays-transgender-school-bathroom-bill/>>.

<sup>69</sup> Mitch Kellaway, “Texas Bill Would Jail Those Whose Chromosomes Don’t Match the Restroom They’re Using” *Advocate.com* (24 February 2015), online: The Advocate <<http://www.advocate.com/politics/transgender/2015/02/24/texas-bill-would-jail-those-whose-chromosomes-dont-match-restroom-th>>. Minnesota’s anti-trans bathroom bill defines sex as “the physical condition of being male or female, which is determined by a person’s chromosomes and is identified at birth by a person’s anatomy.” See SF 1543, Minnesota State Legislature, 2015, online: <[https://www.revisor.mn.gov/bills/text.php?version=latest&session=ls89&number=SF1543&session\\_year=2015&session\\_number=0](https://www.revisor.mn.gov/bills/text.php?version=latest&session=ls89&number=SF1543&session_year=2015&session_number=0)> [SF 1543].

<sup>70</sup> Anne Fausto-Sterling, “The Five Sexes: Why Male and Female Are Not Enough” (1993) 33:2 *The Sciences* at 20.

<sup>71</sup> Intersex Society of North America, “Androgen Insensitivity Syndrome (AIS)” *Intersex Conditions*, online: Intersex Society of North America <<http://www.isna.org/faq/conditions/ais>>.

though they have XX chromosomes.<sup>72</sup> Accordingly, intersex persons could be restricted from using the washroom that corresponds to the sex they were assigned at birth. Moreover, some intersex persons have three sex chromosomes: XYY, XXY, or XXX. The sex and gender binary does not account for intersex variations.<sup>73</sup>

In early 2015, Florida, Kentucky, Minnesota, Missouri, and Nevada also introduced similar bathroom bills.<sup>74</sup> While three of these six bathroom bills failed to pass (in Florida, Kentucky and Nevada), the message underlying the bills is clear: trans persons are dangerous and the best way to protect the public is through adhering to an outdated binary model, which must be enforced through gender policing. These anti-trans bathroom bills follow recent trans victories, such as California's *School Success and Opportunity Act* and other anti-discrimination legislation that seek to protect trans persons from discrimination based on their gender identity.

Trans rights and equality advocates argue that, "the increased visibility of transgender people in American culture in recent years is triggering this legislative backlash, particularly in states (e.g., Nevada) that have already passed laws that protect transgender students or employees from gender discrimination."<sup>75</sup> While anti-discrimination laws state that trans persons cannot be discriminated against when seeking employment, housing, medical care, and other public services, the bathroom bills would bar trans persons from using the washroom that corresponds with their gender identity. Based on these contradictions, trans persons are protected, for example, from wrongful termination for being trans, but could still be denied access to sex-segregated facilities at their place of work. Contradictory legislation can contribute to an unstable lifestyle, as trans persons must navigate the conflicting policies that govern their daily activities.

### III. HATE CRIME LAWS AND INTERSECTING FORMS OF OPPRESSION

Both transphobia and violence against trans persons are on the rise. The Trans Pulse Project, which is based in Ontario, Canada, reports that "experience[s] of

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<sup>72</sup> Intersex Society of North America, "Congenital Adrenal Hyperplasia (CAH)" *Intersex Conditions*, online: Intersex Society of North America <<http://www.isna.org/faq/conditions/cah>>.

<sup>73</sup> "Gender and Genetics" *Genomic Resource Centre*, online: World Health Organization <<http://www.who.int/en/>>.

<sup>74</sup> HB 583, Florida House of Representatives, 2015, online:

<<http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=53629>>; SF 1543, *supra* note 69;

HB 1338, Missouri House of Representatives, 2015, online:

<<http://www.house.mo.gov/billsummary.aspx?bill=HB1338>

&year=2015&code=R>; HB 1339, Missouri House of Representatives, 2015, online:

<<http://www.house.mo.gov/billsummary.aspx?bill=HB1339&year=2015&code=R>>; AB 375, Nevada State Legislature, 2015, online: <<https://www.leg.state.nv.us/Session/78th2015/Bills/AB/AB375.pdf>>.

<sup>75</sup> Marisa Taylor, "The Growing Trend of Transgender 'Bathroom Bully' Bills" *Education* (1 April 2015), online: Aljazeera America <<http://america.aljazeera.com/articles/2015/4/1/transgender-bathroom-bills-are-a-statewide-trend.html>>



transphobia [are] nearly universal among trans Ontarians, with ninety-eight percent reporting at least one experience of transphobia.”<sup>76</sup> Moreover, thirty-seven percent of trans youth have experienced physical violence in school, and twenty percent of trans persons across Ontario have experienced physical or sexual assault.<sup>77</sup> While Canadian research on transphobic hate crimes is limited, a US-based report released by the National Coalition of Anti-Violence Programs (NCAVP) determined that anti-LGBTQ<sup>78</sup> murders increased by eleven percent in 2014, and violence against trans persons increased by thirteen percent.<sup>79</sup>

In particular, transwomen of colour have disproportionately become the victims of assault; they experience exponentially higher incidents of violence than their white counterparts. According to the NCAVP survey, eighty percent of anti-LGBTQ murder victims in 2014 were people of colour, fifty-five percent of homicide victims were transwomen, and fifty percent were transwomen of colour.<sup>80</sup> To combat these high rates of harassment and violence, transgender activists advocate for the inclusion of gender identity and expression under hate crime laws. In Canada, trans persons are not protected under federal hate crime legislation. In the United States, only fifteen states include gender identity under hate crime legislation, delineating harsher sentences for those who commit transphobic crimes.<sup>81</sup> *The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009* includes sexual orientation and gender identity under US federal hate crime legislation.<sup>82</sup> The *Act* permits the federal government to provide grants and assistance to state and local law enforcement agencies investigating and prosecuting hate crimes. Notably, however, the federal government cannot enforce this legislation at the state and local levels.<sup>83</sup>

Focusing solely on hate crimes individualizes acts of violence and discrimination against trans persons and fails to address systemic and state-sanctioned

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<sup>76</sup> Marcellin R Longman et al, “Experiences of Transphobia among Trans Ontarians” *Trans PULSE e-Bulletin* (7 March 2013), online: Trans Pulse <<http://transpulseproject.ca/research/experiences-of-transphobia-among-trans-ontarians/>>.

<sup>77</sup> Catherine Taylor & Tracy Peter, *Every Class in Every School: Final Report on The First National Climate Survey on Homophobia, Biphobia, and Transphobia in Canadian Schools* (Toronto: Egale Canada Human Rights Trust, 2011) at 15.

<sup>78</sup> This acronym stands for lesbian, gay, bisexual, transgender, and queer.

<sup>79</sup> National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2014* (New York: NCAVP, 2015) at 55-56 [NCAVP].

<sup>80</sup> *Ibid.*

<sup>81</sup> The following states include gender identity under hate crime laws: California, Colorado, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, Oregon, Vermont, and Washington, as well as Washington, D.C. See “Maps of State Laws and Policies,” *Human Rights Campaign*, online: Human Rights Campaign <[http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps)>.

<sup>82</sup> 18 U.S.C. § 249. Public Law No. 111-84. *The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009*, The United States Department of Justice, online: The United State Department of Justice <<http://www.justice.gov/crt/about/crm/matthewshepard.php>>.

<sup>83</sup> Human Rights Campaign, “Hate Crimes Law”, *Human Rights Campaign*, online: <<http://www.hrc.org/resources/entry/hate-crimes-law>>.

transphobia. Hate crime laws protect trans persons from individual perpetrators, as these laws are based on the logic that only individuals commit acts of discrimination and violence. This ignores the historical and systemic forms of oppression that are enforced through state and civil acts of violence.<sup>84</sup> Each crime is viewed as an isolated event rather than as a consequence or component of systemic oppression. Accordingly, transphobia and violence against trans persons is conceptualized as a consequence of the perpetrator's own limitations and bias. Critical race scholars have already demonstrated that hate crime laws do not actually provide persons of colour with protection. Spade explains this phenomenon in the following manner: "Hate-crime laws do not have a deterrent effect. They focus on punishment and cannot be argued to actually prevent bias-motivated violence."<sup>85</sup> Hate crime laws offer inadequate protection because they are reactionary: they seek to punish the perpetrator, who has already committed an act of violence, instead of seeking to prevent future acts of violence.

Although hate crime laws confer strict sentences, they can be difficult to prosecute because the victim must be able to prove that the crime was committed due to a personal bias. However, not all transphobic attacks involve transphobic slurs, and it may be difficult to prove the perpetrator's motivation for their actions. Consequently, transphobic attacks may not qualify as a hate crime. This can result in the criminalization of trans persons, as they are often blamed for acts of violence committed against them.

In *Minnesota v McDonald* (2012),<sup>86</sup> for example, CeCe McDonald, an African-American transwoman, was sentenced to forty-one months in a men's prison for defending herself against a racist and transphobic attack that occurred when she and a group of friends passed by a bar in Minneapolis in 2011. Dean Schmitz and his friends hurled transphobic, homophobic, and racist slurs at McDonald and her friends before and during the attack, which was instigated when Molly Flaherty smashed a glass across McDonald's face. The violent altercation ended when McDonald stabbed Schmitz, her assailant, with a pair of scissors in self-defense. Even though Schmitz had three prior convictions of assault and a swastika tattooed on his abdomen, the Supreme Court of Minnesota ruled there was no proof that his attack was a hate crime because the tattoo was not visible to McDonald at the time of the attack.<sup>87</sup> Consequently, McDonald was the victim of two forms of transphobic violence: first, at the hands of her attackers, and

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<sup>84</sup> Normal, *supra* note 9 at 87.

<sup>85</sup> Dean Spade, "What's Wrong with Trans Rights?" in Anne Enke, ed, *Transfeminist Perspectives: In and Beyond Transgender and Gender Studies* (Philadelphia: Temple University Press, 2012) 184 at 186.

<sup>86</sup> 27 CR 11-16485, online:

<<https://supportcece.files.wordpress.com/2012/08/mcdonald-chrishoun-11-16485-5-2-12-plea.pdf>>.

<sup>87</sup> Victoria Law, "Here's Why You Should Know About the Case of CeCe McDonald," *bitchmedia* (10 January 2014), online: Bitch Magazine <<http://bitchmagazine.org/post/cece-mcdonald-may-soon-be-out-of-prison-but-that-doesnt-mean-the-fight-ends-there>>.

second, at the hands of the state, which consigned her to a men's prison facility. Flaherty, on the other hand, was never charged with assault for instigating the violence, even though Minnesota has hate crime legislation that protects trans persons and persons of colour.<sup>88</sup> McDonald accepted a plea deal for second-degree manslaughter to avoid a prison sentence of up to eighty years for two second-degree murder charges.<sup>89</sup> In the end, it appears McDonald was punished for having the audacity to survive. If it is this difficult to categorize a transphobic assault as a hate crime then hate crime laws offer little protection to the trans community.

Hate crime laws are more symbolic than effective. Consigning McDonald to a men's prison perpetuates the cycle of violence and transphobia. Trans persons often face discrimination, harassment, and abuse at the hands of the police and correctional officers. Trans persons who experience harassment or assault may face further victimization if they report an attack to the police. In the United States, forty-six percent of trans persons have reported feeling "uncomfortable" about seeking police help.<sup>90</sup> Ultimately, if trans persons do not feel safe contacting the police, they will not do so, rendering hate crime laws essentially irrelevant.

Furthermore, trans persons are 6.2 times more likely to experience physical violence at the hands of police than those who are cisgender.<sup>91</sup> Twenty-two percent of trans persons who reported interacting with the police experienced some form of harassment and twenty percent were denied equal services.<sup>92</sup> In prison, the rate of harassment of trans persons by officials increases to thirty-seven percent and is even higher for trans persons of colour.<sup>93</sup> Additionally, trans prisoners are often denied health care and report higher rates of physical and sexual assault, including rape, than cisgender prisoners.<sup>94</sup> Transwomen of colour, specifically, are regularly targeted and profiled as sex workers by police officers and are frequently arrested without cause for solicitation or for "walking while transgender."<sup>95</sup> Moreover, seven percent of trans persons reported that they were arrested or detained exclusively because of their gender identity or expression. This figure skyrockets to forty-one percent for black trans

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<sup>88</sup> Under Minnesota law, trans persons are protected under "sexual orientation," which includes those "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." See Minn. Stat. § 363A.03, subd. 44, online: The Office of the Revisor of Statutes <<https://www.revisor.mn.gov/statutes/?id=363a.03>>.

<sup>89</sup> Michelangelo Signorile, "CeCe McDonald, Transgender Activist, Recalls Hate Attack, Manslaughter Case" *Huffpost Gay Voices* (22 February 2014), online: Huffington Post <[http://www.huffingtonpost.com/2014/02/22/cece-mcdonald-manslaughter-case\\_n\\_4831677.html](http://www.huffingtonpost.com/2014/02/22/cece-mcdonald-manslaughter-case_n_4831677.html)>.

<sup>90</sup> NTDS, *supra* note 4 at 158.

<sup>91</sup> *NCAVP*, *supra* note 79 at 56.

<sup>92</sup> NTDS, *supra* note 4 at 158.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

persons.<sup>96</sup> While the general US population faces an incarceration rate of 2.7 percent, the trans population faces a rate of sixteen percent.<sup>97</sup> Evidently, hate crime laws do not protect trans persons from the prison industrial complex, police brutality, or other forms of state-sanctioned violence.

Hate crime laws focus on singular identities and do not allow for an intersectional approach to discrimination and oppression. For trans persons of colour, racism and transphobia intersect and cannot be separated. Hate crime laws suppose that the victim has experienced only one specific form of hate that is easily identifiable. The singular approach of hate crime legislation ignores the struggles that transwomen of colour, trans persons with disabilities, or working-class trans persons face when they experience converging forms of oppression. As Audre Lorde, a feminist and woman of colour, aptly explains, “There is no such thing as a single-issue struggle because we do not live single-issue lives.”<sup>98</sup> Because hate crime legislation does not acknowledge the intersection of identities and oppression, marginalized transwomen, such as McDonald, must decide whether they were discriminated against or attacked for being a woman, transgender, or on some other grounds. The reduction of hate crime victims to a singular identity can be felt as another form of violence because it denies the complexities of their identities and experiences. Therefore, seeking trans inclusion through hate crime laws and anti-discrimination laws does not offer protection to trans persons who also experience racism, ableism, misogyny, homophobia, classism, and xenophobia.<sup>99</sup> Confining hate crime survivors to the government’s predetermined categories contributes to the erasure of their intersectional identities. In doing this, the government indirectly regulates how victims of hate crimes identify.

This type of legislation may prove sufficient in attending to transphobia that is not compounded by other forms of oppression, such as for white middle-class survivors of hate crimes. Although one segment of trans persons may benefit from these laws, it is at the expense of preventing the protection of trans persons of colour, trans persons living with disabilities, queer or gender nonconforming trans persons, and working-class trans persons or those living in poverty.

### CONCLUSION: BEYOND RIGHTS

As trans persons and trans issues continue to gain visibility and garner public attention, many people believe trans equality is inevitable. But as Laverne Cox explains, “At the end of the day, the visibility that I had last year, and continue to have, didn’t save Blake Brockington from suicide, didn’t save Leelah Alcorn from suicide, didn’t

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<sup>96</sup> *Ibid* at 163.

<sup>97</sup> *Ibid*.

<sup>98</sup> Audre Lorde, *Sister Outsider: Essays and Speeches* (Berkeley: Crossing Press, 2007) at 138.

save the seven transwomen who were murdered the first eight weeks of [2015].”<sup>100</sup> Ultimately, visibility will not protect trans persons from persecution and discrimination.

Trans advocates have tried seeking protection under the law through neoliberal discourses of individualism and equal rights. The advent of individual rights over civil rights shifted responsibility from the government to individuals, and trans persons seeking to medically transition face extremely high costs. The issues associated with transitioning are often exacerbated by systemic transphobia that can lead to unemployment, homelessness, and crime. Trans persons of colour, specifically, are further disenfranchised due to state-sanctioned racism within the criminal justice system. Evidently, equal rights do not result in substantively equal lived experiences.

The inclusion of gender identity and gender presentation under anti-discrimination laws has sparked a backlash of anti-trans legislation that has resulted in legal contradictions. Anti-trans bathroom bills have been introduced in Canada and the United States, which threaten the safety of trans persons by essentially denying them access to sex-segregated public spaces. Consequently, trans persons are protected from discrimination by some laws and simultaneously criminalized by others. Hate crime laws, which focus on individual perpetrators rather than systemic and state-sanctioned violence, offer little or no protection. These laws do not protect trans persons from police brutality or from the prison industrial complex. Rather, the burden of proving the perpetrator’s motivation makes it difficult to prosecute hate crimes and deters victims of hate crimes. There is a further fear that trans person may face prosecution, as in the case of *Minnesota v McDonald*. In passing laws that are reactionary rather than preventive, the government offers a band-aid solution under the guise of equality. Further, hate crime laws focus on singular forms of oppression, simplifying the experiences of trans persons with intersectional identities, such as trans persons of colour or those living in poverty. Thus, hate crime laws are more symbolic than effective; in reality, they do not prevent hate.

If equal rights discourse, anti-discrimination and hate crime laws do not protect trans persons or guarantee equality, then other avenues for justice must be pursued. Legislation and amendments to achieve trans equality should attend to the intersections of race, class, sexuality, and ability are needed for trans persons of all identities to gain access to public space and state services. Trans politics must challenge the essentialist notion of the sex-equals-gender binary and reject the idea that medicalization is the only legitimate basis for granting equal rights. Trans activists and lawmakers alike must advocate for a self-determining, non-binary gender model. In order to combat systemic oppression and discrimination, the legislation that contributes to the violence trans persons face must be dismantled. Spade suggests turning “toward[s] legal work that

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<sup>100</sup> “Laverne Cox: Bruce Jenner a ‘Proudly Nuanced, Complicated, Beautiful Human Being’ 4/25/15” *MSNBC* (20 June 2015), online: YouTube <<https://www.youtube.com/watch?v=os6EzJn5BNM>>.

relates directly to the criminalization of trans people and addresses issues like police harassment and violence, inadequate criminal defense, medical neglect, and the myriad violences facing imprisoned trans people.”<sup>101</sup> Changing the negative attitudes towards the trans community requires active work. This includes anti-transphobia education and training for educators, medical practitioners, social service providers, and law enforcement and government officials. The adequate funding of education, health care, social services, and welfare programs must be prioritized and made accessible to all persons regardless of sex, race, class, citizenship or gender identity. Ultimately, equality can be achieved only through systemic change that addresses all forms of social inequality and state-sanctioned oppression.

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<sup>101</sup> Normal, *supra* note 9 at 156.