

**NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF THE LAW by Dean Spade. New York: South End Press, 2011. 256 pp. \$16.00 softcover.**

As with all good radical writing, it's difficult to read Dean Spade's *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* without seeing its central lessons etched in everything around you, whether you agree with them or not. Indeed, *Normal Life* arrived with prophetic timing. On the book's official release date, December 6, 2011, the United States Court of Appeals for the Eleventh Circuit held, "A government agent violates the Equal Protection Clause's prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity."<sup>1</sup> Two weeks earlier, the Massachusetts Legislature added "gender identity" to the state's hate crimes and anti-discrimination statutes, but left the laws governing public accommodations untouched.<sup>2</sup> A day before that, New York City police evicted Occupy Wall Street protestors from Manhattan's Zuccotti Park, arresting hundreds.<sup>3</sup> Professor Spade's analysis invites the conclusion that the latter represents a major event in the fight for trans liberation, while the former two are not, and can never be, sources of meaningful social change. To budding radicals he offers a poignant, incisive manifesto of twenty-first century activism, and to self-assured liberals a spoon of bitter medicine.

Spade's message about using mainstream law reform tactics to improve the lives of trans people is succinct: "they just will not work." (p. 101) His uncompromising thesis is that mimicking the strategies of the mainstream lesbian and gay movement, seeking protection via hate crime laws, and focusing narrowly on inclusion and recognition can only cede more power to legal and social systems that have rarely served trans people well. The most promising avenue for combating the institutional brutality that trans people face in virtually every facet of life is to constantly foster mass mobilization, "led by those living on the sharpest intersecting edges of multiple systems of control," and to avoid the kind of compromise that inevitably leaves behind the most vulnerable potential allies (p. 224). The structural change that would give trans people

1. Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011).
2. Bob Salsberg, *Mass. House Approves Transgender Rights Bill*, BOS. GLOBE (Nov. 15, 2011), [http://www.boston.com/news/local/massachusetts/articles/2011/11/15/mass\\_transgender\\_rights\\_bill\\_could\\_head\\_to\\_vote/](http://www.boston.com/news/local/massachusetts/articles/2011/11/15/mass_transgender_rights_bill_could_head_to_vote/).
3. James Barron & Colin Moynihan, *City Reopens Park After Protesters Are Evicted*, N.Y. TIMES (Nov. 15, 2011), <http://www.nytimes.com/2011/11/16/nyregion/police-begin-clearing-zuccotti-park-of-protesters.html>.

longer and less violent lives “only trickles up, it never trickles down.”<sup>4</sup>

### I. THE ANALYTICAL AND PRACTICAL FAILURE OF “RIGHTS”

Spade’s central argument in *Normal Life* is that the economic and educational opportunities of trans people will not improve through the pursuit of legal inclusion and recognition generally. Traditional law reform strategies have proven ineffective at remedying systemic problems facing other marginalized groups, and will likely serve the trans community no better. Activists must stop trying to “change what the law says about a particular group to make it say ‘good things’ . . . and not ‘bad things,’” because the prevailing narrative about the effects of law does not correlate with how resources and opportunities are actually distributed (p. 29). The only option is to transform how systems of power operate throughout society at large. Spade marshals analysis from Critical Race Theory, Native American scholars, anti-capitalist scholars, and his own prior work to argue that “the law and legal reform strategies can be an ineffective or even a co-opting and neutralizing force for social movements”<sup>5</sup> and that the trans movement can expect no different.

#### A. Brutal Disparities Facing Trans People

To readers likely to be attracted to Spade’s work, the violence and inequity trans people face may come as no surprise, but it bears explication nonetheless. In his Preface, Spade describes some of his clients at the Sylvia Rivera Law Project, a legal aid organization he founded that serves low-income transgender, intersex, and gender non-conforming people in New York City (pp. 7-11). Bianca, a nineteen-year-old trans woman, had been expelled from her high school for wearing feminine clothing and was “homeless, unemployed, and trying to escape from an abusive relationship” when she met Spade (p. 9). Homeless shelters insisted on placing Bianca in men’s facilities, despite her fears that she would be humiliated and harassed, and women’s domestic violence shelters refused to admit her altogether (p. 10). When Bianca tried to access welfare, she was told to attend a workfare program at a job center (p. 10). There, she was outed as trans and harassed by staff and, because she did not feel safe returning, her benefits were terminated (p. 10). Unable to find any source of income, Bianca took up sex work to pay for hormone treatments she used to maintain her desired feminine appearance (p. 10). These treatments were purchased through illicit markets “since Medicaid—had she even been given those benefits—would not cover the cost.” (p. 10) Without these treatments, she would be more easily identifiable as trans and could face further harassment and

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4. *Trans Politics and Legal Structures with Dean Spade* (KUOW 94.9 radio broadcast Dec. 15, 2011, 8:00 P.M.) at 15:30, available at <http://www.kuow.org/program.php?id=25361>.

5. Dean Spade, *The Nonprofit Industrial Complex and Trans Resistance*, 5 *SEXUALITY RES. & SOC. POL’Y* 53, 290 (2008).

violence (p. 10). Spade emphasizes that Bianca's experiences "were not unusual." (p. 11)

The few large-scale studies that have been done show that the problems facing the trans people Spade serves are endemic. In 2011, the comprehensive National Transgender Discrimination Survey reported that 15% of respondents earned less than \$10,000 per year, compared to 4% of the general population.<sup>6</sup> Fourteen percent of respondents reported being unemployed, with unemployment rates among black respondents reaching twenty-eight percent.<sup>7</sup> One in five respondents had experienced homelessness at some point in their lives due to their gender identity, and a majority of those who had tried to access homeless shelters reported being harassed by shelter staff or residents.<sup>8</sup> Once again, black respondents were disproportionately affected: forty-one percent had experienced homelessness at some point.<sup>9</sup> Seventy-eight percent of respondents reported harassment in school during grades K-12, and fifteen percent left school due to harassment before completing any higher education.<sup>10</sup> Sixteen percent of respondents had engaged in sex work, drug sales, or other criminalized work for income.<sup>11</sup> Another recent study of transgender women sex workers in Boston, Massachusetts found an HIV infection rate above one in three.<sup>12</sup> The depth of the inequities facing trans people, and the likelihood they will suffer extreme poverty and violence, is breathtaking.

Although conscious, individual bias against trans people is a constant obstacle, a central point for Spade is that individual bias—whether in the form of employment discrimination, harassment, or exclusion from public services—cannot account for the massive disadvantage facing the trans community. Instead, numerous "seemingly banal" administrative barriers make access to social services and to the legal economy extremely difficult (p. 11). His clients most severely at risk of homelessness, poverty, and violence were "basically unfathomable to the administrative systems that govern the distribution of life chances: housing, education, health care, identity documentation and records, employment, and public facilities." (p. 11) Trans people without access to certain forms of privilege, including people of color and people with disabilities, "experience more extreme vulnerability, in part because more aspects of their lives are directly controlled by legal and administrative systems of domination—prisons, welfare programs, foster care, drug treatment centers, homeless shelters, job training centers—that employ rigid gender binaries." (p. 13) Spade argues

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6. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN 22 (2011), available at [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf).

7. *Id.* at 55.

8. *Id.* at 112, 117.

9. *Id.* at 112.

10. *Id.* at 3.

11. *Id.* at 22.

12. Sari L. Reisner et al., *HIV Risk and Social Networks Among Male-to-Female Transgender Sex Workers in Boston, Massachusetts*, 20 J. ASS'N NURSES IN AIDS CARE 373, 376 (2009).

that remedying harms caused by individual bias cannot be the primary avenue for improving trans people's lives because the disadvantages trans people experience stem from numerous barriers imbedded in the administrative systems everyone interacts with day to day (p. 15). Presenting identification for transactions as simple as purchasing an age-restricted product, cashing a check, or complying with a police officer during a traffic stop can become a moment of vulnerability to discrimination or violence (p. 146). Inconsistent identifying documents can make access to basic government services more difficult (p. 146). This initial recognition that individual discriminators cannot account for the systemic disadvantages facing trans populations lays the groundwork for Professor Spade's critique of mainstream law reform tactics of the past several decades.

### **B. Beyond the Perpetrator/Victim Model and Mainstream Gay and Lesbian Activism**

Against the backdrop of these intersecting modes of harm, Spade sharply distinguishes mainstream lesbian and gay projects of the last several decades as insufficient responses to the needs of the trans community. In particular, he sees the movement slowing "since the incendiary moment of the late 1960s when criminalized gender and sexual outsiders fought back against police harassment and brutality at New York City's Stonewall Inn and San Francisco's Compton's Cafeteria." (pp. 59-60) Instead, "the focus of gay rights work moved toward the more conservative model of equality promoted in U.S. law and culture through the myth of equal opportunity." (p. 60) The most visible demands of the movement in turn became inclusion in military participation, access to marriage rights, and protection in the form of anti-discrimination and hate crimes laws (pp. 61-65). These demands have arisen against the background of the erosion of social welfare programs, increases in mass incarceration via drug and immigration enforcement, and rising wealth inequality (pp. 61-65). The outcomes of the most visible gay and lesbian rights movement have been "preserving and promoting the class and race privilege of a small number of elite gay and lesbian professionals while marginalizing or overtly excluding the needs and experiences of people of color, immigrants, people with disabilities, indigenous people, trans people, and poor people." (p. 65) Although trans activism is often presumed to follow in the footsteps of lesbian and gay activism, Spade suggests that marginalized individuals will not find protection in reform strategies that reflect the preferences of lawyers and activists who already enjoy significant privilege.

Drawing on scholarship from Critical Race Theory and women of color feminism, Spade points out how strategies seeking formal legal equality and protection have not benefitted the most vulnerable community members in the past. The benefits of inclusion-focused law reform never trickle down because such reform fundamentally misconceives how inequality operates (pp. 84-85). In

the context of race discrimination, for example, “[d]iscrimination law primarily conceptualizes the harm of racism through the perpetrator/victim dyad,” attributing harm to bad individuals, ignoring or excusing systemic disparities, and obscuring the historical bases of those inequalities (pp. 84-87). Spade traces cases through numerous anti-discrimination contexts to show how courts have made discrimination cases harder for plaintiffs to win over time by insisting the plaintiff be able to show explicit individual bias and not addressing social norms or institutions that affect marginalized groups differently from the majority population (pp. 84, 109).<sup>13</sup> Successful claims that rely on systemic inequality or implicit bias not traceable to single bad actors have become rarer—a development Spade suggests is inevitable under the traditional model of discrimination law (pp. 85, 87).

Its theoretical underpinnings notwithstanding, Spade’s observation can be put in other terms: if a trans person is unable to secure employment due to homelessness or lack of legal work history, or because the genders listed on required forms of identification do not match, anti-discrimination law offers no protection. An employer is free to reject such an applicant absent explicit bias based on trans status. If a trans person can only find income through illegal work and is then incarcerated, hate crimes law will offer no protection from the extremely violent conditions of prison or immigration detention facilities. Even if a trans person is beaten or killed in prison for being trans (and thus because of individual bias), that violence was facilitated by virtue of the person’s imprisonment.

## II. ALTERNATIVES TO LAW REFORM

Because he sees no possibility of success through traditional tactics, the alternatives Spade outlines call for a radical departure from those tactics. He argues that litigation and legislative advocacy should be used only in support of community-based services that can directly improve the lives of trans individuals and organize constituents, and should not be the activists’ primary strategies (pp. 180–184). Activist organizations should avoid relying on foundations or wealthy donors for funding, and should strive to never replicate in microcosm the forms of oppression they seek to change (pp. 174–80, 192, 196).

Again drawing on the insights of women of color feminists, Spade critiques

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13. *See, e.g.*, *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (holding that terminating employee for refusing to abide by rule requiring female but not male employees to wear makeup is not actionable sex discrimination); *Kahakua v. Friday*, 876 F.2d 896 (9th Cir. 1989) (unpublished disposition) (finding that failing to hire employees because of Hawaiian Creole speech patterns “acquired as a result of their economic status, environment, and education, and not as a result of race or national origin” is not actionable discrimination); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (holding that terminating a trans person perceived as male for wearing feminine clothing and jewelry is not unlawful sex discrimination); *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229, 232–33 (S.D.N.Y. 1981) (finding that a rule forbidding employs from wearing braided hairstyles does not discriminate against women or African Americans).

the “nonprofitization” of American social movements, which he argues has overtaken broad-based grassroots strategies since the 1960s and 1970s (pp. 59–69). Non-profits that rely on donations and foundation grants for funding tend to populate their boards with wealthy donors, and tend to tailor their objectives and strategies around what will attract funding (pp. 177–178). Similarly, non-profits that rely heavily on volunteers tend to be supported by young, college educated whites with enough time and disposable income to offer free labor, and are staffed by white, educated professionals (pp. 176–177). Spade’s contention is that these organizations reproduce many of the problems they allegedly seek to change, in particular through pay disparities among their workers, steep hierarchies reflecting education, race, and class privilege, and strategic choices favoring the goals and interests of those with privilege (pp. 178–179). In the end, such non-profits re-create a system whereby groups of largely white, educated, class-privileged professionals decide how resources are distributed among the poor, without much input from the populations being served. Focusing on providing social services and creating policy change undermines the kind of grassroots organization and movement-building Spade argues is key to creating sustained and meaningful change (pp. 175–176). Spade argues that this model has become prevalent in the lesbian and gay movement over the past several decades, and that, to avoid those pitfalls, trans activists must seek out innovative strategies (pp. 62-68, 198).

The only way activists can escape the patterns these organizations fall into is to avoid the model entirely by creating collectively organized, member- and activity-funded non-profits focused on direct services, lobbying for administrative change, and encouraging mass mobilization (pp. 180–184). The key point, he argues, is to use direct service interventions as a moment to induce involvement—to stop thinking about service seekers as “clients,” but instead as “members” and potential allies in the movement (p. 182). Individuals seeking services should always be offered opportunities to get involved and looked to as future leaders (p. 190).

Spade offers a striking example of the model he advocates through an experience from his own career. In 2005, a number of social justice organizations in New York City, including the Sylvia Rivera Law Project, collaborated with the Human Resources Administration (HRA)—the government agency that oversees New York’s municipal welfare programs—and developed a set of best practices to make public benefits more accessible and safer for trans individuals seeking assistance (p. 218). After the best practices document was finalized, however, HRA never enacted the policy (p. 218). In 2009, the same coalition of groups again advocated for HRA to execute new policies for benefit-seeking trans people, only “this time creating a grassroots organizing campaign that used open meetings, the participatory membership structures of the organizations in the coalition, public petitions, and online social networking tools” to increase involvement from benefits seekers themselves (p. 218). That campaign succeeded, but the final product implemented by the HRA

was watered-down compared to the proposals from the 2005 committee (p. 219).

Nonetheless, Professor Spade argues that even the coalition's watered-down strategy made the final policy guidelines more effective. The process of mobilizing benefits seekers and those who would be affected by the policy created networks of activists who could help with future campaigns (p. 219). Moreover, it raised awareness of the policy among impacted populations, increasing the likelihood the HRA will be forced to follow its own guidelines (pp. 219-220). The victory in Spade's eyes is not the written policy, which he argues can do nothing on its own, but the methods engaged to secure its passage.

A possible weakness of Spade's argument is that at times he seems to conflate the strategies of law reform and its substantive goals. He writes that the mainstream gay and lesbian law reform movement "is an example of [the] shift from a more transformative social movement agenda to an inclusion- and incorporation-focused professionalized non-profit legal reform project." (p. 59) Looking at examples of "formal legal equality demands [like legalizing same sex marriage], and the limited potential of those demands to transform the conditions facing highly vulnerable queer and trans people," Spade concludes that law reform as a tactic is not worthwhile (p. 62). He doesn't leave room for the possibility that a more nuanced law reform agenda, focused on changing policies that cause day-to-day hardship, could use the non-profit tools and structures already in place to more effectively end hardship without starting from scratch.

Part of Spade's argument is that law reform tactics, by virtue of how they are deployed, dictate substantive goals (pp. 62-65). The lesbian and gay movement "has come to reflect the needs and experiences of [its] leaders more than the experiences of queer and trans people not present," and done so in spaces dominated by lawyers and other professionals (p. 65). Nevertheless, his suggestion that law reform must be abandoned as a strategy does not follow inevitably from the experience of the lesbian and gay movement or others. If Spade is right and transformation of tactics is what is required, it's not clear why that effort can't profitably be spent making existing law reform tools more effective and more responsive to the neediest populations. Indeed, it is intuitively likely that many legal readers who enjoy class, race, gender, and educational privilege, and who are persuaded by Spade's critiques, will choose the more familiar path and look for better versions of strategies they already know. Spade's deep distrust of that method notwithstanding, there is no clear reason why the only viable avenues for change must be invented from whole cloth.

*Normal Life* is accessible and swift, consolidating and crystallizing much of Spade's earlier work.<sup>14</sup> The book is intentionally suited for use in undergraduate course work and movement building,<sup>15</sup> eschewing many conventions of a traditional legal text. His citations, for example, appear at a rate

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14. See generally Dean Spade, *Law as Tactics*, 21 COLUM. J. GENDER & L. 442 (2011); Dean Spade, *Trans Law Reform Strategies*, 30 WOMEN'S RTS. L. REP. 288 (2009); Spade, *supra* note 5.

15. *Trans Politics and Legal Structures with Dean Spade*, *supra* note 4, at 19:15.

more typical of social science than law, and nowhere conform to *The Bluebook*. Spade's critique instead offers a path for twenty-first century radical social change, which "imagines and demands an end to prisons, homelessness, landlords, bosses, immigration enforcement, poverty and wealth." (p. 69) He insists that reform efforts that work within the systems they hope to reform can only fail. No matter how impossible the work may seem, climbing straight up the sheer rock face of oppression facing the trans population is the only solution. Although many legal readers—in particular the white, class-privileged professionals whose strategies he most criticizes—may find his radical departure in tactics unappealing or unrealistic, Spade's critique insightfully reframes the received wisdom of how social change can be effected.

### III. TRANS POLITICS AT THE DAWN OF 2012: OCCUPY, *GLENN V. BRUMBY*, AND THE MASSACHUSETTS TRANSGENDER EQUAL RIGHTS ACT

*Normal Life* offers a provocative lens through which to view several recent legal and social developments. First, "gender identity" became a protected category in Massachusetts's hate crimes and anti-discrimination laws—except those affecting public accommodations. Second, in *Glenn v. Brumby*,<sup>16</sup> the Eleventh Circuit Court of Appeals held discrimination based on transgender status violates the Fourteenth Amendment. These first two developments represent the traditional law reform victories that Spade claims are hollow. Finally, the rise of the Occupy movement is exactly the kind of grass-roots activism Spade argues will create lasting change outside the non-profit-led law reform model. Occupy also demonstrates the risks and opportunities associated with Spade's strategy.

#### A. "An act relative to transgender equal rights."

In January of 2011, identical bills were introduced in the Massachusetts House of Representatives and Senate<sup>17</sup> that would make "gender identity or expression" a protected category for discrimination in housing,<sup>18</sup> education,<sup>19</sup> public accommodations,<sup>20</sup> employment,<sup>21</sup> access to credit,<sup>22</sup> and hate crimes.<sup>23</sup> The bills were referred to the legislature's Joint Committee on the Judiciary, which held public hearings about them in June, 2011.<sup>24</sup> After five more months

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16. 663 F.3d 1312, 1320 (11th Cir. 2011).

17. See H. 502, Gen. Court 187 (Mass. 2011), available at <http://www.malegislature.gov/Bills/PDF?billId=8177&generalCourtId=1>; S. 764, Gen. Court 198 (Mass. 2011), available at <http://www.malegislature.gov/Bills/PDF?billId=11076&generalCourtId=1>.

18. See MASS. GEN. LAWS ch. 151B, § 4.7 (2011).

19. See MASS. GEN. LAWS ch. 76, §§ 5, 12B (2011); see also ch. 71 §, 89 (2011).

20. See MASS. GEN. LAWS ch. 272, § 92A (2011).

21. See MASS. GEN. LAWS ch. 151B, § 4.1 (2011).

22. See MASS. GEN. LAWS ch. 151B, §§ 4.3B, 4.14 (2011).

23. See MASS. GEN. LAWS ch. 22C, § 32 (2011); see also ch. 265, § 39 (2011).

24. Brian MacQuarrie, *Hearing held on transgender rights bill*, BOS. GLOBE (Jun. 9, 2011)



of lobbying and legislative negotiation, on the day before the end of the fall legislative session, the Joint Committee reported the bill back to the House without the amendment to the public accommodations statute.<sup>25</sup> The next day the House and Senate voted to enact the bill as amended,<sup>26</sup> and Governor Deval Patrick signed it into law on December 23, 2011.<sup>27</sup> Although no report detailed why the public accommodations language was removed from the amended bill, activists on both sides strongly suggested that the media bombardment from the right, painting the public accommodations language as detrimental to “bathroom safety,” was responsible.<sup>28</sup>

Spade’s analysis suggests a strong critique of the Massachusetts law and the circumstances surrounding its adoption. By Spade’s reasoning, it should come as no surprise that the language dropped from the bill was the language most likely to benefit the most marginalized segments of the trans population. A trans person facing homelessness or extreme poverty might find some protection in the ability to access public accommodations such as homeless shelters and food banks, while they would take little comfort in non-discriminatory access to credit. And Spade’s critique of a non-profit advocacy system run predominantly by white professionals forecasts this outcome: the goals and results of their advocacy reflect the interests of those white professionals in leadership, while those interests most relevant to low-income trans people fall by the wayside. As Spade notes directly, adding gender identity to the hate crimes statute lends broader enforcement authority to police forces that may show little compassion for trans lives (p. 87).

Moreover, even if the Massachusetts law were redrafted to prohibit trans discrimination in public accommodations, Spade points out that courts interpreting similar anti-discrimination laws have actually made suits harder to win, not easier, and the countless administrative barriers facing trans individuals provide ample opportunities for exclusion not based on individual discrimination

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[http://articles.boston.com/2011-06-09/news/29639155\\_1\\_transgender-people-transgender-discrimination-gender-identity-and-expression](http://articles.boston.com/2011-06-09/news/29639155_1_transgender-people-transgender-discrimination-gender-identity-and-expression).

25. See H. 3810, Gen. Court 187 (Mass. 2011) (enacted), *available at* <http://www.malegislature.gov/Bills/PDF?billId=17620&generalCourtId=1>.

26. See Salsberg, *supra* note 2.

27. Press Release, Massachusetts Governor’s Office, Governor Patrick Signs Transgender Equal Rights Bill (Nov. 23, 2011), *available at* <http://www.mass.gov/governor/pressoffice/pressreleases/2011/111123-transgender-bill.html>.

28. “Advocates of the bill have heard that the public accommodations were removed primarily because of unfounded fears stoked by our opponents that including them would somehow make women and children unsafe in public restrooms and a misunderstanding that the public accommodations provision somehow equated to protections for transgender people in bathrooms and locker rooms.”

Gay and Lesbian Advocates and Defenders, *Frequently Asked Questions About the Transgender Equal Rights Bill*, BAY WINDOWS (Nov. 22, 2011) <http://www.baywindows.com/Frequently-Asked-Questions-About-the-Transgender-Equal-Rights-Bill>. Opponents of the bill launched a radio ad campaign deriding the proposed legislation as “the Transgender Bathroom Bill.” *Coalition Launches Radio Ads Exposing Bathroom Bill*, MASS. FAM. INST. (Nov. 10, 2011), <http://www.mafamily.org/state-legislation/bathroom-bill/coalition-launches-radio-ads-exposing-bathroom-bill/1358/>.

(pp. 82–83). Trans people might be denied credit or housing, for instance, not explicitly due to their gender identity but because they are unable to obtain enough matching forms of identification. Therefore, for the majority of trans people this victory will be symbolic at best. A comparison to Professor Spade's work with the HRA is also informative: he would likely argue that, notwithstanding the legal effects of the enacted statute, the opportunity to organize and inform the vulnerable trans populations in Massachusetts around this moment of reform is lost when the final version of a law is hashed out behind closed doors in the State House. Without organized participation in the law-making process, the most affected trans populations will not have the knowledge or support to pursue their rights.

The ultimate question is whether Spade's approach is superior. In discussing his work with the HRA, he notes that the organizing effort and its results are not a final outcome, but rather "a significant moment in [the coalition's] mobilization efforts, which will not stop with this singular achievement." (p. 220) Undoubtedly, the supporters of the Massachusetts legislation feel the same way; they hope that outlawing discrimination in housing and education is the beginning of a process that will allow trans people to access and demand more economic power, and fear that without legal protection their demands could be ignored outright. Professor Spade's response would be that incremental change of that sort, which fails to engage the populations it affects, can be undermined through judicial interpretation, insufficient enforcement, and lack of knowledge within the affected community. While Spade's critiques have bite, undoubtedly many readers will not heed Spade's call to abandon the traditional law reform toolbox in favor of an experimental activist strategy that insists on avoiding compromise and makes the perfect the enemy of the good. But even readers who choose a moderate path can no doubt find a useful antidote to complacency in Spade's analysis.

### **B. *Glenn v. Brumby***

Spade would identify essentially the same problems with the Eleventh Circuit's holding in *Glenn*. The plaintiff in that case, an editor in the Georgia General Assembly's Office of Legislative Counsel,<sup>29</sup> was immediately fired after informing her supervisor she would be presenting as a woman at work and changing her name.<sup>30</sup> She was expressly terminated because her supervisor felt her transition would be disruptive and would make other employees uncomfortable.<sup>31</sup> She sued her supervisor under 42 U.S.C. § 1983, arguing she had been discriminated against on the basis of sex and on the basis of a medical condition (gender identity disorder) in violation of the Fourteenth Amendment's

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29. *Glenn v. Brumby*, 663 F.3d 1312, 1313-14 (11th Cir. 2011).

30. *Id.* at 1314.

31. *Id.*

Equal Protection Clause.<sup>32</sup> The District Court granted summary judgment on Glenn's sex discrimination claim, but also granted summary judgment for her supervisor on the medical condition claim, and both parties appealed.<sup>33</sup>

Relying on *Price Waterhouse v. Hopkins*,<sup>34</sup> the Eleventh Circuit panel found that behavioral stereotyping based on gender presentation constitutes discrimination on the basis of sex for Fourteenth Amendment purposes, just as it does under Title VII.<sup>35</sup> The court further held, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. . . . There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms."<sup>36</sup> The court further states that "[a]n individual cannot be punished because of his or her perceived gender non-conformity. Because these protections are afforded to everyone, they cannot be denied to a transgender individual."<sup>37</sup> Because the supervisor could not show a substantial state interest to support the discrimination, the court affirmed summary judgment for Glenn on the sex discrimination claim.<sup>38</sup> The medical condition claim was never reached by the court.<sup>39</sup>

Spade's critique flatly rejects this kind of progress as illusory and as ignoring the fundamental problems that create oppressive harm for trans people. Piecemeal law reform strategies have not worked in the context of race discrimination, he explains:

Narrowing political resistance strategies to seeking inclusion in anti-discrimination law makes the mistaken assumption that gaining recognition and inclusion in this way will equalize life chances and allow us to compete in the (assumed fair) system. This often constitutes a forfeiture of other critiques, as if the economic system is fair but for the fact that bad discriminators are sometimes allowed to fire trans people for being trans. Defining the problem of oppression so narrowly that an anti-discrimination law could solve it erases the complexity and breadth of the systemic, life-threatening harm that trans resistance seeks to end. (p. 86)

Again, his analysis would highlight that Glenn benefitted from the significant privilege of obtaining and retaining a job in the Georgia statehouse—and thus presumably had the requisite educational and professional history to be selected for such a position—a feat unlikely for many, if not most, trans people.

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32. *Id.* at 1313-14.

33. *Id.*

34. 490 U.S. 228 (1989).

35. *Glenn*, 663 F.3d at 1316.

36. *Id.*

37. *Id.* at 1319.

38. *Id.* at 1321.

39. *Id.*

The response that such litigation is a starting point from which other opportunities can grow, rather than a final victory, is not satisfying to Spade: “[o]ur demands for redistribution, access, and participation must be reflected in our resistance work every day—they can’t be something we come back for later.” (p. 69) He sees opening the door first for trans people with greater privilege as a hollow victory that will never improve the lives of trans people living in severe poverty or facing other intersecting forms of disadvantage. Precisely because such a high percentage of trans people face poverty, homelessness, and imprisonment, elite law reform strategies are particularly unsuited for activism aimed at improving the lives of trans individuals who could be subject to multiple forms of severe disadvantage.

### C. The Occupy Movement<sup>40</sup>

While Spade’s analysis would question the presumed value of these law reform victories, it would laud another development that occurred at the end of 2011: the rise of the Occupy movement. Originally sparked by a call to action posted on the *Adbusters* magazine blog,<sup>41</sup> demonstrators gathered in New York and began what turned into months of demonstrations, marches, teach-ins, and other non-violent protests eventually centered in Lower Manhattan’s Zucotti Park.<sup>42</sup> Similar Occupy groups cropped up in cities all over the United States and across the globe.<sup>43</sup> Although the movement grew out of populist discontent over economic inequality and an unresponsive government, the protestors have been criticized in the media for not having a coherent message, a recognizable leader, or a succinct list of demands.<sup>44</sup> And while Occupy activities have persisted in various forms and locations since September 2011, media commentators have asked whether the movement has come to an end, and what it has accomplished.<sup>45</sup>

Spade’s analysis would tell us that Occupy is in many ways the moment

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40. Some of the sources cited in this section are drawn from the syllabus of Spade’s Spring 2012 course *Law and Social Movements* at Seattle University School of Law, made available on Spade’s personal website at <http://www.deanspade.net/wp-content/uploads/2010/07/LSM-syll-spring-2012-for-web.pdf>.
  41. *#Occupywallstreet: A Shift in Revolutionary Tactics*, ADBUSTERS BLOG (July 13, 2011), <http://www.adbusters.org/blogs/adbusters-blog/occupywallstreet.html>.
  42. See Saki Knafo, *Occupy Wall Street’s 6-Month Anniversary Observed By Leftists, Crashed By Protestors*, HUFFINGTON POST (Mar. 17, 2012, 6:18 PM), [http://www.huffingtonpost.com/2012/03/17/six-months-in-occupy-look\\_n\\_1355749.html](http://www.huffingtonpost.com/2012/03/17/six-months-in-occupy-look_n_1355749.html).
  43. See generally *Occupy Protests Around the World: Full List Visualized*, THE GUARDIAN DATA BLOG, <http://www.guardian.co.uk/news/datablog/2011/oct/17/occupy-protests-world-list-map> (last visited Apr. 9, 2012).
  44. See Terra Lawson-Remer, *What Do the Occupiers Want?*, CNN GLOBAL PUB. SQUARE BLOG (Nov. 11, 2011, 11:19 AM), <http://globalpublicsquare.blogs.cnn.com/2011/11/11/what-do-the-occupiers-want>.
  45. See David Carr, *The Occupy Movement May Be in Retreat, but Its Ideas Are Advancing*, NY TIMES MEDIA DECODER BLOG (Feb. 9, 2012, 9:44 AM), <http://mediadecoder.blogs.nytimes.com/2012/02/09/the-occupy-movement-may-be-in-retreat-but-its-ideas-are-advancing>.

for which activists of various backgrounds have been waiting. Decision-making processes in the various occupations come through direct democracy in the form of “General Assemblies” that welcome and support the voices of marginalized members, including homeless and indigenous activists, among others.<sup>46</sup> Spade would particularly commend the thousands of activists who have come to rallies and developed relationships and knowledge that could help build momentum and leadership within the movement.

But Occupy also illustrates many of the concomitant risks associated with a de-centralized, dynamic movement, and the difficulties of implementing the strategies Spade suggests. On the one hand, gathering under the mantle of “The 99%” and working through democratically organized direct action brings together marginalized groups, avoiding the trap of dividing constituencies that Spade cautions against. Some commentators have noted, however, that political messages from many individual occupiers and Occupy groups have suffered from the same kinds of racialized imagery that Spade critiques in mainstream liberal movements, including comparisons between bank debt and slavery, and prominent imagery about hard-working and deserving middle-class whites<sup>47</sup> (pp. 92–93, 108–109). Some Occupy groups are also hesitant to address incidents of sexual violence within their encampments, in fear of diluting their economic message.<sup>48</sup> Spade acknowledges that a central challenge of resistance movements is generating the “consistent self-reflection and critique” necessary to avoid replicating received racist or classist stereotypes (pp. 210–212, 216–217). If that kind of focused self-critical effort is necessary even in collective, democratic, radical structures, the question arises whether the same effort can be profitably spent in a more traditional law reform setting. If constantly assessing whether an organization is still focused on the needs of its most vulnerable constituents can be a determining factor in its effectiveness, it may be that organizations with an established law reform skill set can utilize the same modifications in thought process and agenda without abandoning the tools they have at hand. Whether democratic de-centralized processes will necessarily better protect the interests of marginalized minorities than a refocused mainstream movement is by no means clear.

As with the other examples of transformative activism Spade highlights (*e.g.*, pp. 210–224), the Occupy movement is ultimately an experiment in twenty-first century activism, and no one can say yet what fruit it will bear. Activists can see Spade’s model at work, as well as some of the perils he acknowledges in transformative movement building and potential mitigating strategies. Even those readers unpersuaded by Spade’s call to abandon law reform tactics and non-profit strategies can see the power of direct action at

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46. *See, e.g., Decolonize Occupy Seattle!*, BLACK ORCHID COLLECTIVE (Oct. 22, 2011), <https://blackorchidcollective.wordpress.com/2011/10/22/decolonize-occupy>.

47. *See, e.g., Kenyon Farrow, Occupy Wall Street’s Race Problem*, AM. PROSPECT (Oct. 24, 2011), <http://prospect.org/article/occupy-wall-streets-race-problem>.

48. *Trans Politics and Legal Structure with Dean Spade*, *supra* note 4, at 50:00.

work, and may see the value in prioritizing the needs and experiences of marginalized groups in their work.

### CONCLUSION

Professor Spade admits that when confronted by his form of radicalism, “for a lot of people their first reaction is ‘oh, that’s impossible.’”<sup>49</sup> His answer to that anxiety is two-fold. First, the traditional law reform strategies of the past thirty to forty years only offer symbolic change at best, and at worst, they recapitulate the inequities they claim to combat. Second, even if the dreams of abolishing imprisonment, ending the disparity between poverty and wealth, and extinguishing violence cannot be achieved (a point he doesn’t necessarily concede), the benefits that will spiral from a transformative framework are more lasting and substantive than victories obtained through formal legal equality. Poignantly, though, he asserts how being labeled impossible offers the trans community a particular form of power:

Trans people are told by the law, state agencies, private discriminators, and our families that we are impossible people who cannot exist, cannot be seen, cannot be classified, and cannot fit anywhere. We are told by the better-funded lesbian and gay rights groups, as they continually leave us aside, that we are not politically viable; our lives are not a political possibility that can be conceived. Inside this impossibility, I argue, lies our specific political potential—a potential to formulate demands and strategies to meet those demands that exceed the containment of neoliberal politics. (p. 41)

From this starting point, Spade argues the only solution is to form strong bonds with marginalized communities and accept leadership from the most vulnerable members, who are likely to understand how harmful systems actually work, not just how they purport to work. Seeking this transformative change through mass mobilization is the only way to improve the life expectancy and health of those currently most at risk in the trans community.

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49. *Id.* at 16:00