
DON'T BE SO HATEFUL: THE INSUFFICIENCY OF ANTI-DISCRIMINATION AND HATE CRIME LAWS IN IMPROVING TRANS WELLBEING

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The question of judicial protection of trans people has come to the fore in recent years, culminating in Bill C-16 which added gender identity and gender expression to the federal anti-discrimination and hate crime laws. In this article, the author contests the notion that anti-discrimination and hate crime laws are effective in mitigating anti-trans harassment, discrimination, and violence. Suggesting that the model of anti-trans acts which underlies anti-discrimination and hate crime laws is erroneous, the author argues that the law's impact on trans wellbeing will be modest and that a careful analysis of anti-trans attitudes enables us to identify a number of more effective governmental avenues towards trans emancipation.

INTRODUCTION

Violence against transgender¹ people is a pandemic that has been garnering some recognition by the Canadian government. Reacting to the recent spike of mainstream interest in trans bodies, the Canadian federal government has opted for a familiar route, passing Bill C-16 which added gender identity and gender expression as prohibited grounds under the *Canadian Human Rights Act*,² as well as aggravating motivations under the hate crime penal provisions of the *Criminal Code*.³ This bill comes as a legislative

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¹ A person is transgender if their gender identity does not match the gender they were assigned at birth. A person who is not transgender, whose gender identity matches the gender they were assigned at birth, is said to be cisgender.

² R.S.C. 1985, c. H-6 at subsection 3(1)

³ R.S.C. 1985, c. C-46 at subsection 718.2(a)(i). While the bill also adds to the *Criminal Code*'s hate speech provision at subsection 318(4), I will not concern myself with speech criminalisation in my analysis due to the

response to the alarming rate of harassment, discrimination, and violence faced by trans individuals in Canada. Particularly concerning is the 21.2% of trans Ontarians reporting having been physically assaulted due to their gender identity.⁴ By targeting discrimination, harassment, hate speech, and criminal acts, the bill takes a route previously taken to address racist and anti-gay oppression. It targets grave transphobic acts, and seeks to discourage them by imposing financial and penal burdens on offenders.

Anti-discrimination and hate crime laws serve a range of purposes, and Bill C-16 is no exception⁵. Nevertheless, the government's approach to anti-trans acts gives the impression that by empowering civil and criminal court in meting out sanctions, the wellbeing of trans people will significantly increase. The government has not yet set out a cogent plan for further addressing transantagonistic violence nor recognised that hate crime and anti-discrimination provisions are only a first step to improving trans wellbeing. In debates at the House of Commons, Minister of Justice Jody Wilson-Raybould framed the bill as a way to protect trans people in light of appalling statistics about the harassment, discrimination, and violence faced by trans people in Canada⁶. Repeated denials that the law would merely be a symbolic gesture as well as affirmations that the law is necessary given the difficulties faced by trans people show the government's intent that the law have a tangible impact on trans wellbeing.

Understandably, many Canadians expect Bill C-16 to be a leading solution to the problem of transantagonism. Insofar as it is the government's primary response to the problem, the choice suggests that anti-discrimination and hate crime laws are effective and legitimate solutions to anti-trans violence.

While anti-discrimination laws and non-carceral variants of hate crime laws are legitimate and justified legislative endeavours, I believe that the government over-estimates the impact that such laws have on the wellbeing of trans people, and would have had a greater positive impact on trans wellbeing if they had expended their legislative and executive resources on other avenues. The government should prioritise those changes which would have the biggest impact, rather than hate crime and anti-discrimination laws. Now that Bill C-16 has been passed, we should recognise the limited impact that the law will have, and demand a cogent plan for further governmental measures to improve trans wellbeing.

difference in the intended and actual effects of hate speech laws in contrast with anti-discrimination and hate crime laws.

⁴ Greta R. Bauer, Ayden I. Scheim, Jake Pyne, Robb Travers & Rebecca Hammond, "Intervenable factors associated with suicide risk in transgender persons: a respondent driven sampling study in Ontario, Canada," (2015) 15:525 *BMC Public Health* at 7.

⁵ As current Minister of Justice Jody Wilson-Raybould explained before the Standing Committee on Justice and Human Rights, adding gender identity and gender expression to the *Canadian Human Rights Act* will make the law more accessible to trans people and help inform Canadians as to their legal duties under the law: Standing Committee on Justice and Human Rights, *Committee Evidence*, 42nd Parl, 1st Sess, No 31 (27 October 2016) at 1104 (Hon Jody Wilson-Raybould).

⁶ *House of Commons Debates*, 42nd Parl, 1st Sess, No 92 (18 October 2016) at 1010 (Hon Jody Wilson-Raybould).

If anti-trans acts were isolated and irrational events, perhaps anti-discrimination and hate crime laws would be the best we could do. But this is not the case. Because of the complex social imaginary which supports transantagonistic acts, the current measures undertaken by the federal government are ineffective in addressing anti-trans violence and improving trans wellbeing. As I will argue in this article, much more efficient courses of action can be identified within the respective heads of legislative power of both the federal and provincial governments. This leads us to the conclusion that legislative and executive resources should be directed away from hate crime and anti-discrimination laws, towards those alternative avenues which have the added benefit of addressing often-invisible incursions on trans wellbeing which are not captured by a system directed at isolated acts. Though those laws may be a small part of the whole solution, both money and time are scarce resources and focusing on passing hate crime and anti-discrimination laws at best delays and at worst precludes more beneficial changes. As has been highlighted in the case of same-sex marriage in the United States, single-issue agendas tend to leave activists exhausted after years of struggle, unable or unwilling to take up a new struggle while both governmental and public pressure for further progress wanes, complacency settles in, and vulnerable groups are left politically undefended. By sketching the limitations of hate crime and anti-discrimination laws as set out in Bill C-16, I hope to reinvigorate the ongoing fight for trans people's wellbeing in Canada and warn other jurisdictions about the risks of focusing on similar legal frameworks.

I opted to speak of transantagonism rather than transphobia for a number of reasons. The suffix "phobia" typically refers to extreme and irrational fears, phobias themselves being a form of anxiety disorder. Though the suffix when used in terms like homophobia and transphobia does not stand for fear of gay or trans people, it connotes irrationality and strong negative emotions such as fear and hatred. This connotation leads to much confusion among those who are not initiated to queer terminology. However, as I argue in this article, the attitudes which impact trans people negatively are frequently neither irrational nor hateful. On the contrary, some of the most insidious beliefs such as the belief that gender is determined by genitalia at birth cannot be accurately described as irrational or hateful, since they fit neatly into a complex social ideology about gender and are neutral on their face by relation to trans people. By choosing the term transantagonism in its stead, I want to highlight how those beliefs and attitudes generate an opposition towards trans people while refusing to cast them as necessarily irrational or hateful. The term is also meant to have a wider breadth than transphobia and stand as the negative counterpart to cisnormativity⁷.

⁷ Cisnormativity refers to the web of norms and beliefs that prioritises and privileges cisgender ways of existing. Frequently, this is done by ignoring or invalidating the genders of trans people through broad statements such as "men cannot become pregnant".

In speaking about wellbeing, I include such considerations as physical health, psychological health, life satisfaction, and the absence of oppression and subjugation.⁸ Freedom from harassment, discrimination, and violence is one of my organising concerns in addressing the limits of anti-discrimination and hate crime laws. As a trans person who faces the threat of harassment, discrimination, and violence daily, I am deeply uninterested in legal changes that will have no concrete impact in my life. For many of those living in a state of primary emergency because of their transitude—the state of being trans—justice is not an immediate concern. Trans lives, rather than an abstract ideal of justice, should guide our approach.

Although I will consider both anti-discrimination and hate crime laws, I will only concern myself with anti-discrimination laws to the extent that they are used to address concrete harm perpetrated by individuals. Anti-discrimination lawsuits can be used to seek compensation for harm done, or can be used to promote institutional change. I will be concerning myself with the former. The reason for this is dual. Firstly, my interest in anti-discrimination laws for the purposes of this article is limited to aspects shared with hate crime laws. Other aspects, while deserving of attention, are better left to a separate inquiry. Secondly, human rights tribunals in Canada have long recognised⁹ that transgender people are protected from discrimination under the grounds of sex, and that in this regard Bill C-16 for the most part repeats past jurisprudence. Impact litigation, which aims at institutional or legal changes rather than individual compensation, is already available without Bill C-16 and thus the primary benefit of the anti-discrimination provisions of Bill C-16 appears to be making individual enforcement more readily known and accessible. Thirdly, impact litigation's benefits are hard to predict. Success depends on a number of factors such as judicial attitudes and public support. In some cases, the impact can be immense (*XY v. Ontario*¹⁰) or set back trans rights for a long time (*Vancouver Rape Relief Society v. Nixon*¹¹). Most of the positives institutional changes that result from impact litigation would be best implemented through the legislative process. Lawsuits are excessively long, costly, and do not represent all trans community views in the way that legislative consultation may. All subsequent references to anti-discrimination laws should be understood as limited to this aspect.

⁸ I wish to avoid explicitly defining wellbeing because most definitions of wellbeing accommodate my concerns: both commonsense theories of wellbeing as well as academic theories such as that of Amartya Sen in *Commodities and Capabilities* (New Delhi: Oxford University Press, 1987) largely converge on features such as freedom from harm, self-determination and individual autonomy though their contribution to wellbeing is framed and understood differently. I do not want to commit myself to any specific theory of wellbeing since my arguments do not depend on any specific theory and discussions of the definition of wellbeing risk detracting from the pivotal controversy of the justifiability of anti-discrimination and hate crime laws.

⁹ See for example *Commission des droits de la personne et des droits de la jeunesse c. Maison des jeunes A...*, [1998] RJQ 2549, 33 CHRR 263 (Quebec); *Sheridan v. Sanctuary Investments Ltd. (c.o.b. B.J.'s Lounge)*, [1999] B.C.H.R.T.D. No. 43 (British Columbia); *Montreuil v. National Bank of Canada*, (2004) 32 CCEL (3d) 290, 48 CHRR 436 (Canada).

¹⁰ [2012] OHRTD No 715 (HRTO).

¹¹ 2005 BCCA 601, 262 DLR (4th) 360.

The starting point to my inquiry is an intuition that transantagonism cannot be understood as an irrationally held antagonism. Instead, I argue that there is a disciplinary structure to gender which informs transantagonism, and from which transantagonistic attitudes rationally flow. This intuition comes from a four-fold source: my personal experience, as a trans woman, of the social imaginary surrounding gender and trans existence; trans community wisdom regarding transantagonism, empirical data on anti-trans harassment, discrimination, and violence; and the insights of critical race theory, feminist theory, and trans studies.

Society should not be understood as a generally trans-friendly world in which a few exceptions arise of violation of trans bodies, motivated by a fear or dislike of difference. Trans people's experience of the social world is an experience of a sphere penetrated by attitudes and institutional categorisations interlocking seamlessly, leading to a recurring hostility that goes from minor invalidations to violent hatred. Transantagonism is characteristic of the total social field, and can be found in most individuals in some form or another. As Stevi Jackson states in the context of sexism:

“Gender and heterosexuality are sustained not only through structural hierarchies and social norms, but through our everyday sexual and social practices. The gendered heterosexual order thus requires our continual reaffirmation for its continuance.”¹²

The argument applies, *mutatis mutandis*, to transantagonism.

Transantagonistic attitudes often appear mundane and objective, hiding in their insidiousness. Harassment, discrimination, and violence are just its most egregious instantiations. Cracking down on those symptoms not only fails to curtail them, but also fails to palliate pervasive and insidious forms of transantagonism.

The first part of this article will be dedicated to showing how hate crime and anti-discrimination laws may be criticised within a reformist framework. I will then expound how an understanding of the structure of transantagonism reveals deeper limitations to hate crime and anti-discrimination laws which cannot be met by mere reform. In the second part, I will set out the disciplinary structure which gives rise to anti-trans harassment, discrimination and violence. I will argue that transantagonism should be understood as a direct result of a social system termed “sexually manipulative and sexual assault-normalizing heterosexuality” (hereinafter manipulative heterosexuality). In the third part of this article, I will employ this analytical framework to highlight the ineffectiveness of anti-discrimination and hate crime laws by themselves in alleviating anti-trans violence, and I identify a broad range of actions which would drastically reduce transantagonism in Canada. Transantagonism is a multifaceted scheme of subjection which includes a number of subsystems, including that of manipulative heterosexuality. My analysis will be

¹² Stevi Jackson, “Why a Materialist Feminism is (Still) Possible – And Necessary,” (2001) 24:3-4 *Women's Studies International Forum* 283 at 291.

centred on manipulative heterosexuality due to both the standalone value of understanding systems of oppression, as well as the emancipatory potential of an analysis focused on the given system¹³. Though manipulative heterosexuality is not the only source of transantagonism—beliefs in the inferiority of the feminine being another one, for instance—it is one of the main ones and will be my focus in this article.

An exclusive focus on anti-discrimination and hate crime laws maintains a façade of equality which obscures the violence and inequality inherent in society’s understanding and ordering of trans existence. On their own, they are a poisoned gift which fails to alter the material conditions trans people live under. Worse, they create perceptual barriers to further trans emancipation by protecting the minority of trans people who can readily access legal and criminal institutions, only metaphorically extending this protection in the social imaginary to all trans people by drawing on the symbolic power of formal equality and the rule of law. In day to day life, those laws fail to protect most trans people.

I. REFORMIST CRITIQUE OF HATE CRIME AND ANTI-DISCRIMINATION LAWS

Anti-discrimination and hate crime laws tell us a story of how anti-trans harassment, discrimination and violence happen. Perpetrators of violence are bad apples, and their acts are calculated and malevolent. The character structure sets up a duality of rationality and irrationality: offenders irrationally hate certain groups of people, but engage in rational decision-making processes insofar as they are responsive to reasons, and in particular the threat of sanctions. While these stories sometimes also concern themselves with agents who are not presumed rational in their decisional process—conjuring tropes of mental illness—hate crime laws as deterrents are primarily geared towards people for whom threat of punishment is an effective deterrent. Where perpetrators fail to respond to this additional incentive, incarceration incidentally provides protection.

In the archetypal case, we are advised to view violent behaviour as gratuitous acts motivated by bias, prejudice or hatred¹⁴ contrary to the warrants of rationality, and in which offenders do not have a personal stake. In other words, it paints transantagonism as a set of aberrant,¹⁵ irrational, and exceptional attitudes, and views the problem with transantagonism solely in terms of the resulting violence, discrimination, and harassment targeted by anti-discrimination and hate crime laws. Those laws are warranted because there

¹³ I am indebted to the work of Talia Mae Bettcher, most notably for her article “Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion” which was a key inspiration for my analysis: Talia Mae Bettcher, “Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion,” (2007) 22:3 *Hypatia* 43. The terminology of sexually manipulative and sexual-assault normalising heterosexuality was partially drawn from this text. I was also inspired by her book chapter “Trans Identities and First-Person Authority” in Laurie Shrage, ed., *You’ve Changed: Sex Reassignment and Personal Identity* (Oxford: Oxford University Press, 2009).

¹⁴ *Criminal Code*, R.S.C. 1985, c. C-16, art. 718.2(i).

¹⁵ Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law*, Durham: Duke University Press, 2015 at 44.

will always be people hostile to difference, and transitude is just another axis of difference. Solving the problem is about blocking those aberrant attitudes from materializing in tangible, isolated behaviour:¹⁶ we must act at the level of choice. In Dean Spade's words, "[i]n this (mis)understanding, structure or systemic racism is rendered invisible."¹⁷ The comment applies equally to transantagonism.

The bad apples model fails to explain why various groups suffer from disproportionate levels of violence while others do not. The distribution of vulnerability does not accurately track the proportion of the group within the broader national population, nor are oppositional attitudes proportional to lack of exposure to trans people. Why are trans people specifically targeted for violence instead of any other form of difference? Why are Black trans women disproportionately suffer from physical violence despite the fact that white trans men suffer from similar levels of harassment? Why is the persecution of trans people accompanied by rigid narratives of deceit? The bad apples model of transantagonism is not competent at answering those questions.

Firstly, deployed in an inaccessible civil court system, anti-discrimination laws do not provide a viable means of redressing discrimination. Invasions of privacy and civil law assaults remain difficult to litigate given financial and temporal barriers to access. The justice system is prone to excessive delays, and the cost of pursuing a civil lawsuit is frequently in the tens of thousands of dollars.¹⁸ While Human Rights Commissions occasionally support lawsuits, they have insufficient resources to support the majority of cases, and tend to favour clear-cut cases of discrimination over complex ones, allowing more devious employers to evade lawsuits by citing other motives such as merit. Hiding one's transantagonistic motives under another guise disarms anti-discrimination laws; as prejudiced service providers and employers grow concerned with accusations of discrimination, they can merely opt to obscure the reasons for their decisions.

Despite every trans person I know having suffered from harassment or discrimination at some point, none has launched an anti-discrimination lawsuit to obtain reparation for the harm they have suffered. The prevalent impression I gather from Canadian trans communities is that anti-discrimination lawsuits are not viable tools for addressing the transantagonism faced by members of trans communities. Given the widespread poverty in the trans community as well as the inaccessibility of the justice system— over 55%

¹⁶ Dean Spade, *supra* note 15 at 61.

¹⁷ Dean Spade, *supra* note 15 at 42.

¹⁸ In the context of Quebec, see Pierre-Claude Lafond, *L'Accès à la justice civile au Québec : Portrait général*, (Cowansville: Éditions Yvon Blais, 2012) at 50.

of transgender people in the U.S.A. earned less than \$25,000 annually,¹⁹ a percentage that likely translates into a similarly high degree of poverty amongst transgender Canadians —the law is largely inaccessible.²⁰

Secondly, hate crime laws also suffer from enforcement-related pitfalls. Hate crime laws are rarely enforced.²¹ Violence against transgender people is not taken as seriously as violence against cisgender people, leading anti-trans assaults and murders to be less investigated, perpetrators to be less frequently apprehended, and accused to face reduced punishment.²² Police officers themselves frequently misgender²³ trans victims and blame them for the crimes they suffer²⁴ when they are not themselves the perpetrators of harassment, discrimination and violence against trans people,²⁵ a more than frequent occurrence.

¹⁹ Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet, & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey* (Washington: National Center for Transgender Equality, 2016) at 56. According to Dean Spade, *supra* note 15 at 40, “[a]nti-discrimination laws are not adequately enforced. Most people who experience discrimination cannot afford to access legal help, so their experiences never make it to court.”

²⁰ In a number of jurisdictions, the absence of gender identity and gender expression from the text of the law, even if it is interpreted as covered under the basis of “sex”, means that trans persons must engage in additional costs to argue that trans persons are covered by anti-discrimination statutes under “sex”. Anti-discrimination laws marginally increase the accessibility to the legal system by reducing the costs associated with making this argument in court. However, even without this cost the legal system remains inaccessible to all but the most privileged trans people, as well as the few who are able to find alternative source of funding.

²¹ Section 718.2(a)(i) of the *Criminal Code* was only applied by courts 25 times between 1996 and 2007, whereas the number of police-reported offences was around 800-900 in later surveyed years: Michelle S. Lawrence, *Sentencing Hate: An Examination of the Operation and Effect of Section 718.2(a)(i) of the Criminal Code* (M.A. Thesis, Simon Fraser University, 2009) at 15, 20. By way of comparison, extrapolating from 2015 U.S. data (Sandy E. James *et al.*, *supra* note 19 at 202) and a 2016 estimate of the percentage of the U.S. population which identifies as transgender (Andrew R. Flores, Jody L. Herman, Gary J. Gates, & Taylor N. T. Brown, *How Many Adults Identify as Transgender In the United States* (Los Angeles: The Williams Institute, 2016) at 3) we would find that slightly fewer than 15,000 trans adults in Canada have been assaulted by reason of their gender identity in the last year. As such, the number of unreported hate crimes *just for* trans people in Canada is at least 17 times more than the number of reported hate crimes in 2007.

²² Dean Spade, *supra* note 15 at 39. See also the Trans Day of Remembrance handout Anti-Trans Murder: Over One A Month, reproduced in Sarah Lamb, *infra* note 53 at 28-29, highlights that “[t]hose who are caught seldom receive sentences commensurate with their crimes. In over 200 cases, only one such murderer is currently on death row, and just two others are serving life sentences.”

²³ Misgendering refers to the practice of attributing the wrong gender to a trans person, for example by using the pronouns associated with the gender they were assigned at birth.

²⁴ Jen Richards & Laura Zak, *Her Story*, Speed of Joy Productions, 2016, ep. 5. Violet, a trans woman played by Jen Richards explains: “[I can’t go to the police b]ecause they’ll laugh at me. I can’t handle that again. [...] Someone saw him hitting me in a park. The police came, checked our IDs, and left. Asked him if he knew I was a guy. If I was trying to trick him. And one of the cops said: well I’d be pissed too if I found out. Then they said: well, shouldn’t be dressed like that, sir. Then left... I’m not doing that again.”

²⁵ Sandy E. James *et al.*, *supra* note 19 at 185: “Of respondents who interacted with police or law enforcement officers who thought or knew they were transgender *in the past year*, 57% said they were never or only sometimes treated

Aside from being symptomatic of the widespread inadequate service of transgender populations, the negative experiences trans people have had with the police leads the majority of trans people to be uncomfortable in asking them for help when needed,²⁶ which is only compounded with the variety of other reasons which leads trans people to underreport crimes against them.

The underreporting of crimes, coupled with the inadequacy of police and judicial involvement with trans-victimising criminality, creates barriers to the effectiveness of hate crime laws within a reformist perspective, in parallel to the inefficacy of anti-discrimination laws and the civil justice system in addressing discrimination, invasions of privacy, and civil law assaults. Is the solution then to bolster the current system and to address the specific flaws which preclude its proper functioning? Adopting a radical perspective grounded in an understanding of manipulative heterosexuality, the answer must be: no.

II. SEXUALLY MANIPULATIVE AND SEXUAL ASSAULT-NORMALISING HETEROSEXUALITY

In subsection A, I will be describing the system of manipulative heterosexuality. I describe how it attributes availability to bodies, designating them as sexually available to cisgender heterosexual men on the basis of appearances and demeanour. I will then explain how the habitual attitude about gender reduces gender to genitals at birth. Finally, I will argue that trans people are seen as deceivers because of their gender presentation.

In subsection B, I will explain how multiple forms of transantagonistic violence arise from the ascription of deceit to trans bodies.

The system of manipulative heterosexuality is highly gendered, given its nature. Because manipulative heterosexuality motivates cisgender heterosexual men, it will in turn impact transfeminine and transmasculine individuals differently²⁷. Because of the nature of transantagonism, the foregoing analysis

respectfully. Further, 58% reported some form of mistreatment, such as being repeatedly referred to as the wrong gender, verbally harassed, or physical or sexually assaulted.” Evan Vipond, *supra* note 49 at 17: “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. Ultimately, if trans persons do not feel safe contacting the police, they will not do so, rendering hate crime laws essentially irrelevant.”

²⁶ “More than half (57%) of respondents said they were either somewhat or very uncomfortable asking the police for help.” Sandy E. James *et al.*, *supra* note 19 at 185.

²⁷ Transfeminine individuals are people who were assigned male at birth but identify more strongly with femininity, whereas transmasculine individuals are people who were assigned female at birth but identify more strongly with masculinity. Trans women are considered transfeminine, and trans men are considered transmasculine. Non-binary people may be transfeminine, transmasculine, or neither.

is more enlightening with regards to violence against transfeminine individuals than against other trans people.

A. A SYSTEM OF SEXUAL OPPRESSION

1. THE JUSTIFICATORY IMAGINARY—RAPE CULTURE

The justificatory imaginary on which manipulative sexuality relies is known under the term “rape culture” in feminist circles. The term is used to refer to the manifold ways in which sexual violence is justified or excused, subsuming it under the category of normal, acceptable sexual behaviour. It operates by classifying bodies as sexually available or unavailable to cisgender heterosexual men on the grounds that certain appearances and behaviours—including geographical location, notably proximity to clubs or presence in areas known for sex work—are communicative of sexual availability to varying degrees. Short skirts and smiles are read not as enacting basic autonomy over one’s self-presentation or friendliness, but as indicating sexual availability.²⁸ In its most absurd variants, merely having big breasts—something most people have little control over—or being Black²⁹ is interpreted as indicative of sexual availability. Availability-associated gender expression and behaviours as are encouraged in women.³⁰

Availability—an imposed status justified by mistaken assumptions regarding the communicative content of the non-verbal—privileges appearances and behaviours over affirmative expressions of consent. Yet, we should not understand this attribution of availability as causing isolated sexual assaults. The role of availability is not measured in individual events, and the presence of availability-associated behaviours and expression is not a predictor of sexual violence. Public inquests into the clothing and demeanour of sexual assault victims attest to the power of the justificatory imaginary, mobilising a perverted version of the presumption of innocence to overlay accusations of sexual assault with a mist of defensibility.³¹ Availability plays a major role in muddying the waters after the fact, allowing offenders to evade consequences for their

²⁸ In a publication by Bauer *et al.* cited by Julie Hatfield in “Defining Appropriate Dress in the Workplace”, *Boston Globe* (16 January 1992), 63% of psychiatrists surveyed claimed that attractive clothing increases the risk of sex crimes. Julie Hatfield’s analysis is criticised by Duncan Kennedy in “Sexual Abuse, Sexy Dressing and the Eroticization of Domination”, (1992) 26 *New England Law Review* 1309 at 1351.

²⁹ Black female slaves in Canada were portrayed as “seducers whose charms (hapless) White men cannot resist.” Afua Cooper, *The Hanging of Angélique: The Untold Story of Canadian Slavery and the Burning of Old Montréal* (Toronto, HarperCollins, 2006) at 90.

³⁰ bell hooks, “Sisterhood: Political Solidarity Between Women,” (1986) 23 *Feminist Review* 125 at 127: “Male supremacist ideology encourages women to believe we are valueless and obtain value only by relating to or bonding with men.”

³¹ In this light, it is interesting to note how womanhood is occasionally circumscribed as a marked category through representation of clothing. Whereas bathrooms intended to be used by men are marked by a simple stick figure with little discerning characteristics, bathrooms intended to be used by women are indicated by a character wearing a dress. Whereas no form of clothes has grown to represent men as a whole, dresses are frequently used to represent women as a whole.

acts. Because anyone can be accused of availability after the fact, all accusations of sexual assault are thought to be suspect.

It comes as no surprise that being married to the perpetrator,³² or failing to sufficiently physically resist³³ for a long time precluded sexual assault convictions in the criminal law system. Being married or not saying no sufficiently loudly, in the perverted logic of the law, indicated sexual availability. Only after tireless work by feminists, which led to the evolution of social attitudes, have those cases been recognised by the law as not indicative of sexual availability. Despite legal and social changes, the attitudes which undergirded those laws manifest themselves in other social relations.

2. NATURALIZING INTERCOURSE

The habitual attitude³⁴ about gender tells us that there are only two genders, that gender is invariant, and that it is determined by genitalia. Because of the social desirability of reproduction,³⁵ the system of manipulative heterosexuality deploys the habitual attitude about gender so as to enforce cohesion of gender presentation and genital status. Genital status not being directly appreciable, gender presentation serves as a communicative intermediary in securing knowledge about genital status. Whether accurate or

³² Until 1983, rape was defined in Canada as excluding sexual assaults by one's husband: Constance B. Backhouse, "A Selected History of Sexual Assault Legislation in Canada, 1892-1983" in C. Lesley Biggs, Susan Gingell & Pamela J. Downe, eds., *Gendered Intersections: An Introduction to Women's & Gender Studies*, 2nd ed. (Winnipeg: Fernwood, 2011) at 293-295.

³³ Cheryl Siskin, "No. The 'Resistance Not Required Statute' and 'Rape Shield Law' May Not Be Enough", (1993) 66:2 *Temple Law Review* 531 at 537.

³⁴ Talia Mae Bettcher employs the expression "natural attitude," coined by Harold Garfinkel and subsequently used by Kate Bornstein, Jacob Hale and Kessler and McKenna amongst many others. Regardless of its plausible source in Husserlian terminology, I prefer avoiding the moral connotation of the term "natural" and opt for the more neutral "habitual". The features of the habitual attitude which I highlight are the first three components of Kate Bornstein's reformulation, as reproduced in Jacob Hale, "Are Lesbians Women?", (1996) 11:2 *Hypatia* 94. Jacob Hale and Kate Bornstein introduce important criticisms and nuances to Garfinkel's account, though their exploration is beyond the scope of this work. It is sufficient to point out that this account is merely the most common attitude, and does not accurately track the unabridged complexity of how gender is attributed and operates in society, nor is it responsive to the understanding of gender as rooted in self-identity that is endorsed by many trans people.

³⁵ Indeed, the relationship to reproduction is salient in past and present narratives surrounding the unnaturalness of romantic arrangements other than heterosexual dyads insofar as the couple cannot conceive children on their own. We can see hints of this normative structure in the unpopularity of adoption and beliefs as to the superiority of having "biological children"—because apparently adopted children are robots. Heterosexual dyads involving trans people sometimes do conceive children on their own, but this fact is regularly ignored.

not, knowledge of genital status enables the classification of individuals as women or men, as potentially available or not.³⁶

Animosity against trans people is shrouded in a narrative of *unnaturalness* that centres its notion of the natural on the reproductive. Much of “society’s stigmatization of trans existence is partly due to the fact that we mess with our reproductive organs,”³⁷ Emi Koyama reminds us, and even when specific trans individuals have no intention of undergoing hormone replacement therapy or genital reassignment surgery—treatments which sterilize—there is often an assumption in anti-trans discourses that all trans people elect to undergo those treatments. Emi Koyama also notices the link between anti-trans attitudes and the subjection of women’s reproductive capabilities: “Such hysteria over our personal choices is fuelled in part by society’s taboo against self-determination of our reproductive organs: like women seeking an abortion, our bodies have become an open territory, a battleground.”³⁸

The history of trans healthcare is shrouded with hostility surrounding “messing with our reproductive organs.” Magnus Hirschfeld, an early advocate of genital reassignment surgery for transgender persons, who arranged the first documented genital reassignment surgery—that of Dora Richter, in 1931—was denounced by Adolf Hitler as “the most dangerous Jew in Germany.”³⁹ Early attempts at genital surgeries for trans persons in the United States were jeopardized because according to future California attorney general Edmund Brown in 1949, genital surgery would constitute wilful destruction of healthy tissue that would hamper the person’s ability to defend themselves in combat, which potentially opened surgeons up to criminal prosecution.⁴⁰ Blackstone even included “castration” on his list of procedures that would constitute criminal mayhem⁴¹. Many surgeons refused to perform gender reassignment surgeries⁴².

³⁶ Catharine MacKinnon seems to speak to this effect of the natural attitude when she claims “To be rapable, a position that is social not biological, defines what a woman is,” in *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 148.

³⁷ Emi Koyama, “The Transfeminist Manifesto” in Rory Dicker & Alison Piepmeier, eds., *Catching a Wave: Reclaiming Feminism in the 21st Century* (Boston: Northeastern University Press, 2003) at 255.

³⁸ Emi Koyama, *supra* note 37 at 255. One could even go so far as to suggest that the subjection of women’s reproductive capabilities is motivated by a desire to maintain white demographic dominance and thus that anti-trans sentiments are fuelled by racism and xenophobia. For more on the relationship between reproductive autonomy and racism, see bell hooks, *supra* note 30 at 132.

³⁹ Susan Stryker, *Transgender History* (Berkeley: Seal Press, 2008) at 40.

⁴⁰ Susan Stryker, *supra* note 39 at 44-45. See also Joanne J. Meyerowitz, *How Sex Changed: A History of Transsexuality in the United States* (Cambridge: Harvard University Press, 2009) at 120-121. According to Joanne Meyerowitz, surgeons ceased to use the possibility of criminal prosecution to excuse their refusal in the 1960s.

⁴¹ Melvin M. Belli, “Transsexual Surgery: A New Tort?”, (1978-1979) 17 *J. Fam. L.* 487, at 492.

⁴² Susan Stryker & Nikki Sullivan, “King’s Member, Queen’s Body: Transsexual Surgery, Self-Demand Amputation and the Somatechnics of Sovereign Power” in Samantha Murray & Nikki Sullivan, eds., *Somatechnics: Queering the Technologisation of Bodies* (Burlington: Ashgate Publishing Company, 2009) at 54.

Harry Benjamin's first trans patient, Sally Barry, had her already-approved genital reassignment surgery vetoed by the Wisconsin attorney general in 1948 on the basis that it would have constituted mayhem,⁴³ and Alfred Kinsey, who was the leading medical authority on sexuality at the time, endorsed the position, confirming that such surgeries were in his opinion disabling, and interfered with reproductive capabilities.⁴⁴ Many trans women overcame this obstacle by illegally seeking an orchiectomy, as subsequent vaginoplasties were not perceived as involving risks of criminal prosecution.

3. THE PUTATIVE DECEPTIVENESS OF TRANS BODIES AND THE ROOTS OF TRANSANTAGONISM

Manipulative heterosexuality distributes social value in terms of the cisgender women whom cisgender men have had intercourse with. Cis men who engages sexually with more or more attractive cisgender women win. Because social value is desirable, manipulative heterosexuality motivates.

Trans women do not, as a rule, seek to deceive people into having sex with them, nor mislead people about their genital history for reasons other than personal safety or avoidance of differential treatment. However, due to trans people's resistance to the habitual schema of gender presentation, heterosexual cisgender men tend to categorise trans women as sexually available, trans men as sexually unavailable, and non-binary trans people according to their gender presentation. Deviations from cisheteronormative norms, as an instance of deviations from norms, are sensed as a wrong wanting retribution. This wrong must be righted.

Mere disappointment of expectations cannot explain violent reactions to trans bodies. Even when trans individuals are forthcoming about their transitude, or are readily assessed as trans by those they interact with—a process known in the community as “clocking”—violence and harassment are common. Trans existence poses a symbolic threat to the system of manipulative heterosexuality, an insidious form of sexuality closely tied to personal value. Readily ascertainable, binary gender is the bread and butter of manipulative heterosexuality. If trans individuals can pass as cisgender, everyone's status as sexually receptive—that is, as potentially sexually available—is undermined. If trans individuals exist, then essential, biological understandings of gender must be wrong: everyone's gender is threatened, and manipulative heterosexuality becomes increasingly unworkable.

Misgendering is a diluted response to the same threat; intentionally, it serves as a basic denial of authenticity which seeks to expose trans people as deceivers.⁴⁵ In routine forms of misgendering, the trans person poses a symbolic threat to the notion of gender rather than posing an individual threat to the culprit's social status. Despite a difference in degree, misgendering evidences the same underlying belief system as do certain other forms of transantagonistic violence, and perpetuates the same system which

⁴³ Zagria, “Sally Barry (1926 - ?) Benjamin's first transsexual patient” in *A Gender Variance Who's Who* (6 May 2009), online: <https://zagria.blogspot.ca/2009/05/sally-barry-1926-benjamins-first.html>.

⁴⁴ Susan Stryker & Nikki Sullivan, *supra* note 42 at 54.

⁴⁵ See Talia Mae Bettcher, “Trans Identities and First-Person Authority”, *supra* note 13 for an extensive discussion of the notion of basic denial of authenticity.

regularly takes a toll in trans lives, even when the recurring emotional violence of misgendering does not by itself precipitate trans suicide.

Trans women pose a distinct threat to cisgender men, beyond the symbolic threat posed by trans existence. To the extent that gender is understood as a genital-centric institution, trans women marked as available threaten the masculine cisgender heterosexual male subject, as his social status may be undermined by sexual interest in and sexual activity with trans women. Cis men who date trans women are stigmatised and accused of being gay. They have their sexual orientation and masculinity questioned, and the media tends to revile famous men who date trans women. Analogously, though to a lesser extent, cis women who date trans women are frequently stigmatised within the lesbian community for not being lesbian enough. The existence of trans women threatens the heterosexual status of cisgender men as delineated by manipulative heterosexuality. The man who brutally murdered Islan Nettles in 2013, said that his masculinity was in question: “I just don’t wanna be fooled. My pride is at stake.”⁴⁶ He had initially attempted to flirt with her before realising that she was trans. Moreover, trans women are not seen as passively posing this risk. Rather, they’re seen as actively lying about their gender, and womanhood, as implicated by the heterosexual schema, is about sexual availability. A mischievous motive is implied: trans women are seen as trying to deceive straight men into having sex with them, who superficially adorn women-like presentation but are men, underneath it all. Following the 2002 murder of Gwen Araujo, a trans woman living in the United States, the perpetrators argued that they should be convicted of manslaughter instead of murder due to Araujo’s so-called deception. After a jury deadlock during the first trial, both perpetrators were found guilty of murder at their second trial.⁴⁷ This type of legal argument, colloquially termed “trans panic defence”, attempts unsuccessfully to satisfy the legal conditions for provocation, a concept which also exists in Canadian law. The defence has yet to be argued in a Canadian context.

The defence has yet to be used successfully. Nevertheless, the attempt to use it attests to the strength and prevalence of the belief that trans people are actively deceiving others. Though both trans women and trans men frequently face allegations of deceptiveness⁴⁸, trans women face the bulk of threats and violence in this regard. Anti-trans violence is gendered, with the intersection between transitude and womanhood attracting the most attention and ire.

⁴⁶ Nico Lang, “James Dixon Pleads Guilty in Death of Islan Nettles”, *Advocate* (5 April 2016), online: <http://www.advocate.com/transgender/2016/4/05/james-dixon-pleads-guilty-death-black-trans-woman-islan-nettles/>.

⁴⁷ Marisa Lagos, “Mistrial Declared in Teen’s Killing”, *L.A. Times* (23 June 2004).

⁴⁸ While the accusation more frequently targets trans women, trans men are not exempt from this acerbic criticism. Brandon Teena, a trans man, was accused of deception in newspaper headlines and blamed for being raped and murdered. Non-binary trans people are not commonly accused of deceit, but their gender identity is frequently ignored and accused of being whimsical.

In a world which sees coitus as a means of acquiring personal value, we can make sense of the conservative concern over proximity between trans women and cis women in gender-segregated spaces. Trans women are imputed sexual or fetishistic motives because of the sexual schema within which gender takes on meaning. With regards to public accommodation facilities such as washrooms and changing rooms, the fear is that trans women are trying to gain unfair access to cis women's bodies, a fear driven by the association between genitalia and the role of men in sexual dyads.⁴⁹ In those narratives, cis women are reduced to little more than objects of property. Cis women are weak and exist for sexual possession, whether in actuality, in potentiality, or symbolically as a class. The concern is not for cis women's sexual autonomy, as the same groups and individuals typically oppose access to abortion, sex education centring communication and affirmative consent, and initiatives which address the prevalence of sexual assaults of cis women by white cis men. Rather, it is feared that the value of cis women will be diminished if they either have sex or are raped.⁵⁰ This would correspond to a diminution of cis men's value, as they derive more value under this system when the woman with whom they engage sexually meets antiquated standards of purity and chastity. Narratives on bathroom inclusion reveal a conception of gendered value and motivation which is grounded in male access to women's bodies.

Bills seeking to prevent trans women from entering the correct bathrooms often include enforcement mechanisms which encourage gender policing. For example, the Kentucky *Student Privacy Act*, which was defeated in the Kentucky House of Representatives would have implemented a form of peer surveillance. Those reporting trans students who entered bathrooms consistent with their gender identity rather than to their gender assigned at birth were to be rewarded up to \$2,500.⁵¹ The law would have encouraged crowd enforcement of strict gender roles by simultaneously declaring trans bodies alien, and rewarding those who identify and punish non-conformity. Subjective perceptions of non-conformity serve as the measuring guide to identifying trans bodies; the enforcement system therefore encourages heightened scrutiny, and the subjection of gender non-conforming students to harassment and sexual violence, notably genital exposure. In such a toxic school environment, it is difficult to imagine healthy explorations of gender expression and gender identity. Instead, the situation reifies and perpetuates strict gender roles, and discourages queerness.

B. ENFORCING THE SYSTEM—OPPRESSION OF TRANS PEOPLE

1. NORMATIVELY MOTIVATED VIOLENCE

⁴⁹ See also Evan Vipond, "Trans Rights Will Not Protect Us: the Limits of Equal Rights Discourse, Antidiscrimination Laws, and Hate Crime Legislation", (2015) 6:1 *Western Journal of Legal Studies* 1 at 9, who argues that claims that the targets of laws precluding trans women's access to women-only spaces are not trans women but cis men who would pretend to be trans in themselves echo identical accusations having been levied against trans women in the past. The claim draws on the imaginary of the perverted-trans-woman-who-is-really-a-man to convince people of the need for protections that exclude trans women.

⁵⁰ As mentioned in an earlier section, the two are frequently conflated in this conceptual system.

⁵¹ Evan Vipond, *supra* note 49 at 12-13.

Value has a metaphorical instantiation. We organise value around imagined archetypes to which we subsequently compare ourselves and others. What would Jesus do? Jacob Hale speaks of the “non-transsexual male heterosexual middle-class [or higher] able-bodied Christian.”⁵² I would add: neurotypical and white. Proximity to this ideal is the standard of personal value reigning over Euro-American societies. It has an impact on our interpersonal relationships in two ways: firstly, it affects how we relate to others insofar as our personal characteristics must be maintained socially through our actions, and, secondly, it relates to how we evaluate others’ personal value and assess their violability.

The directedness of those two prongs—whether self-regarding or other-regarding—has an effect on transantagonistic motivations. Interactions which threaten the status of the subject as a masculine heterosexual man cause stronger reactions than interactions which do not, although in all interactions trans people are credited with less social value who are seen as less respect-deserving. The two patterns of transantagonism differ.

Trans women are seen as deviant, and as threatening to mark others as deviant. As Sarah Lamble reminds us, “[t]o be misread as gay is not a trivial mislabelling of identity, but a significant disruption of the dividing line between self and other.”⁵³ By declaring trans women “deceptive” and by assaulting them, cisgender heterosexual men seek to displace imputed homosexual guilt by painting themselves as cheated and thus faultless. The assault confirms their position as heterosexual men who were deceived while also punishing trans women for their so-called transgression. It enacts “disavowal through violence.”⁵⁴ “To brutalize another and recount it with pride is an exercise in identity formation that reaffirmed [the perpetrator’s] sense of self as dominant and superior.”⁵⁵ In the United Kingdom, the law itself paints trans people as deceptive: trans people who do not disclose their transitude may have their marriage annulled⁵⁶ or face criminal charges for sexual fraud.⁵⁷

⁵² Jacob Hale, *supra* note 34 at 104.

⁵³ Sarah Lamble, “Retelling Racialized Violence, Remaking White Innocence: The Politics of Interlocking Oppressions in Transgender Day of Remembrance”, (2008) 5:1 *Sexuality Research & Social Policy* 24 at 33.

⁵⁴ Sarah Lamble, *supra* note 53 at 33.

⁵⁵ Sarah Lamble, *supra* note 53 at 33 speaks of the murder of F.C. Martinez in the following terms: “To maintain his sense of self, Murphy [who was threatened by the economy of desire between him and a Two-Spirit Navajo man, Fred (F.C.) Martinez] had to disavow this desire; he accomplished this disavowal through violence. [...] Murphy declared neither shame nor remorse, but pride. His statement was a way of recording what he had done, to claim the violent act as his. To brutalize another and recount it with pride is an exercise in identity formation that reaffirmed Murphy’s sense of self as dominant and superior.” As Lamble warns us, however, we should be careful not to reduce Martinez’s murder solely to gender non-conformity. Race was also an important intersecting factor.

⁵⁶ Alex Sharpe discusses the ramifications of section 12 of the *Matrimonial Causes Act 1973*, U.K. c-18 in “Transgender Marriage and the Legal Obligation to Disclose Gender History”, (2012) 75:1 *The Modern Law Review* 33.

⁵⁷ For an analysis and critique of the case law, see Alex Sharpe, “Expanding Liability for Sexual Fraud Through the Concept of ‘Active Deception’: A Flawed Approach”, (2016) 80:1 *The Journal of Criminal Law* 28.

In the second category of transantagonistic violence, it is the ascription of subhuman status to trans people that motivates the violence. Genitals position individuals as men or women, placing them in the sexual schema. Sexualised people are seen as less deserving of empathy and respect. Julia Serano observes that “there is an extensive body of psychological research that shows that when people are sexualized, they are not treated with empathy, are not taken as seriously and are seen as less competent and intelligent less than those who are not sexualized.”⁵⁸ The structure of manipulative heterosexuality is at the root of the relationship between dehumanisation and sexualisation, because it creates a hierarchy of individuals based on sexuality, and conceives one pole in terms of agency, and the other in terms of sexual instrumentality. Sexualisation drags individuals back into this normative ordering. Non-conformity of gender presentation serves as the visual cue establishing the person both as trans as well as gay, independently of actual sexual orientation. Trans bodies becomes alien, other, and unworthy of respect, justifying and warranting harassment. Through the attack, the contrast between the victim and the attacker confirms the latter as normal, valuable, worthy of respect and bodily integrity. This is also a frequent motivation for discrimination and harassment: because trans people are understood as subhuman through ascriptions of hypersexualisation, mental illness, and sheer abnormality, they are subjected to rejection and insults.

Of reported⁵⁹ trans murders in 2015 in the United States, we see that 73% of those murdered were Black women, and fewer than 14% were white women. The 73% of murdered Black trans women is roughly 5.6 times the demographic proportion of Black persons in the United States, whereas the 13.6% of murdered white trans women is roughly 4.9 times lower than the demographic proportion of white persons in the United States. In other words, Black trans women are murdered at a rate 2,744% higher than White trans women. Given the foregoing analysis, this would be explainable by the devaluation and oversexualisation of Black female bodies. While it remains unclear which proportion of murders relate to this oversexualisation, pending a thorough analysis of the causes of trans murders, it remains that bodies most strongly imputed availability are disproportionately vulnerable to cisgender heterosexual rage. Blackness uniquely magnifies the threat of trans bodies in the cisgender heterosexual imaginary. Black trans women’s reliance on sex trade due to intersecting axes of marginalisation certainly contributes to their increased vulnerability as well.⁶⁰ Clearly, transantagonism and transmisogyny on their own do not appropriately capture the role of racism and sex work in anti-trans violence.⁶¹ Nor does racism by itself explain the

⁵⁸ Julia Serano, “Psychology, Sexualization and Trans-Invalidations”, Keynote lecture presented at the 8th Annual Philadelphia Trans-Health Conference (12 June 2009), online: <http://www.juliaserano.com/av/Serano-TransInvalidations.pdf> at 12.

⁵⁹ The comprehensiveness of the list can be doubted, given its reliance on police and media reporting. Sarah Lamble, *supra* note 53 at 26.

⁶⁰ Erin Fitzgerald, Sarah Elspeth, Darby Hickey, Cherno Biko, & Harper Jean Tobin, *Meaningful Work: Transgender Experience in the Sex Trade* (December 2015), online: http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf at 14.

⁶¹ Trans communities’ accounts of transantagonistic violence—although it is slowly improving—frequently fails to replace murders within their racial and class contexts: Sarah Lamble, *supra* note 53 at 25. With regards to the impact

phenomenon. We are faced with transmisogynoir,⁶² a form of oppression speaking to the unique reality of Black trans women.

2. GENDERED VIOLENCE AGAINST TRANS WO/MANHOOD

If “woman” is the category of persons delineated as sexually receptive within a manipulative heterosexuality excusing and normalising sexual violence, and if trans women cannot be legitimately sexually receptive because of the genitalia they were born with, then the labelling of trans women as “deceivers” and “really men” is unsurprising. Transantagonism is not an isolated form of bigotry towards people who are unlike cisgender people. It is a reaction to the challenge to this system of identifying targets of sexual (mis)behaviour posed by trans existence.

Violence against trans people is gendered, and so is our analysis. Men and women, masculinity and femininity, are subjected to different norms and value differently and thus transantagonism does not affect transmasculine and transfeminine individuals in the same way. The gendered differences in violence faced by trans men and trans women⁶³ attests to a reactive pattern to anti-trans violence. A major script of violence against trans women arises from a need to reassert one’s heterosexuality and masculinity. The concern is over the perpetrator’s appearance vis-à-vis society. An audience is needed, and as expected trans women are primarily assaulted in public spaces. In a recent analysis of eyewitness videos, WITNESS Media Labs confirmed that the majority of filmed attacks against transfeminine individuals were in crowded public spaces.⁶⁴ Trans men, on the contrary, are punished for failing to label themselves as sexually receptive and adopt availability-associated appearances and behaviours. No audience is needed, and as expected trans men are primarily assaulted in private spaces with few bystanders.⁶⁵

Gender enforcement plays a role in segregating public and private spheres, giving the public sphere to men while women are relegated to the private sphere. Describing genderbashing—assaults against gender non-conforming individuals—Viviane Namaste explains:

of anti-sex worker attitudes in trans murders, see Mirha-Soleil Ross’ words as related in Viviane Namaste, *Sex Change, Social Change: Reflections on Identity, Institutions, and Imperialism* (Toronto, Women’s Press, 2005) at p. 91. According to her, those deaths are evidence of anti-sex worker attitudes rather than transantagonism.

⁶² Transmisogynoir appends the prefix “trans” to the terminology of “misogynoir”. The latter term was coined by Moya Bailey to refer to violence against Black women, which stands at the intersection of sexism (“misogyny”) and anti-black racism (“noir”) in Moya Bailey, “New Terms of Resistance: A Response to Zenzele Isoke”, (2013) 15:4 *Souls* 341.

⁶³ Due to lack of available data, I will not specifically consider gendered differences faced by non-binary folks. I anticipate that patterns of violence against transmasculine and transfeminine individuals would for the most part track those of trans men and trans women respectively.

⁶⁴ Karen Stevenson & Kylar Broadus, *Capturing Hate* (Brooklyn: WITNESS Media Lab, 2016) at 19.

⁶⁵ Karen Stevenson & Kylar Broadus, *supra* note 64 at 19.

“In this light, attacks against lesbians and gay men can be interpreted in terms of a defense of the ‘public’ as that domain that belongs to men—heterosexual men, to be precise. Entrance into the public sphere is secured through the enactment of a sanctioned gender identity, preferably within the context of a heterosexual dyad. Couples who violate this prescription, and perhaps especially transgendered people who walk alone, pose a fundamental challenge to public space and how it is defined and secured through gender.”⁶⁶

The enforcement of gender norms against gay men and women parallels the enforcement of gender norms against trans women and men, and augments our understanding of the localisation of violence for communicative reasons with one of space as gendered, mimicking the relationship between the self-regarding and other-regarding prongs of transantagonism.

Whereas trans women are subjected to forced genital exposure and violence because they allegedly misrepresent themselves as sexually receptive, patterns of violence against trans men are different. In pre-university educational settings, trans men experience slightly more harassment, but trans women face significantly more physical and sexual assaults both by students and teachers⁶⁷. More trans women than trans men left school due to harassment, financial barriers, or discrimination, hinting at harsher experiences.⁶⁸ Similarly, misgendering, invasions of privacy and harassment in the workplace plague all trans people equally, but trans women face disproportionately higher rates of physical and sexual assaults.⁶⁹

Trans women often suffer from both sexual and physical violence when violent cisgender heterosexual men learn that they are trans. Trans men are not said to misrepresent themselves as sexually receptive, but as sexually unreceptive. Forced genital exposure and physical violence for them is frequently supplemented by rape in the case of trans men who have vaginas. Viviane Namaste well explains the point:

“When FTMs [transgender men] are assaulted, for instance, rape is a routine part of the violence they endure. This suggests that gender functions not merely as a cue to identify potential victims. FTMs who are raped are told, through the act of sexual assault, that they are “really” women, and they will be treated as such. Biology is

⁶⁶ Viviane Namaste, “Genderbashing: Sexuality, Gender, and the Regulation of Public Space” in Stryker & Whittle, eds., *The Transgender Studies Reader* (New York: Routledge, 2006) at 589.

⁶⁷ Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, & Mara Keisling, *Injustice at Every Turn – A Report of the National Transgender Discrimination Survey* (Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011) at 37-38.

⁶⁸ Jaime M. Grant *et al.*, *supra* note 67 at 41.

⁶⁹ Jaime M. Grant *et al.*, *supra* note 67 at 57.

destiny. [...] The act of rape functions as an aggressive reinscription of the FTM individual's biological sex and social gender."⁷⁰

While trans women suffer from high rates of sexual violence,⁷¹ we must distinguish sexual assaults occurring in the context of sex work as well as sexual or romantic relationships from those motivated by self-regarding assertions of social status by cisgender heterosexual men. In contexts of forced genital exposure, forms of degrading sexual violence other than penetration against trans women are likely more common.⁷²

In sum, we cannot understand transantagonism as a form of irrational hatred. The concordance between anti-trans belief systems and violence militates against an understanding of transantagonism as mere xenophobia. Were transantagonism mere xenophobia, we would expect experiences of harassment, discrimination and violence by trans people to be lower, and similar to those experienced by other marginalised groups. This is not the case. The distribution of all categories of hostile deeds along gendered lines should be near equivalent. This is also not the case. Violence against trans women of colour and trans sex workers would, expectedly, additively combine trans, racial and sex workers' susceptibility to violence, whereas the subjection to violence faced by trans women of colour and sex workers is off the charts due to the standing of sexualisation in the heteronormative schema. In other words, the arrangement of transantagonism belies its putative irrationality. We can reconceive the *transgression* of transitude as a movement not from gender to another but across a boundary of social power to a site that threatens the very authority and legitimacy of gender oppression. Transantagonism is a rational reaction, and will not recede lest we recognise it as such.

III. LEGAL POLICY IMPLICATIONS OF MANIPULATIVE HETEROSEXUALITY

In this section, I will contrast the bad apples mode expounded in part I with the disciplinary model of transantagonism. This disciplinary model, which is drawn from our exposition of manipulative heterosexuality, will serve as the starting point for a radical critique of hate crime and anti-discrimination laws. In the last part of this section, I will use this disciplinary model to sketch possible responses to transantagonism.

A. THE DISCIPLINARY MODEL OF TRANSANTAGONISM

Manipulative heterosexuality tells us a more complicated story about transantagonism than the bad apples model. It flips the duality of rationality of the bad apples model. Perpetrators of anti-trans violence, discrimination, and harassment aren't typically individuals who coldly calculate the risks of punishment

⁷⁰ Viviane Namaste, *supra* note 66 at 592.

⁷¹ Jaime M. Grant *et al.*, *supra* note 67, at 37, 57.

⁷² We may only speculate, as most studies on anti-trans violence do not discriminate between different forms of sexual violence and assault.

against the motivating force of bias, prejudice and hatred, outputting a carefully-crafted decision. The archetypical case is rather one in which impulsivity reigns over the chronology of action, and emotions are informed by pervasive social structures. As I have detailed previously, the first subtype of anti-trans violence is motivated by a perceived threat to the offender's status as heterosexual man, while the second subtype sees trans people as subhuman. In the latter subtype, escalation of commitment—a pattern of decision-making in which prior actions motivate escalating hostility—frequently drives the chronology of violence. In cases of discrimination, which are addressed by anti-discrimination rather than hate crime provisions, this latter subtype is predominant. Employers, service-providers and lessors rarely feel threatened by trans people, though their behaviours and words betray a dislike of trans people. Conceptualised in this fashion, transantagonism must be addressed at the level of values. We must act on desire rather than on choice.

Borrowing from Dean Spade, a pivotal inspiration for this section, I term this model the disciplinary model of transantagonism.⁷³ It belongs to the scheme of what Dean Spade calls the “disciplinary mode of power,” referring to the way in which “racism, transphobia, sexism, ableism, and homophobia operate through norms that produce ideas about types of people and proper ways to be.”⁷⁴

In the disciplinary model, transantagonistic attitudes are not aberrant, irrational or malevolent. If antagonism is explained, it is as the rational development of a social organisation which distributes value through the process of heterosexual male access to cisgender women's bodies. The ideal men and women promoted by manipulative heterosexuality generate self-directed and other-directed patterns of violence⁷⁵ which prey on trans bodies.

Hate crime laws and anti-discrimination laws interface differently with the disciplinary model because the model is two-pronged. Stronger feelings associated with threats to heterosexual status tend to produce direct violence whereas weaker feelings, in comparison, tend to provoke discrimination and harassment. Generally speaking, threatening individuals elicit stronger reactions than do individuals perceived as subhuman. Though not all violence is due to personal threat, nor all discrimination and harassment due to attributed subhuman status, a strong level of convergence is anticipated. The hypersexualisation and pathologisation of trans people, and their dehumanisation more broadly, play a significant role in discrimination and harassment. Both attitudes come to the fore when we are confronted, for example, with the claims that trans people are perpetrators of sexual assault and are unsafe around children. Despite their inaccuracy, those claims are commonly given as justification of the exclusion or differential treatment of trans people.

⁷³ Dean Spade, *supra* note 15.

⁷⁴ Dean Spade, *supra* note 15 at 52.

⁷⁵ See also Dean Spade, *supra* note 15 at 53, 65-66.

Acting at the level of choice, or acting at the level of values, those are the two choices given respectively by the bad apples model and the disciplinary model. As I will argue, it is on the level of values that we can most efficiently intervene.

B. A RADICAL CRITIQUE OF HATE CRIME AND ANTI-DISCRIMINATION LAWS AND OF STATE COMPLICITY

The inadequacy of anti-discrimination and hate crime laws run much deeper than the reformist critique suggests. Reformist approaches, which shun radical redistributions of material and ideological capital, adhere to the bad apples model, blind them to the inadequacy of the model's presupposed picture of hate-motivated harassment, discrimination, and violence. Armed with the disciplinary model, anti-discrimination and hate crime laws can be recast as surface-level management of ostensive ills which fail by themselves to address the underlying roots of those ills. As Evan Vipond eloquently asserts: "In passing laws that are reactionary rather than preventive, the government offers a band-aid solution under the guise of equality."⁷⁶

Critical scholars have extensively highlighted the inadequacy of anti-discrimination and hate crime laws.⁷⁷ Trans, queer, feminist, and critical race scholars have criticised these laws for their inefficiency in deterring violence against disenfranchised groups, and for reducing marginalised experiences to a single axis of oppression,⁷⁸ despite the interrelatedness of oppressive systems—as the disproportionate violence faced by Black female trans sex workers evidences. "Discrimination and violence against people of color have persisted despite law changes that declared them illegal,"⁷⁹ observes Dean Spade.

Applying the disciplinary model of transantagonism, the inefficacy of such laws becomes evident: they presume an inaccurate pattern of human behaviour. Assaults on trans people do not follow from a period of deliberation, during which the would-be offender looks up laws and estimates his chance of being prosecuted as well as the length of sentence he expects to receive if found guilty. Transantagonistic offenders "do not read law books before committing acts of violence and choose not to engage in bias-motivated violence because it carries a harsher sentence."⁸⁰ Hate crimes are impulsive, reacting to a threat to one's sense of social worth or sitting as the next step in an escalating chain of hostile behaviours against those believed to be subhuman. In the vast majority of cases, perpetrators are likely to be fully aware that their actions are illegal and punishable by lengthy jail sentences or result in an order for hefty pecuniary compensation. Their motivations—especially when engendered by concern for one's social value—are stronger than any immediate concern with punishment. In the case of murder, even the risk of a life

⁷⁶ Evan Vipond, *supra* note 49 at 19.

⁷⁷ See, for example, Dean Spade, *supra* note 15 at xv.

⁷⁸ Evan Vipond, *supra* note 49 at 16, 18.

⁷⁹ Dean Spade, *supra* note 15 at 40.

⁸⁰ Dean Spade, *supra* note 15 at 45.

sentence is not sufficient to dissuade them. Where the act is discrimination, few are deterred for much the same reasons. Believing that trans people are subhuman or pose a threat because of mental illness or sexual deviance, people react impulsively to their presence and maintain an oppositional attitude towards them.

Punishment is a dubious deterrent, as few people are aware of the typical sentence length or compensation amount for most illicit acts, and no doubt even fewer engage in a utilitarian calculation of punishment versus benefits. If life sentences fail to deter murders, why should we expect hate crime and anti-discrimination laws to work? There is no good reason to think that quantitatively increasing punishment by a few years would impact the outcome of their decisional process—especially given how little known those laws tend to be.⁸¹ As Evan Vipond emphasises, “[h]ate 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.”⁸²

Widespread knowledge of the presence of anti-discrimination laws might nevertheless have a greater deterrent effect than hate crime laws. Acts of discrimination tend to be motivated by weaker emotions and occur over a longer time span, thus mitigating the impact of impulsivity. However, short of a successful, structured educational campaign, anti-discrimination provisions are bound to retain a modest reach. People can’t be influenced by the law if they don’t know it.

Rationales focusing on the motivational impact of hate crime laws on police officers, prosecutors, and judges overlook the structure of transantagonism. In institutional atmospheres of widespread hostility to and disregard for trans lives, nebulous governmental mandates to take anti-trans violence more seriously will not perceptibly affect enforcement. Governmental mandates do not propose punishing agents of the state who fail to enforce them. Given those agents’ propensity to disregard their stated function—as

⁸¹ Knowledge of the law as it concerns trans people is poorly known. It always surprises me how little trans people know about the process to change one’s name and gender marker under Quebec law, despite Bill 35, *An Act to amend the Civil Code as regards civil status, successions and the publication of rights*, S.Q. 2013, c. 27, having been passed as recently as 2015 and having been widely discussed in trans communities. And despite courts in Quebec having recognised that trans people are protected under the ground of “sex” as early as 1998, few trans people knew themselves to be protected under anti-discrimination law. Can we expect cis offenders to know hate crime and anti-discrimination laws when so many trans people do not know laws that are of immediate relevance to them?

⁸² Evan Vipond, *supra* note 49 at 16.

pervasive racial profiling,⁸³ police brutality,⁸⁴ and recurring cases of sexual assaults by police officers⁸⁵ repeatedly demonstrate—hopes of changing police behaviour through symbolic measures appear misguided at best. However, if enforcement were to be increased, the question remains whether this would improve trans wellbeing, since my arguments against hate crime laws apply to increased enforcement as well. It bears repeating: hate crime laws have not had measurable impacts on violence against groups long protected under them. Changing societal perceptions and public outcry, in this respect, are more effective.

At its worst, arming prejudiced agents of the state with further discretionary powers exacerbates the discriminatory impacts of the current justice system, and contributes to the over-incarceration of Black and Aboriginal populations in Canada, a trend which is worsening.⁸⁶ Co-optation of the trans cause by the prison-industrial complex and the collaboration of trans people with it has been explored and critiqued by Dean Spade in his book *Normal Life* from a United States standpoint. His arguments apply equally to Canada. As he points out, hate crime laws are disproportionately used against members of marginalised groups.⁸⁷ If balancing our commitments to fighting the over-incarceration of Black and Aboriginal peoples with our commitments to fighting transantagonism is a challenging but crucial concern, the debate is a non-starter considering the ineffectiveness of hate crime laws in deterring transantagonistic behaviour and improving trans wellbeing. Such laws create a schism between white liberal trans people and trans people of colour.⁸⁸ Given the emancipatory power of solidarity and empathy, this schism further disempowers trans communities while providing only deficient protections.

Anti-discrimination and hate crime laws fail to alter the underlying societal norms giving rise to harassment, discrimination, and violence.⁸⁹ Although sentencing plays a role in communicating

⁸³ Demond Cole, “The Skin I’m In: I’ve been interrogated by police more than 50 times—all because I’m black”, *Toronto Life* (21 April 2015), online: <http://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/>. Other marginalised groups are also targeted by the police. See for example the recent targeting of gay men by the Toronto Police: Manisha Krishnan, “Toronto Police Are Going Undercover to Bust Men Having Sex with Other Men”, *Vice* (14 November 2016), online: https://www.vice.com/en_ca/article/why-are-toronto-police-going-undercover-to-bust-men-having-sex-with-men.

⁸⁴ Janaya Khan, “Exclusive: Black Lives Matter Toronto co-founder responds to Pride action criticism”, *Now Toronto* (6 July 2016), online: <https://nowtoronto.com/news/exclusive-black-lives-matter-pride-action-criticism/>. See also Jennifer Jee-Lyn García & Mienah Zulfacar Sharif, “Black Lives Matter: A Commentary on Racism and Public Health”, (2015) 105:8 *American Journal of Public Health* e27.

⁸⁵ Such as the sexual assaults of Aboriginal women in Val-d’Or: Laureanne Fontaine, “Anger and Disappointment: Quebec Native Women Condemns a Racist and Discriminatory System”, *Quebec Native Women* (18 November 2016), online: <http://www.faq-qnw.org/en/news/anger-and-disappointment-quebec-native-women-condemns-a-racist-and-discriminatory-system/>.

⁸⁶ Shannon Gottschall, *Ethnic Diversity in Canadian Federal Offender Admissions*, Research Report R-263 (Ottawa: Correctional Service of Canada, 2012).

⁸⁷ Dean Spade, *supra* note 15 at 47.

⁸⁸ Dean Spade, *supra* note 15.

⁸⁹ Dean Spade, *supra* note 15 at 39, 56.

governmental and judicial disapproval, its impact is mitigated by its failure to address the underlying causes of transantagonistic behaviour. Symbolism fails to counterbalance the strong motivational force of transantagonism as a set of attitudes deeply entrenched in structures of social value that are reproduced by governmental and non-governmental actors alike.⁹⁰ Conflicting state directives are produced as the government on one hand tells citizens that trans lives must be respected, while on the other hand creating the preconditions of trans violence by turning gender into an essential and static legal category based on genitalia at birth, which it then uses to segregate trans people in a variety of social environments.

It is (un)surprisingly difficult to find a governmental form that doesn't ask for gender. By being consistently produced as a category in the administrative realm, gender becomes understood as a neutral feature of social life,⁹¹ insidiously setting up and teaching the habitual attitude about gender—sometimes literally, insofar as governments write school curricula. The habitual attitude lies there, as the seed which will eventually sprout in the form of transantagonistic behaviours. The othering of trans bodies occurs not only through forms which make use of gender, but by policies which specifically exclude trans people from their gender. Birth certificates are drafted on the basis of genitalia at birth and are notoriously difficult to change, though recent provincial-level legislation has made it easier in most provinces. Canadian Blood Services, working under the aegis of Health Canada, added criteria for trans blood donors in 2016 which classified trans women as men or women on the basis of genitalia, reinforcing the notion that trans women who have penises are indeed men.⁹²

By being requested in all sorts of governmental forms, regardless of content, gender is inscribed as a particularly important fact, leading to an “implied shared understanding that certain things, like gender, are just necessary information”⁹³ in social life. Far from merely recounting natural facts, “administrative systems that classify people actually invent and produce meaning for the categories they administer, and [...] those categories manage both the population and the distribution of security and vulnerability.”⁹⁴ By creating and maintaining those categories, norms of behaviour are created: don't be trans and, if you are, better not *look* trans.⁹⁵ Unsurprisingly, trans activists have long objected to the administrative institution of gender, and have made some strides in fighting it.⁹⁶

⁹⁰ According to Dean Spade, *supra* note 15 at 2: “[P]ower is decentralized and that certain practices, ways of knowing, norms, and technologies of power are distributed in myriad ways rather than only from a single person or institution.”

⁹¹ Dean Spade, *supra* note 15 at 5.

⁹² For a critique of the policy, see Florence Ashley, “Une politique sans bon sens”, *Journal Métro* (17 August 2016).

⁹³ Dean Spade, *supra* note 15 at 76.

⁹⁴ Dean Spade, *supra* note 15 at 11.

⁹⁵ Dean Spade, *supra* note 15 at 54.

⁹⁶ The federal government has recently begun a large-scale review of the necessity of administratively recording gender following a lawsuit settlement: Jennifer Yang, “Is your gender really necessary on a passport?”, *The Star* (25

A myth of state innocence is promulgated through anti-discrimination and hate crime laws. They give us a story in which the state is a neutral actor who serves as arbiter of injury, punishment, and justice, instead of showing it accurately as one of the contributors of subjugation and injustice in trans lives.⁹⁷ Harassment, discrimination, and violence become “an exceptional moment, not an everyday one.”⁹⁸ Isolating and individualising violence, systemic factors become invisible and allegations of state guilt are shunned. The process is perfidious. By promising legal equality to trans individuals who are ready to conform to disenfranchising standards of respectability, those standards are recast as neutral. Collaboration with oppressive institutions within the justice system—most notably the police and imprisonment, but also our acutely classist civil legal system—is welcomed as indicia of progressiveness.

Having cast away doubts of inequity, the state puts forward a semblance of fairness all the while it naturalises oppressive structures that disproportionately harm trans people. “We are invited to demand that trans people are ‘human’ when ‘human’ is still defined through colonial norms of race, gender, ability, and immigration status that actually limited the invitation to a very small part of the trans population,”⁹⁹ summarizes Dean Spade. In Canada, the workings of this system become evident as we observe the Liberal federal government’s defunding of HIV community organisations—a decision which deprived Action Santé Travesti(e)s et Transsexuel(le)s du Québec’s of most of its funding despite their essential role in promoting the health and wellbeing of Montreal trans communities. Its failure to repeal of the previous government’s anti-sex work laws in a timely fashion and its refusal to adequately support trans migrants, who still cannot change their name on legal documentation in Quebec, also leave activists with a bitter taste given the government’s claims to trans-friendliness. By focusing on the symptoms of transantagonism experienced by a handful of trans people rather than on the root causes of trans subjugation,¹⁰⁰ the state forecloses resistance strategies material and ideological emancipation. In the midst of this opposition, staggering rates of anxiety, depression, suicidality, and exclusions from social life within trans communities are left unaddressed.

For anti-discrimination and hate crime laws to plausibly reduce the incidence of transantagonistic acts, the law would have to be widely and continuously publicised, and the associated sentences would have to be excessively high. As important as reducing harassment, discrimination, and violence against trans people may be, excessive jail time is disproportionate, inhumane, socially costly, and flies in the face of every prison abolitionist bone in my body. We should instead seek to identify alternatives which show due concern and care for everyone in society.

January 2017), online: <https://www.thestar.com/news/gta/2017/01/25/is-your-gender-really-necessary-on-a-passport.html>.

⁹⁷ Sarah Lamble, *supra* note 53 at 29.

⁹⁸ Sarah Lamble, *supra* note 53 at 34.

⁹⁹ Dean Spade, *supra* note 15 at 137.

¹⁰⁰ Dean Spade, *supra* note 15 at 97-98.

To eliminate transantagonism in all its forms, governments must devote efforts to address the broader social system within which transantagonism is implicated, as well as engage with its own complicity in creating and maintaining various systems of oppression. We must begin by understanding that transantagonism is rooted not in individual animosity towards trans people. Transantagonism is rooted in the overvaluation of cis bodies and the devaluation of trans bodies in a cisheteronormative system which promotes and facilitates sexual access to cis women's bodies and their reproductive capabilities. Only by understanding that can we begin to plan more effective legal reform strategies and resistance opportunities geared towards trans wellbeing. Instead of acting at the level of offenders' choices, we must radically alter the normative underpinnings of social organisation.

C. *CONTENDING WITH TRANSANTAGONISM*

Can we do better than anti-discrimination and hate crime laws? Laws which fall short of their intended target, provided they are not harmful, may nevertheless be legitimate in deploying legislative and judicial resources if no more effective alternative exists. Though we have seen that such laws may well be harmful due to their role in over-incarceration and in presenting governments as fair although they decline to address systemic inequality, the mere fact that more effective alternatives exist provides a strong argument against exclusively focusing legislative and judicial resources on laws of those two types.

Instead of employing anti-discrimination and hate crime laws as primary means to address transantagonism, the law should first seek to inquire into what makes people adopt transantagonistic behaviours. If I am correct in identifying manipulative heterosexuality as one of the roots of transantagonism, then addressing manipulative heterosexuality will be pivotal to trans emancipation. Undoing the system of sexually manipulative and sexual assault-normalizing heterosexuality entails engaging fully with the continuing problem of sexism in society notably by dismantling rape culture, as well as disposing of gendered classifications in the administrative realm, especially where this classification is not based on gender identity. Over-reliance on the law and liberal conceptions of the role of government must be rejected if we are to address each of those intersecting systems of subjugation. The inclusion of trans people in anti-discrimination law should be understood as a supplementary means of attaining wellbeing rather than as an end in itself, and be resourced accordingly.¹⁰¹ The role anti-discrimination laws play in enabling impact litigation should not be discounted, despite the limits of impact litigation as an activist strategy¹⁰² and its longstanding presence in Canadian law. Though impact litigation was already possible prior to Bill C-16, this situation is peculiar to the Canadian context. In other jurisdictions, enabling impact litigation will likely turn out to be of benefit to trans people and further set apart anti-

¹⁰¹ An example of this being done would be Quebec's Bill 103, *An Act to strengthen the fight against transphobia and improve the situation of transgender minors in particular*, S.Q. 2016, c. 19. In this bill, gender identity and gender expression were added to the *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12 although the primary purpose of the bill was to extend the change of name and gender marker change regimes to trans minors.

¹⁰² Mark Tushnet, "The Critique of Rights", (1993) 47 *SMU Law Review* 23.

discrimination laws from hate crime laws. Unlike anti-discrimination laws which will be useful in many contexts, hate crime laws may well be wholly unjustifiable given their disproportionate impact on people of colour.

Jointly with the analytical lens we have developed throughout this article, we can elaborate three broad avenues of resistance: knowledge, empowerment, and healing. Knowledge seeks to prevent anti-trans harassment, discrimination, and violence by identifying and nullifying the systems of social belief which generate transantagonistic attitudes. Empowerment seeks to create conditions within which trans people can escape harassment, discrimination, and violence without having to forego social benefits and socioeconomic resources. Healing seeks to alleviate the ills of transantagonistic acts after the fact by meeting victims' psychosocial and material needs.

At the level of knowledge, curricula should be amended to include education on social diversity, including trans realities, gender identity and sexuality, written in collaboration with trans communities. Where anti-discrimination laws are already in place, clear guidelines for interacting with trans individuals should be produced and widely publicised, and government-funded, community-written workshops on trans realities should be mandatory for the public sector, for regulated service providers such as universities, banks, internet companies and telecom companies, and for licenced professionals¹⁰³. Those workshops should also be made available to the broader Canadian society at a low cost. Media guidelines that address rape culture as well as transantagonism should be promoted. Campaigns aimed at unteaching manipulative heterosexuality should be funded. Instead of increased jail sentences, people who commit transantagonistic acts should face mandatory, extensive education on trans realities and issues as well as therapy in the hopes of preventing recidivism, and other non-prison alternatives should be explored. The content of all those measures should be written in light of the functioning of manipulative heterosexuality, and address the othering of trans bodies within an oppressive scheme of access to cis women's bodies.

At the level of empowerment, trans people must be given the opportunity to leave environments where they are particularly vulnerable: reducing policing, placing trans prisoners in prisons which correspond to their gender identity¹⁰⁴ and giving them access to medical care, fully decriminalising sex work¹⁰⁵ and providing alternatives to sex work for trans sex workers that they are not driven into spaces where they are

¹⁰³ Evan Vipond, *supra* note 49 at 20: "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."

¹⁰⁴ Evan Vipond, *supra* note 49 at 17: "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. Additionally, trans prisoners are often denied health care and report higher rates of physical and sexual assault, including rape, than cisgender prisoners."

¹⁰⁵ For instance by repealing the *Protection of Communities and Exploited Persons Act*, S.C. 2014, c. 25, commonly known as Bill C-36, as Justin Trudeau's Liberal Party had promised.

particularly vulnerable,¹⁰⁶ decriminalising HIV non-disclosure, increasing healthcare coverage for surgeries and facial hair removal which will help trans individuals stave off violence,¹⁰⁷ abolishing immigration enforcement and immigration detention, funding HIV and trans community organisations¹⁰⁸ are all measures that trans communities advocate for. Establishing a realistic list of priorities can be done through community consultations, as some of those changes are not feasible within the current political climate. Administrative bodies should also receive mandatory education on trans issues, and welfare, work, and housing initiatives addressing trans poverty and homelessness should be set up by the government.

At the level of healing, organisms that provide support for victims of transantagonism should be funded by the government. Healing derives its efficacy by understanding transantagonism as a pervasive ideological field which must be disrupted if trans victims of violence are to recover their self-worth. Because violence occurs in a field of devaluation, dehumanisation, pathologisation, and invalidation, it is understood by victims as confirming social hostility towards transitude, and frequently leads to the internalisation of this hatred.¹⁰⁹ Frequently, this can lead trans people to turn against others, appealing to norms of social respectability to distance themselves from those most directly targeted by transantagonism. By helping victims see transantagonism rather than transitude as wrong, the fundamental hostility of the world is defused. This process affirms the emancipatory potential of trans people by denaturalizing transantagonism, planting the seed of radical consciousness.

Each avenue of resistance can be served by increasing funding to trans-driven community organisations and initiatives. Those organisations and initiatives are best situated to understand the needs of trans people, reach trans communities, and educate on their realities. Further discussions on the most needed governmental actions will be necessary, and trans community organisations will be essential participants in those discussions.

IV. CONCLUSION

¹⁰⁶ Decriminalizing sex work has the added benefit of ceasing some of the state's endorsement of the association between sexualisation and dehumanisation, which harms all women, and most particularly women who are trans and or sex workers.

¹⁰⁷ Sarah Lamble, *supra* note 53 at 36. Greater healthcare coverage also has a direct impact on trans wellbeing since those procedures alleviate dysphoria.

¹⁰⁸ As opposed to the strategy of the current Liberal government which massively defunded HIV organisations, including a leading trans/HIV organisation in Montreal, ASTT(e)Q.

¹⁰⁹ bell hooks, *supra* note 30 at 134 expresses a similar sentiment: "White women are not the only group who must confront racism if Sisterhood is to emerge. Women of colour must confront our absorption of white supremacist beliefs, 'internalized racism', which may lead us to feel self-hate, to vent anger and rage at injustice at one another rather than at oppressive forces, to hurt and abuse one another, or to lead one ethnic group to make no effort to communicate with another." Her comments on racism are, *mutatis mutandis*, applicable to transantagonism.

Oppression comes in many forms. There is a distinct benefit in understanding how the oppression of different groups arises, both in terms of argumentative strength but also in terms of our ability to identify further solutions. Empirical data on hate crimes and discrimination is flawed and scarce. Arguments about their inefficacy often rely on general accounts of offenders' psychology. By providing a theoretical account of how transantagonistic motivations lead to anti-trans acts, I have sought to bolster those critiques of hate crime laws and highlight tangible solutions to transantagonism. Armed with this model, we can understand how talk of "girl's bodies" when referring solely to cis girl's bodies is not just invisibilising trans people, but also playing a direct role in generating violence against us down the line.

Transantagonism is rational and must be confronted as a rational belief-system. Manipulative heterosexuality attributes availability on the basis of appearance. Appearance, as a communicative medium, colludes with the habitual attitude about gender to carve the deceit of trans bodies out of their otherness. Trans bodies are bodies that are socially coded as bodies which cheat men into sexualising them in contradiction with their gender assigned at birth. Trans bodies are produced as *harmful* both to normative social systems and to specific social actors. The same system of manipulative heterosexuality similarly generates the marginality of same-gender sexualities,¹¹⁰ of asexuality, and of intersex bodies because they challenge the subject positions of cisheterosexual couples.

Hate crime laws are woefully inefficient by themselves in improving trans wellbeing and addressing the problem of violence against trans people. No amount of fine-tuning will do. The inadequacy of those laws is particularly evident in their inability to mitigate insidious forms of transantagonism which, despite appearing trivial, are to blame for much of the difficulties trans people face in their daily lives. Many measures are more effective than anti-discrimination lawsuits and hate crime laws in improving trans wellbeing and reducing anti-trans violence. In the words of Ta-Nehisi Coates: "The hammer of criminal justice is the preferred tool of a society that has run out of ideas."¹¹¹ Though we may not be heard, we have yet to run out of ideas. Resources dedicated to legislating and enforcing those laws should be redirected towards those alternatives that address manipulative heterosexuality and the other roots of trans vulnerability. The complex social nature of transantagonism creates new challenges for lawmakers, who are required to move beyond legalistic approaches to social progress, as they have frequently been asked to in the past with regards to sexism, racism, and homophobia. Anti-discrimination laws are useful. Gender marker change laws are important. They make our lives easier, and happier. But they're a far cry from eliminating inequality and violence. Lived conditions of trans persons can be better improved though

¹¹⁰ For an inquiry into queerbashing as a form of violence motivated by gender norms, see Viviane Namaste, *supra* note 66.

¹¹¹ Ta-Nehisi Coates, "Killing Dylann Roof", *The Atlantic* (26 May 2016), online: <https://www.theatlantic.com/politics/archive/2016/05/dylann-roof-death-penalty/484274/>. Ta-Nehisi Coates was speaking about the death sentence.

expenditures on healthcare, insurance coverage, education,¹¹² criminal defence, prison gender segregation¹¹³, information campaigns,¹¹⁴ economic support of trans-led research and activism, and global wealth redistribution. Ultimately, activist agendas should be guided by material conditions, not legal abstractions.

Given the distinct relationship between transantagonism and misogyny, anything short of the elimination of sexism and a radical reordering of society will fail to eradicate transantagonism.¹¹⁵ As Julia Serano advocates: “Because anti-trans discrimination is steeped in traditional sexism, it is not simply enough for trans activists to challenge binary gender norms (i.e., oppositional sexism)—we must also challenge the idea that femininity is inferior to masculinity and that femaleness is inferior to maleness. In other words, by necessity, trans activism must be at its core a feminist movement.”¹¹⁶

Transantagonism penetrates all spheres of society. Far from an exception, it is an unavoidable experience for trans subjects. Limiting ourselves to anti-discrimination and hate crime laws would be a grave mistake. To engage trans realities, the fight against transantagonism must be led on two fronts: anti-neoliberal legal reform to meet our immediate needs, and radical activism to foster a better society for tomorrow. Both fronts must be informed by trans-led analysis of the roots of transantagonism. This article has provided an exploration of sexually manipulative and sexual assault-normalizing heterosexuality, one of the various systems that govern the production of transantagonism in Canada. I hope that this inquiry will serve as an apt starting point for judicious legal policy, and will inspire legal actors to demand more of the federal government and its provincial counterparts than the reforms recently adopted.

“Transfeminism believes that a society that honors cross-gender identities is the one that treats people of all genders fairly, because our existence is seen as problematic only when there is a rigid gender hierarchy.”

Emi Koyama, *The Transfeminist Manifesto*.¹¹⁷

¹¹² Evan Vipond, *supra* note 49 at 20: “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.”

¹¹³ Or prison abolition, if possible.

¹¹⁴ Evan Vipond, *supra* note 49 at 20: “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.”

¹¹⁵ Evan Vipond, *supra* note 49 at 20: “Ultimately, equality can be achieved only through systemic change that addresses all forms of social inequality and state-sanctioned oppression.”

¹¹⁶ Julia Serano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (Berkeley: Seal Press, 2007) at 16.

¹¹⁷ Emi Koyama, *supra* note 37 at 257.