

THE MASSACHUSETTS TRANSGENDER EQUAL RIGHTS BILL: FORMAL LEGAL EQUALITY IN A TRANSPHOBIC SYSTEM

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When the Transgender Equal Rights Bill¹ was introduced into the Massachusetts legislature in 2011, opposition emerged from a surprising source: Black and Pink, a Massachusetts-based radical “open family” of queer prisoners and their allies who “work toward the abolition of the prison industrial complex.”² Massachusetts’s Transgender Equal Rights Bill forbids discrimination based on “gender identity”³ in a variety of areas, including employment,⁴ housing,⁵ credit,⁶ and education.⁷ However, Black and Pink’s opposition focused solely on the hate crime sections of the bill, which mandate enhanced sentences for crimes based on gender identity.⁸ This is not the first time that groups representing queer and transgender communities have voiced opposition to transgender civil rights legislation. Black and Pink drew inspiration for their letter of non-support from the response of a group of New York organizations against the 2009 Gender Expression Non-Discrimination Act (GENDA),⁹ a similar bill which passed New York’s State Assembly multiple times but stalled in the Senate.¹⁰ Five organizations that “work to advocate for and increase the political voice” of transgender and gender non-conforming communities of color, most notably the Sylvia Ri-

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¹ H.R. 3810, 187th Gen. Ct. (Mass. 2011). The online version of the bill is available at <http://www.malegislature.gov/Bills/187/House/H03810>. The Bill was signed into law by Massachusetts Governor Deval Patrick in November 2011. Press Release, Office of the Governor of Massachusetts, Governor Patrick Signs Transgender Equal Rights Bill (Nov. 23, 2011), available at <http://www.mass.gov/governor/pressoffice/pressreleases/2011/111123-transgender-bill.html>.

² *Purpose*, BLACK & PINK, <http://www.blackandpink.org/purpose/> (last visited Feb. 18, 2012) [hereinafter *Purpose*].

³ H.R. 3810, 187th Gen. St. § 1 (Mass. 2011).

⁴ *Id.* at §§ 6, 7.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at §§ 3–5.

⁸ *Id.* at §§ 2, 8; *Non-Support for Massachusetts’ Transgender Equal Rights Bill*, BLACK & PINK, <http://www.blackandpink.org/revolt/non-support-for-massachusetts-transgender-equal-rights-bill/> (last visited Feb. 18, 2012).

⁹ *Non-Support for Massachusetts’ Transgender Equal Rights Bill*, *supra* note 8. See also *SLRP Announces Non-Support of the Gender Employment Non-Discrimination Act*, SYLVIA RIVERA LAW PROJECT (Apr. 6, 2009), <http://srp.org/genda> [hereinafter *SLRP Announces Non-Support*]; A. 05039, 234th Sess. (N.Y. 2012).

¹⁰ See Matt Sledge, *Gender Expression Non-Discrimination Act: Transgender New Yorkers Still Waiting For Equality*, HUFFINGTON POST (Oct. 5, 2011), http://www.huffingtonpost.com/2011/10/05/gender-expression-non-discrimination-act-transgender-new-york_n_996256.html.

vera Law Project (SLRP), wrote a letter to the GENDA coalition asking them to strike the hate crime legislation attached to the bill.¹¹

Thirteen states, as well as Washington, D.C., include gender identity or gender expression in their hate crime laws.¹² From a political standpoint, expanding hate crime laws is an easy sell: liberals can pledge protection for communities affected by prejudice, satisfying many queer rights organizations, while conservatives can show that they are tough on crime.¹³ With such a broad coalition of support for expanded hate crime laws, it may seem strange that some of the most impassioned rhetoric against the Massachusetts Transgender Equal Rights Bill has come from a segment of the transgender community itself. Black and Pink's critique of the bill rests on the idea that hate crime legislation gives even more power to a criminal justice and prison system that has already proven itself to be transphobic and racist.¹⁴ Transgender people, particularly those of color, are arrested and imprisoned at much higher rates than the rest of the population due to higher rates of poverty and unemployment-driven crime, as well as police profiling and selective enforcement.¹⁵ Transgender individuals endure higher rates of police violence,¹⁶ and have reported being arrested after calling the police for

¹¹ *SLRP Announces Non-Support*, *supra* note 9.

¹² Katie Moisse, *Mass. Transgender Rights Bill Headed for Vote*, ABC NEWS (Nov. 15, 2011), <http://abcnews.go.com/Health/Wellness/mass-transgender-rights-bill-seeks-protection-discrimination-hate/story?id=14956998#.TxXno-uC98s>.

¹³ *Non-support for Massachusetts' Transgender Equal Rights Bill*, *supra* note 8.

¹⁴ *See id.*; *SLRP Announces Non-Support*, *supra* note 9 (“[T]his kind of legislation places an enormous amount of faith in our deeply flawed, transphobic, and racist criminal legal system.”); KATHERINE WHITLOCK, AM. FRIENDS SERV. COMM., IN A TIME OF BROKEN BONES: A CALL TO DIALOGUE ON HATE VIOLENCE AND THE LIMITATIONS OF HATE CRIMES LEGISLATION 8 (2001), available at http://www.afsc.org/sites/afsc.civicactions.net/files/documents/In_A_Time_Of_Broken_Bones.pdf (“AFSC’s engagement with the U.S. criminal justice system over the past fifty years leads us to the inescapable conclusion that this system is itself a key institutional perpetrator of violence and hatred and is responsible for massive abuses of civil and human rights.”).

¹⁵ *See, e.g., Non-Support for Massachusetts' Transgender Equal Rights Bill*, *supra* note 8; *SLRP Announces Non-Support*, *supra* note 9 (“Trans people . . . are disproportionately incarcerated to an overwhelming degree. Trans and gender non-conforming people, particularly trans women of color, are regularly profiled and falsely arrested for doing nothing more than walking down the street.”); WHITLOCK, *supra* note 14, at 8, 20; SYLVIA RIVERA LAW PROJECT, “IT’S WAR IN HERE”: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS 15 (2007), available at <http://srp.org/files/warinhere.pdf>; AMNESTY INT’L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 18–21 (2005), available at <http://www.amnesty.org/en/library/asset/AMR51/122/2005/en/2200113d-d4bd-11dd-8a23-d58a49c0d652/amr511222005en.pdf>; Angela Okamura, *Equality Behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System*, 8 HASTINGS RACE & POVERTY L.J. 109, 110 (2011).

¹⁶ *See* APRIL J. WALKER, SELECTED WORKS, RACIAL PROFILING IN AMERICA 32 (Sept. 2009), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=april_walker.

assistance when victimized.¹⁷ Additionally, fifty-nine percent of transgender prisoners report experiencing sexual abuse while incarcerated, in contrast to just over four percent of the overall prison population.¹⁸

Black and Pink and SLRP take issue not with efforts to decrease violence against transgender people but with entrusting transphobic institutions to implement these policies. In theory, hate crime laws are meant to protect oppressed groups from violence by enhancing the penalties against their attackers.¹⁹ However, in reality,

[h]ate crime laws do not distinguish between oppressed groups and groups with social and institutional power. . . . Compared to white men, Black men are disproportionately arrested for race-based hate crimes. The second-largest category of race-based hate crimes tracked by the FBI is crimes committed against white people. Every year, the FBI reports a number of so-called “anti-heterosexual” hate crimes—incidents where members of the LGBT community have been prosecuted for supposedly targeting straight people²⁰

Hate crime statutes are designed not to protect specific groups; they use neutral language to expand the power of the criminal justice system over all victims and victimizers, regardless of their race or gender.²¹ Part of the opposition to expanded hate crime laws lies in the fear that they will be used to further the aims of imprisoning and criminalizing, rather than protecting, transgender people.²²

Black and Pink, SLRP, and other critics of hate crime laws such as the American Friends Service Committee also note that these statutes are reactive, rather than preventive or pro-active.²³ There is no evidence that longer prison sentences have any deterrent effect on hate crimes.²⁴ To the contrary, many argue that they contribute to recidivism: incarceration “does nothing to address the root reasons why someone was violent or hateful; it only plunges them into deeper poverty, further isolates them from their commu-

¹⁷ AMNESTY INT’L, *supra* note 15, at 6; NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, ANTI-LESBIAN, GAY, BISEXUAL AND TRANSGENDER VIOLENCE IN 2007, at 9 (2008), *available at* http://ncavp.org/common/document_files/Reports/2007HVRReportFINAL.pdf.

¹⁸ Okamura, *supra* note 15, at 116.

¹⁹ SLRP Announces Non-Support, *supra* note 9.

²⁰ *Id.*; see also FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS: VICTIMS (2010), *available at* <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-victims>.

²¹ WHITLOCK, *supra* note 14, at 18.

²² *Non-Support for Massachusetts’ Transgender Equal Rights Bill*, *supra* note 8.

²³ *Id.*; SLRP Announces Non-Support, *supra* note 9; WHITLOCK, *supra* note 14, at 9.

²⁴ Dean Spade, *Keynote Address: Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change*, 30 WOMEN’S RTS. L. REP. 288, 297 (2009) [hereinafter *Trans Law Reform Strategies*].

nity, and subjects them to further violence and trauma.”²⁵ At the same time, the high incidence of imprisonment of transgender people and the lack of protection provided by prison staff mean that transgender people are extremely likely to be subjected to further hate crimes in prison.²⁶

Queer and transgender advocacy organizations like Black and Pink celebrate the employment anti-discrimination sections of the Massachusetts Bill yet lament the hate crime legislation that is attached. Black and Pink writes, “We absolutely believe in the rights for all people to have access to discrimination-free housing and jobs. . . . We would love to support an anti-discrimination bill that does not include a Hate Crimes inclusion.”²⁷ The Massachusetts Transgender Equal Rights Bill and its peers in other states may have arisen out of the multiple failures to pass the Employment Non-Discrimination Act (ENDA), national legislation that would protect against employment discrimination on the basis of sexual orientation.²⁸ A prohibition against employment discrimination based on gender identity was added to ENDA in 2007, then later removed in order to garner votes in the U.S. House of Representatives, leading activists to claim that “the T in LGBT is silent.”²⁹ After dying in the Senate, ENDA was reintroduced with gender identity protections in the 111th Congress, only to stall in the House Education and Labor Committee.³⁰ It was again introduced in the 112th Congress, but has not yet come to a vote.³¹ Meanwhile, the 2009 National Transgender Discrimination Survey shows that ninety-seven percent of transgender people reported “mistreatment, harassment, or discrimination on the job,”³² while twenty-six percent reported losing their job because they were transgender.³³ Partly as a result of this discrimination, the unemployment rate among transgender people is twice the national average.³⁴ As Congress has

²⁵ *SLRP Announces Non-Support*, *supra* note 9; WHITLOCK, *supra* note 14, at 8, 27 (“Long, harsh periods of incarceration, in which maintenance of meaningful family and community ties is rendered difficult or impossible, offer youthful perpetrators of hate violence little opportunity to rebuild their lives.”).

²⁶ See Okamura, *supra* note 15, at 116–17.

²⁷ *Non-Support for Massachusetts’ Transgender Equal Rights Bill*, *supra* note 8.

²⁸ H.R. 3685, 110th Cong. (2007); see Stuart Biegel, *Unfinished Business: The Employment Non-Discrimination Act (ENDA) and the K–12 Education Community*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 357, 359–61 (2011).

²⁹ William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 503 (2011).

³⁰ *Pass ENDA Now: Timeline*, HUMAN RIGHTS CAMPAIGN, <http://sites.hrc.org/sites/passendanow/timeline.asp> (last visited Mar. 8, 2012).

³¹ See Jerome Hunt, *A History of the Employment Non-Discrimination Act: It’s Past Time to Pass This Law*, CTR. FOR AM. PROGRESS (July 19, 2011), http://www.americanprogress.org/issues/2011/07/enda_history.html.

³² NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASK FORCE, NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (Nov. 2009), available at http://transequality.org/Resources/NCTE_prelim_survey_econ.pdf.

³³ *Id.* at 1.

³⁴ *Id.*

repeatedly failed to pass ENDA, individual states have taken employment nondiscrimination legislation into their own hands.

The non-support ideology expressed by Black and Pink and the Sylvia Rivera Law Project is built upon an intellectual architecture largely established by Dean Spade, who founded SLRP in 2002.³⁵ Spade takes suspicion of civil rights legislation to another level by exploring the limits of “formal legal equality,” arguing that pursuit of anti-discrimination legislation is a waste of resources, if not outright harmful.³⁶ Spade opposes not only hate crime laws, but all anti-discrimination legislation, regarding them as “window dressing[s]” that satisfy advocates and make politicians look good without creating any real change in the life experiences of transgender people.³⁷ The danger of these “window dressing[s]” is that they focus on “what the law says about us,”³⁸ and are concerned solely with “explicit, intentional operations”³⁹ of prejudice that are actually written into the law. These types of bills support the fiction that “what the law says about a vulnerable population . . . will necessarily change the key conditions of vulnerability,”⁴⁰ and rely on legal declarations rather than work for policies that decriminalize poverty and change prison conditions.⁴¹ The focus on formal legal equality “narrow[s] . . . critical engagement with oppressive systems,”⁴² while simultaneously empowering and legitimizing those systems.⁴³ Nondiscrimination laws necessarily stem from the experience of more privileged members of the transgender community, rather than the most vulnerable, who face an array of issues that cannot be resolved through formal legal equality alone.⁴⁴ Spade argues that it is time to “let go of elite liberal notions that . . . winning the right lawsuit will create equality,” in favor of “visualiz[ing] [a] broader social movement infrastructure.”⁴⁵

Spade’s scholarship raises a key issue: innovative, on-the-ground change is much more difficult than declaring an act illegal. There are established legal and political pathways for creating protective legislation that creates equality on paper; however, there is no established method to systematically change the attitudes of people across the country on a daily basis. The symbolic value of being legally declared an equal citizen is more immediately gratifying than working for broader policies that redistribute life chances and may take long periods to produce noticeable change. Still,

³⁵ *About*, DEANSPADE.NET, <http://www.deanspade.net/about/> (last visited Mar. 7, 2012).

³⁶ Dean Spade, *Laws as Tactics*, 21 COLUM. J. GENDER & L. 442, 459 (2011).

³⁷ *Id.*

³⁸ Dean Spade, *Keynote Address*, 19 COLUM. J. GENDER & L. 1086, 1093 (2010).

³⁹ *Id.*

⁴⁰ Spade, *Laws as Tactics*, *supra* note 36, at 459.

⁴¹ *See, e.g., id.* at 470.

⁴² Spade, *Trans Law Reform Strategies*, *supra* note 24, at 293–94.

⁴³ *Id.* at 297.

⁴⁴ Spade, *Laws as Tactics*, *supra* note 36, at 467–68.

⁴⁵ Spade, *Keynote Address*, *supra* note 38, at 1099.

Spade contends that working for non-discrimination legislation actually gives more power to the criminal justice system not only by widening the range of criminal acts and possible sentences, which hate crimes laws do, but also by lending the system credibility as “fair and neutral” from the transgender community’s perspective.⁴⁶ Thus, by working for civil rights legislation—even long-awaited and popular employment anti-discrimination laws—transgender communities are placing their faith in and empowering a deeply flawed system.

It is important to note that the majority of transgender advocates do not share, or at least do not voice, these fears of empowering the criminal justice system, and generally endorse employment anti-discrimination and hate crime legislation.⁴⁷ Perhaps these ideas are too radical for mainstream advocacy groups. After all, advocates from all backgrounds have supported civil rights legislation over the years, and many feel that it has been a worthwhile and transformative accomplishment, even though it has not eliminated racism, sexism, or homophobia. It is also possible that the goals of more mainstream transgender advocacy groups and radical groups have diverged, based on class, racial, sexual, or political issues. This struggle between inclusion and co-optation, assimilation and recognition of difference, is one that has emerged in many other civil rights movements.⁴⁸

Spade challenges the idea of relying on non-discrimination legislation at all, preferring more creative approaches that affect a broader range of social and economic issues.⁴⁹ Black and Pink and SLRP, on the other hand,

⁴⁶ *Id.* at 1093.

⁴⁷ See, e.g., *Massachusetts Transgender Equal Rights Law*, MASS. TRANSGENDER POLITICAL COAL., <http://www.masstpc.org/ter/> (last visited Feb. 18, 2012); *Our Mission and Public Policy*, EMPIRE STATE PRIDE AGENDA, <http://www.prideagenda.org/About-Us/Our-Mission-and-Public-Policy.aspx> (last visited Feb. 18, 2012); TRANSGENDER LAW & POLICY INST., <http://transgenderlaw.org> (last visited Feb. 18, 2012); *Legislative Memo: Gender Expression Non-Discrimination Act*, N.Y. CIVIL LIBERTIES UNION, <http://www.nyclu.org/content/legislative-memo-gender-expression-non-discrimination-act> (last visited Feb. 18, 2012); *GENDA: Providing Critical Civil Rights Protections*, TRANSGENDER LEGAL DEF. & EDUC. FUND, http://www.transgenderlegal.org/headline_show.php?id=19 (last visited Feb. 18, 2012); *The Employment Non-Discrimination Act, H.R. 3017 / S. 1584: I Want To Work!*, NAT’L CTR. FOR TRANSGENDER EQUAL., <http://transequality.org/ENDA/> (last visited Feb. 18, 2012); ACLU OF MASS., <https://secure.aclu.org/site/Advocacy?page=UserActionInactive&id=2839> (last visited Feb. 18, 2012); *Advocates Praise House for Advancing Transgender Equal Rights Bill*, GAY & LESBIAN ADVOCATES & DEFENDERS (Nov. 15, 2011), <http://www.glad.org/current/item/advocates-praise-house-for-advancing-transgender-equal-rights-bill/>.

⁴⁸ Spade, *Keynote Address*, *supra* note 38, at 1095.

⁴⁹ See notes 34–42 and accompanying text; Spade, *Keynote Address*, *supra* note 38, at 1099–1101. Spade sees a possibility for change developing through membership-based organizations that focus on building participatory movements and innovative structures, including the following key principles:

- the work should be led by those directly impacted
- it should use an intersectional framework for understanding the multiple vectors of vulnerability converging in the issues (racism, sexism, xenophobia, transphobia, homophobia, ablism)

confine their reservations to hate crime provisions, embracing legal declarations of equality and nondiscrimination legislation as long as they do not overtly strengthen the criminal justice system.⁵⁰ The employment discrimination section of the Massachusetts Transgender Equal Rights Act is subsumed in the ideological gulf between Spade's writings and the objections espoused in the letters from Black and Pink and SLRP. The Black and Pink and SLRP letters are silent about their apparent disagreement with Spade's distrust of employment discrimination legislation. Perhaps they perceive a benefit to sending a legislature-sanctioned message that employment discrimination and hate crimes against transgender people are not to be tolerated. Perhaps groups like Black and Pink, who emphasize support for their "queer family in prison,"⁵¹ are focused on slightly different goals than Spade, in that their community is already inextricably linked with or locked within the criminal justice system. Abandoning any legislative avenue could feel like abandoning those already imprisoned. It may be that even the most radical groups have to sustain some faith in the legal system—at least until the broader social movement that Spade visualizes comes to life.

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- the work should aim to model its own politics, to practice its vision in its day-to-day operations
 - it should be process-oriented, using ongoing critical reflection rather than assuming that there is a moment of finishing or arriving
 - it should continually develop new leaders, ever-expanding participation and focusing on building leadership of those who face the greatest barriers to participation and leadership
 - the work should be based in an understanding that meaningful change comes from below (rather than top-down change granted by elites)
 - it should strive for accountability and transparency within organizations, between organizations, to its constituency, and to allied organizations and movements
 - it should strengthen and build relationships as the underlying support system of the work and the change it seeks.

Id. at 1100–01.

⁵⁰ *Non-Support of Transgender Equal Rights Bill*, *supra* note 8.

⁵¹ *Purpose*, *supra* note 2.

