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## Under the Cover of Gay Rights

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# UNDER THE COVER OF GAY RIGHTS

DEAN SPADE<sup>†</sup>

“Marriage is a wonderful institution . . . but who wants to live in an institution?”

Groucho Marx, quoted by Judge Reinhardt, *Perry v. Brown*<sup>1</sup>

“Race and gender restrictions shaped marriage during eras of race and gender inequality, but such restrictions were never part of the historical core of the institution of marriage.”

Judge Walker, *Perry v. Schwarzenegger*<sup>2</sup>

## I.

### THE MARRIAGE MYSTIQUE IN *PERRY* AND SAME-SEX MARRIAGE ADVOCACY

In his *Perry v. Brown* opinion, Judge Reinhardt devotes a great deal of attention to describing the significance of “marriage,” explaining why access to domestic partnership—a status granting all the same rights and responsibilities as marriage in California, but using a different name for the status—is not a sufficient substitute. He argues that the status of marriage is unique, and that the distinction between domestic partnership and marriage is a meaningful one and that same sex couples denied marriage but granted the same rights and responsibilities through domestic partnership are being denied something important. Along the way, he invokes numerous unsubstantiable<sup>3</sup> romantic

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1. *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012), *aff’g* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *cert. granted sub nom.* Hollingsworth v. Perry, 81 U.S.L.W. 3075 (U.S. 2012) (No. 12-144).

2. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993, *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (2012), *cert. granted sub nom.* Hollingsworth v. Perry, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

3. He writes, “The name ‘marriage’ signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships.” *Perry v. Brown*, 671 F.3d at 1078. Yet, of course, common sense suggests that relationships need be none of those things to have the legal status of “marriage,” and in fact marriages are quite frequently tumultuous, brief, and violent. There are 16,800 homicides due to domestic violence every year. NATIONAL COALITION AGAINST DOMESTIC VIOLENCE DOMESTIC VIOLENCE FACTS (2007), *available at* [www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf). Recent research suggests that marriage rates in the U.S. are dropping and many people believe that marriage is “obsolete.” D’VERA COHN, JEFFREY S. PASSEL, WENDY WANG & GRETCHEN LIVINGSTON, BARELY HALF OF U.S. ADULTS ARE MARRIED—A NEW LOW (2011), *available at* <http://www.pewsocialtrends.org/files/2011/12/Marriage->

clichés about marriage, largely about its relationship to human dignity and its recognition of enduring bonds of mutual care.<sup>4</sup> The mystique of marriage is central to Judge Reinhardt's reasoning. This mystique has long been critiqued by feminists and queers naming violence inside the family and resisting rigid gender roles and compulsory heterosexuality. Judge Reinhardt invokes the excitement of witnessing public marriage proposals "whether on bended knee in a restaurant or in text splashed across a stadium Jumbotron"<sup>5</sup> to describe the "cherished status of marriage."<sup>6</sup> Interestingly, he also invokes famous quotations from significant historical figures that call to mind an image of marriage as a trap and perhaps even as a form of social control.<sup>7</sup> But these are only invoked to demonstrate that domestic partnership is no replacement for the prized status of marriage, a status defined by a presumed shared romantic attachment that makes it so important that denying it to same-sex couples is an affront to human dignity. As Reinhardt describes it, while marriage exists to create particular material arrangements attendant to the government's preferred family structure, these arrangements do not capture the significance of marriage. It is marriage's romantic mystique—the social recognition of marriage—that really matters. "We do not celebrate when two people merge their bank accounts; we celebrate when a couple marries. . . . It is the principal manner in which the State attaches respect and dignity to the highest form of committed relationship and to the individuals who have entered into it."<sup>8</sup>

The sentimental mythologies about marriage delivered by the court in the *Perry v. Brown* opinion (and so many other marriage decisions and the same-sex marriage advocates' briefs) attest to some of the nagging contradictions that haunt same-sex marriage advocacy, the California litigation specifically, and the project of granting "marriage equality" or "the freedom to marry" generally.

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Decline.pdf (finding that 39% of people overall said that they believe marriage is obsolete, including 31% of married people). However, reference to inaccurate cultural fantasies about marriage is central to both the same-sex marriage litigation and the advocacy efforts of same-sex marriage proponents. For example, signs circulating in Washington State created by same-sex marriage advocates prior to the 2012 election read, "Marriage for All Loving and Committed Couples." See, e.g., Ross Murray, *Faith Leads for Marriage Equality*, GLAAD (Nov. 4, 2012, 9:37 AM), <http://www.glaad.org/blog/faith-leads-marriage-equality>. The group Washington United for Marriage states in its self-description, "We're a coalition of organizations, congregations, unions, and businesses working together to defend civil marriage for loving, committed gay and lesbian couples." *Wash. United for Marriage*, FACEBOOK, <http://www.facebook.com/WashingtonUnited> (last visited Jan. 18, 2013). The group's Facebook page is littered with photos of babies, weddings, and gay American flags that have rainbow stripes where the red and white stripes normally are. *Id.* The imagery, typical of same-sex marriage advocacy, invokes the romantic mystique surrounding marriage as well as the national narratives about legal equality discussed in this essay.

4. See, e.g., *Perry v. Brown*, 671 F.3d at 1078–79.

5. *Id.* at 1078.

6. *Id.*

7. He quotes Groucho Marx, above, as well as "Shakespeare's 'A young man married is a man that's marr'd,' Lincoln's 'Marriage is neither heaven nor hell, it is simply purgatory,' and Sinatra's 'A man doesn't know what happiness is until he's married. By then it's too late.'" *Id.*

8. *Id.* at 1079.

Living under a system where a marriage-based family structure is preferred and is granted over 1,000 federal legal rights and protections<sup>9</sup> aimed at promoting the life of those who conform to that model, is it accurate to identify being permitted to register to occupy such a confined and narrow status a “freedom?” Given that the entire point of legal marital status is to identify the government’s preferred way of forming a family and provide it with extensive benefits denied to all other forms of relationships, is it accurate to characterize efforts to access that status as efforts toward “equality?” Isn’t the term “marriage equality” a contradiction in terms, since marriage is about creating and maintaining a distinct hierarchy of relationships and distributing material necessities (health care, child custody, public benefits, immigration status) according to that hierarchy? And does it make sense to invoke the indignity of denying that status to gay and lesbian couples while casually referring to the apparently unquestioned legitimacy of denying such status to people in other potentially important, committed, enduring, financially interdependent relationships, such as siblings and roommates?

And what about the litigation that led to Proposition 8 and *Perry v. Brown*? If the advocacy groups that brought that litigation exist to make changes that will improve the lives of people facing homophobia and transphobia, why did they pour their resources into a case that is just about the word “marriage” in a state where all the material benefits of marriage were already granted to same-sex couples through domestic partnership? Was that the most urgent thing for them to work on? How did the priorities of those groups become so disconnected from the material interests of their purported constituents? How could this be justified as the priority case to bring, when, even if we just look in California, we can see pressing unmet needs for legal support of queer and trans people in the state’s monstrous and brutal prison system,<sup>10</sup> its voracious immigration enforcement system,<sup>11</sup> its cities where queer and trans poor people and people of color face

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9. *An Overview of Federal Rights and Protections Granted to Married Couples*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples> (last visited Jan 18, 2013) (citing GENERAL ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT: AN UPDATE TO PRIOR REPORT (2004), available at [www.gao.gov/new.items/d04353r.pdf](http://www.gao.gov/new.items/d04353r.pdf)).

10. California’s prison system is notoriously large and dangerous. In 2011, the U.S. Supreme Court ruled that California must reduce its size to comply with the Constitution’s ban on cruel and unusual punishment. *Brown v. Plata*, 131 S. Ct. 1910 (2011). The system was placed under receivership in 2006 to address the severe medical neglect of prisoners. Matt Clarke, *CA Prison Medical Care Receiver: Three Top Officials Ousted, Controversial Building Plan Opposed*, PRISON LEGAL NEWS (Dec. 28, 2012), <https://www.prisonlegalnews.org/display/Article.aspx?articleid=21789>. A 2007 study by the Center for Evidence Based-Corrections found that 59 percent of transgender prisoners had experienced sexual assault. VALERIE JENNESS, CHERYL L. MAXSON, KRISTY N. MATSUDA & JENNIFER MACY SUMNER, VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT (2007), available at <http://ucicorrections.seweb.uci.edu/files/BulletinVol2Issue2.pdf>.

11. The Obama Administration broke records in 2009, 2010 and 2011, deporting more people than ever before deported in the U.S. Brian Bennett, *Obama Administration Reports Record Numbers of Deportations*, L.A. TIMES (Oct. 18, 2011), <http://articles.latimes.com/2011/oct/18/>

police violence, displacement from gentrification, cuts to basic services, and more? What misguided buy-in to the same romantic fantasies about marriage could motivate the decision to prioritize this litigation in California, which generated considerable backlash, perhaps most intensely, and predictably, experienced by queer and trans people of color?<sup>12</sup> Was this the biggest affront to human dignity being perpetrated on queer and trans people by the state of California at the time this case was brought?

In the last several decades, scholars and activists have explored the contradictions inherent in same-sex marriage advocacy in the U.S.<sup>13</sup> What

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news/la-pn-deportation-ice-20111018; Corey Dade, *Obama Administration Deported Record 1.5 Million People*, KUOW.ORG (Dec. 24, 2012), <http://www.kuow.org/post/obama-administration-deported-record-15-million-people>. People, including queer and trans people, struggling in this system are not entitled to legal representation, face dangerous and sometimes deadly medical neglect, and often experience violence while imprisoned. See ADELE P. KIMMEL, CONAL DOYLE AND THOMAS M. DEMPSEY, LITIGATING MEDICAL NEGLECT CASES ON BEHALF OF IMMIGRANT DETAINEES: THE IMPACT OF THE NINTH CIRCUIT'S DECISION IN *CASTANEDA V. HENNEFORD* (2009), available at <http://publicjustice.net/sites/default/files/downloads/Litigating%20Medical%20Neglect%20Cases%20on%20Behalf%20of%20Immigrant%20Detainees.pdf>; Nancy López, *Transgender Immigrant Detainees Cut Off from Legal Help*, NEW AMERICAN MEDIA (Mar. 14, 2012), <http://newamericamedia.org/2012/03/transgender-immigrant-detainees-cut-off-from-legal-help.php>; SCHA LA, *Victoria Arellano, HIV+ Transwoman Dies in ICE Custody*, DAILY KOS (Aug. 28, 2007), <http://www.dailykos.com/story/2007/08/28/377547/-Victoria-Arellano-HIV-transwoman-dies-in-ICE-custody#>; Cindy Chang, *O.C. Immigration Detention Center Named Among Nation's 10 Worst*, L.A. TIMES, Nov. 15, 2012, <http://latimesblogs.latimes.com/lanow/2012/11/orange-county-immigration-detention-facility-named-one-of-10-worst-in-the-country.html>. An ACLU study of sexual abuse complaints in immigration facilities in the U.S. found California to have the second most complaints of any state, after Texas. *Sexual Abuse in Immigration Detention Facilities*, ACLU, <http://www.aclu.org/maps/sexual-abuse-immigration-detention-facilities> (last visited Jan. 18, 2013).

12. Although this is not the topic of this article, I will briefly note that the focus on marriage litigation at least in part stems from the heavy influence of wealthy donors and foundations who represent the interests of elite white gays and lesbians who are unlikely to be aware of or prioritize the concerns I listed above. For more discussion about the role of funding in determining the strategies and priorities of the most well-funded lesbian and gay rights groups, see DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* (2011); Rickke Mananzala & Dean Spade, *The Nonprofit Industrial Complex and Trans Resistance*, 5 SEXUALITY RES. & SOCIAL POL'Y 53 (2008). For more information on the backlash experienced by people of color after Proposition 8, see, e.g., Adele Carpenter, *Open Letter: Resisting the Racist Blame Game Post Prop 8*, RACIALICIOUS (Nov. 12, 2008), <http://www.racialicious.com/2008/11/12/open-letter-resisting-the-racist-blame-game-post-prop-8/>; Monica Roberts, *Dan Savage, Chill With Your Race Baiting*, FEMINISTE (Sept. 3, 2009), <http://www.feministe.us/blog/archives/2009/09/03/dan-savage-chill-with-your-race-baiting/>; *Dan Savage, Racism Has Its Rewards*, WOMANIST MUSINGS (Sept. 2, 2009), <http://www.womanist-musings.com/2009/09/dan-savage-racism-has-its-rewards.html>; Kirk Grisham, *From One White Gay Male to Another: Calling out the Implicit Racism in Dan Savage's 'Liberal' Politics & the 'It Gets Better' Campaign*, THE FEMINIST WIRE (Feb. 28, 2012), <http://thefeministwire.com/2012/02/from-one-white-gay-male-to-another-calling-out-the-implicit-racism-in-dan-savages-liberal-politics-the-it-gets-better-campaign/>; Pam Spaulding, *The N-Bomb Is Dropped on Black Passersby at Prop 8 Protests*, HUFFINGTON POST (Nov. 10, 2008), [http://www.huffingtonpost.com/pam-spaulding/the-n-bomb-is-dropped-on\\_b\\_142363.html](http://www.huffingtonpost.com/pam-spaulding/the-n-bomb-is-dropped-on_b_142363.html).

13. See, e.g., BEYOND MARRIAGE, BEYOND SAME-SEX MARRIAGE: A NEW STRATEGIC VISION FOR ALL OUR FAMILIES & RELATIONSHIPS (2006), available at

emerges from this ongoing conversation are two very different pictures of marriage. On one side, Judge Reinhardt and same-sex marriage advocates portray marriage as a desirable form of state recognition, essential to inclusion in the economy and to personal dignity. For them, marriage is an institution beneficial to society and to the individuals who marry because of how it organizes care, property, and sexuality.<sup>14</sup> Achieving access to same-sex marriage for couples is sometimes portrayed as a way to clear up injustice or inequality by helping same-sex couples better access taxation rules, health care systems, inheritance and other property, and child custody, though not in the case of California since these material matters were already addressed by recognition of domestic partnerships.

On the other side, critics of same-sex marriage advocacy portray marriage as

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[www.beyondmarriage.org/BeyondMarriage.pdf](http://www.beyondmarriage.org/BeyondMarriage.pdf) (arguing for broad recognition of diverse family arrangements and the separation of benefits and recognition from marital status); LISA DUGGAN, *THE TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* 43–66 (2003) (criticizing the neoliberal turn toward marriage and military service in gay and lesbian rights advocacy); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* (2008) (analyzing same-sex marriage advocacy and arguing that family and relationship recognition benefits should not be tied to marriage); Anna M. Agathangelou, M. Daniel Bassichis, & Tamara L. Spira, *Intimate Investments: Homonormativity, Global Lockdown, and the Seductions of Empire*, 100 *RADICAL HIST. REV.* 120, 121–23 (2008) (arguing that same-sex marriage advocacy reifies racialized and classed dichotomies of “good” vs. “pathological” populations, supporting the criminalization of queer and trans people of color); Marlon M. Bailey, Priya Kandaswamy & Mattie Udora Richardson, *Is Gay Marriage Racist?*, in *THAT’S REVOLTING!: QUEER STRATEGIES FOR RESISTING ASSIMILATION* 87 (analyzing marriage as a tool of white supremacy and arguing that same-sex marriage advocacy does not address the needs and concerns of people of color); Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 *TEMP. L. REV.* 709, 712, 734–821 (2002) (arguing “that marriage implicates serious and insoluble problems of equality, that the present regime is one of compulsory matrimony, and that the marital status of individuals is linked to the state in disturbing ways”); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, 6 *OUT/LOOK: NATIONAL LESBIAN & GAY QUARTERLY* 14, 14–16 (Fall 1989) (arguing that queer liberation is about dismantling gender, sexual and family norms and that the quest for same-sex marriage is not aligned with that project); Kenyon Farrow, *Is Gay Marriage Anti-Black?*, KENYON FARROW (Mar. 5, 2004), <http://kenyonfarrow.com/2005/06/14/is-gay-marriage-anti-black/> (identifying the anti-black racism of the marriage-focused lesbian and gay rights framework); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 *COLUM. J. GENDER & L.* 236 (2006) (critiquing same-sex marriage advocates’ articulation of conservative family formation norms and examining the shift in lesbian and gay politics toward the demand for marriage); Angela P. Harris, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14. *WM. & MARY BILL RTS. J.* 1539 (2006) (arguing that purported gay rights victories, including in marriage litigation, are actually part of broader neoliberal trends of privatization, depoliticization and the upward redistribution of wealth); Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 *WIDENER L. REV.* 309 (2005) (critiquing the demand for same-sex marriage as failing to oppose harmful racialized, classed and gendered state regulation of family formation norms).

14. *Perry v. Brown*, 671 F.3d 1052, 1069 n.4 (9th Cir. 2012) (describing the trial court’s findings that “(1) marriage benefits society by organizing individuals into cohesive family units, developing a realm of liberty for intimacy and free decision making, creating stable households, legitimating children, assigning individuals to care for one another, and facilitating property ownership” and that “(2) marriage benefits spouses and their children physically, psychologically, and economically”), *cert. granted sub nom.* *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

a method of racialized and gendered social control. They invoke long-term feminist and anti-racist arguments about how it is unjust to distribute key resources (such as avenues to legal immigration, health care benefits, Social Security survivor's benefits and tax benefits) according to family formation norms. They observe the long-term efforts of anti-racist and feminist advocates to de-link marital status from such apparatuses and reduce the legal significance of marriage and make it less difficult to get out of marriages.<sup>15</sup> These efforts, moreover, are related to analysis about the family as a site of danger and violence, particularly for women and children, that has been permitted and protected by the legal logic of the "private" realm of marriage and the property relationship between men and their children and wives.

Critics of same-sex marriage advocacy have further observed that because most of the privileges accorded to married people are most useful for those who have employer-provided health care benefits to share with spouses, property to pass on when they die, immigration status to share with a spouse and other such privileges, the same-sex marriage advocacy agenda primarily benefits white, wealthy people and marginalizes the key issues facing queer and trans immigrants, people of color, poor people, people with disabilities and youth.<sup>16</sup> They argue that the turn toward a pro-marriage agenda unfortunately mirrors right wing "family values" rhetoric and policymaking, abandoning queer, feminist, anti-racist and anti-colonial efforts to politicize family violence and gendered labor structures and dismantle rigid norms about sexuality and gender roles.<sup>17</sup> Instead, the critics claim, same-sex marriage advocacy produces an image of a "deserving" category of gay and lesbian people who meet straight society's norms (wealth, whiteness, monogamy, domesticity, consumption and patriotic complacency), further demonizing the queer and trans people who are cast as criminal and disposable in contemporary politics.<sup>18</sup>

The debate about marriage indicates a broader tension, also visible on other issues such as gay and lesbian military service and the passage of hate crimes legislation that enhances penalties for crimes motivated by bias based on sexual orientation or gender identity. That tension is about what the fundamental aims of queer and trans resistance should be. Is the goal to make people's sexual orientation irrelevant, so that being gay or lesbian is no obstacle to participating in key functions and institutions of American society, such as being a police officer, a soldier, a banker, or a spouse? According to that view, accessing legal inclusion in these institutions is an essential marker of desired equal citizenship. Opponents of this view argue that the aim of queer and trans politics should not be inclusion in systems that enforce colonial, gender and racial control, but to

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15. See, e.g., POLIKOFF, *supra* note 13; Franke, *supra* note 13; Robson, *supra* note 13; Willse & Spade, *supra* note 13.

16. Bailey, Kandaswamy & Richardson, *supra* note 13.

17. Ettelbrick, *supra* note 13; Franke, *supra* note 13; Harris, *supra* note 13.

18. Agathangelou, Bassichis & Spira, *supra* note 13.

dismantle such systems.<sup>19</sup> According to this view, inclusion is a trap—it legitimizes these systems and institutions as fair and neutral while they continue to perpetrate harm, and most queer and trans people reap no benefits from the surface change of formal legal equality. Further, battles for inclusion in such systems require investing in the romantic mythologies and distinctions between “deserving” and “undeserving” people that justify the harm these systems perpetrate.

This debate brings up basic questions about what it means to work for the well-being of queer and trans people. Is dismantling racism central or marginal to such a project? Is resisting colonialism central or marginal? These questions constitute a key divide within queer politics and other U.S. identity-based political movements. White people often articulate anti-racist or anti-colonial work (such as addressing criminalization, poverty, immigration enforcement issues) as beyond the scope of what is essential political terrain for people in the given identity group (e.g. women, queers, people with disabilities).<sup>20</sup> People of color, indigenous people and immigrants often observe that as long as these issues are left off the agenda (or worse, as long as the agenda aligns with the forces producing these crises for marginalized groups), that agenda is not really improving conditions for all the people with that identity, but actually is operating only for the good of the white people.<sup>21</sup> As a result, advocacy for “women” or “LGBT people” operating in this way might be for all such people in name, but in practice it is shaped by the concerns, perspectives, and needs of a narrow slice of that group—those least vulnerable and most easily assimilated in contemporary systems and institutions.

19. Bailey, Kandaswamy & Richardson, *supra* note 13; Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ: J. LESBIAN & GAY STUD. 437 (1997); Ettelbrick, *supra* note 13; Willse & Spade, *supra* note 13.

20. This dynamic has been described by many scholars and activists in many social movements, but a prominent example is the work of women of color feminists identifying how white feminists consistently have side-lined concerns and experiences of women of color, creating a “single-issue” politics that falsely universalizes white women’s experience as all women’s experience. See CHELA SANDOVAL, *METHODOLOGY OF THE OPPRESSED* 45–50 (2000).

21. We witness this divide in movements focused on reproductive health issues. “Reproductive rights” work has been criticized by “reproductive justice” activists and scholars who argue for a broader frame and a focus on anti-racism, poverty and anti-colonialism. They assert that failure to centralize race and poverty has meant that the reproductive rights movement has primarily fought for white women’s right to certain reproductive choices, and has both ignored the issues most pressing to women of color and made mobilized rhetoric and strategic alliances harmful to anti-racist movements. Loretta J. Ross, *The Color of Choice: White Supremacy and Reproductive Justice*, in *THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* 53, 53–65 (2006). In the context of disability politics, “disability justice” activists and scholars have articulated a similar critique of the limitations of “disability rights” advocacy. *Hanging Up My Hat. Falling into the Arms of Disability Justice*, CRIPCHICK’S BLOG (July 2, 2010, 8:18 PM), <http://blog.cripchick.com/archives/7037>; Mia Mingus, *Changing the Framework: Disability Justice: How Our Communities Can Move Beyond Access to Wholeness*, RESIST NEWSLETTER (RESIST: A Call to Resist Illegitimate Authority, Somerville, Mass.), Nov.–Dec. 2010, at 4 available at [http://www.resistinc.org/sites/default/files/NovDec10NL\\_sm.pdf](http://www.resistinc.org/sites/default/files/NovDec10NL_sm.pdf).

## II.

## GAY AND LESBIAN RIGHTS AS COVER FOR STATE VIOLENCE

These debates and tensions are not new in U.S. social movements generally or in queer and trans politics specifically. However, these conversations are surfacing in particularly important ways right now because of the role that legal equality for gay and lesbian people (and, in some instances, trans people) is playing in global discourses about human rights. Increasingly, the degree to which countries have adopted certain high-profile lesbian and gay-related law reforms, specifically granting marriage recognition and access to military service to gays and lesbians, is framed as central to a country's reputation regarding respect for human rights. In recent years, the U.S. and Israel have put significant resources into portraying countries with certain lesbian and gay rights in place as "modern" while framing countries that do not, particularly Arab and African countries, as "backward" and "undemocratic." The strategy of using gay and lesbian rights, particularly with regard to marriage and military participation, as a marker of being a human-rights respecting country, and particularly doing so in the face of charges of ongoing significant human rights violations, has been called "pinkwashing."<sup>22</sup> Prof. Katherine Franke summarizes pinkwashing:

A state's posture with respect to the rights of "its" homosexuals has become an effective foreign policy tool . . . to portray a progressive reputation when their other policies relating to national security, immigration, income inequality, and militarism are anything but progressive. . . . *Modern* states recognize a sexual minority within the national body and grant that minority rights-based protections. *Pre-modern* states do not. Once recognized as modern, the state's treatment of homosexuals offers cover for other sorts of human rights shortcomings. So

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22. See, e.g., Sarah Schulman, *Israel and 'Pinkwashing'*, N.Y. TIMES (Nov. 22, 2011), <http://www.nytimes.com/2011/11/23/opinion/pinkwashing-and-israels-use-of-gays-as-a-messaging-tool.html> [hereinafter Schulman, *Israel and 'Pinkwashing'*]; *An Open Letter to LGBTQI Communities and Allies on the Israeli Occupation of Palestine*, WWW.QUEERSOLIDARITYWITHPALESTINE.COM, <http://www.queersolidaritywithpalestine.com/> (last visited Jan. 18, 2013); Maya Mikdashi, *Gay Rights as Human Rights: Pinkwashing Homonationalism*, JADILAYYA (Dec. 16, 2011), [http://www.jadaliyya.com/pages/index/3560/gay-rights-as-human-rights\\_pinkwashing-homonationalism](http://www.jadaliyya.com/pages/index/3560/gay-rights-as-human-rights_pinkwashing-homonationalism); PINKWATCHING ISRAEL, [www.pinkwatchingisrael.com/portfolio/pinkwashing-kit/](http://www.pinkwatchingisrael.com/portfolio/pinkwashing-kit/) (last visited Jan. 18, 2013); Jasbir K. Puar, *The Golden Handcuffs of Gay Rights: How Pinkwashing Distorts Both LGBTIQ and Anti-Occupation Activism*, THE FEMINIST WIRE (Jan. 30, 2012), <http://thefeministwire.com/2012/01/the-golden-handcuffs-of-gay-rights-how-pinkwashing-distorts-both-lgbtqi-and-anti-occupation-activism/>; Sarah Schulman, *A Documentary Guide to Brand Israel and the Art of Pinkwashing*, MONDOWEISS (Nov. 30, 2011), <http://mondoweiss.net/2011/11/a-documentary-guide-to-brand-israel-and-the-art-of-pinkwashing.html>; Sarah Schulman, *Pink Washing: A Documentary Guide by Sarah Schulman*, RECAPS MAGAZINE, <http://recapsmagazine.com/rethink/pink-washing-a-documentary-guide-by-sarah-schulman/> (last visited Jan. 18, 2013); Denise Turner, *It's Okay to Be Gay in Israel—Unless You're Muslim*, WOMEN'S VIEWS ON NEWS (May 27, 2012), <http://www.womensviewsonnews.org/2012/03/its-okay-to-be-gay-in-israel-unless-youre-muslim/>.

long as a state treats its homosexuals well, the international community will look the other way when it comes to a range of other human rights abuses.<sup>23</sup>

Hilary Clinton's 2011 speech declaring that "gay rights are human rights,"<sup>24</sup> along with the prevalence of references to same-sex marriage and gay rights at the 2012 Democratic National Convention (DNC) and Obama's reference to gay marriage in his 2013 inauguration speech, are examples of American pinkwashing.<sup>25</sup> Clinton's speech evinces a relatively new logic in U.S. imperialism: that the U.S., regardless of failures to protect queer and trans people from state violence at home, will now use gay rights to exert pressure on countries where the U.S. has some ulterior motive. Clinton uses lesbian and gay rights to bolster the notion that the U.S. is the world's policing arm, forcing democracy and equality globally on purportedly backward and cruel governments. Gay rights operates as a new justification for this imperial role—a justification that fits well within the anti-Arab and anti-Muslim framings that have been developed during the War on Terror and portray Arab and Muslim countries as more sexist and homophobic than the U.S., European countries and Israel. At the DNC and his inauguration, Obama's support for same-sex marriage similarly helped him portray his administration as progressive and equality-loving in order to obscure his abysmal record on key issues such as austerity, his failure to close Guantanamo, ongoing drone strikes, harsh sanctions against Iran, the long wars in Iraq and Afghanistan, and his record-breaking rates of deportation.<sup>26</sup> Purported support for "gay rights," regardless of whether those rights are recognized in the U.S. or if they actually prevent or reduce harm facing queer and trans people, is used as a rationale for domestic and international regimes of racialized violence and warfare that continue to expand under the Obama administration. These declarations of gay rights aim to distract from and justify—to pinkwash—the brutal realities of U.S. politics and policy.

The term "pinkwashing" is most frequently used to describe the explicit strategy Israel has undertaken in recent years to market itself as a human rights leader based on its stances on same-sex marriage and LGBT military service. Israel has explicitly worked with marketing experts to "rebrand" itself, trying to overcome its international reputation as a brutal occupying force. The new image is focused on portraying Israel as a "modern democracy" in the Middle East,

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23. Katherine Franke, *Dating the State: The Moral Hazards of Winning Gay Rights*, 44 COLUM. HUM. RTS. L. REV. 1, 2–4 (2012).

24. *Hillary Clinton on Gay Rights Abroad: Secretary of State Delivers Historic LGBT Speech in Geneva*, HUFFINGTON POST (Dec. 6, 2011), [http://www.huffingtonpost.com/2011/12/06/hillary-clinton-gay-rights-speech-geneva\\_n\\_1132392.html](http://www.huffingtonpost.com/2011/12/06/hillary-clinton-gay-rights-speech-geneva_n_1132392.html).

25. See Kenyon Farrow, *Afterword: A Future Beyond Equality*, S&F ONLINE (2011–2012), <http://sfonline.barnard.edu/a-new-queer-agenda/afterword-a-future-beyond-equality/>.

26. Stephen Dinan, *Obama Administration Sets Deportation Record*, WASH. TIMES (Dec. 21, 2012), <http://www.washingtontimes.com/news/2012/dec/21/obama-administration-sets-deportation-record/>.

surrounded by countries with less enlightened policy and culture.<sup>27</sup> A key feature of that portrayal is the articulation of Israel as a country that recognizes gay and lesbian rights (specifically marriage and military service) and as an ideal destination for gay and lesbian tourism.<sup>28</sup> As part of its pinkwashing efforts, Israel has funded tours of Israelis to the U.S. in order to discuss Israel's marriage and military laws with respect to gays and lesbians.<sup>29</sup> It has provided financial resources to media outlets to produce news coverage about Israel as a gay and lesbian tourist destination.<sup>30</sup> Marketing Israel's gay friendly image to American audiences has been an explicit priority. Increasingly, queer and trans activists have been publicly responding to Israel's strategy, calling the attention of their intended audiences to the pinkwashing strategy and the motivations behind this mobilization of gay and lesbian equality rhetoric.<sup>31</sup>

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27. Katherine Franke provides a detailed account of the development of Israel's marketing campaign in *Dating the State*. Franke, *supra* note 23, at 5, 6. She also quotes Prime Minister Benjamin Netanyahu's May 2011 speech to the U.S. Congress, in which he summarized the message critics identify as pinkwashing: "In a region where women are stoned, gays are hanged, Christians are persecuted, Israel stands out. It is different." *Id.* at 9.

28. Benjamin Doherty, *Tel Aviv Is the World's Gayest Apartheid Travel Destination*, THE ELECTRONIC INTIFADA (Jan. 12, 2012, 3:02 PM), <http://electronicintifada.net/blogs/benjamin-doherty/tel-aviv-worlds-gayest-apartheid-travel-destination>; Philip Weiss & Adam Horowitz, *Sarah Schulman Takes on Pinkwashing at OUT Magazine*, MONDOWEISS (Sept. 10, 2012), <http://mondoweiss.net/2012/09/sarah-schulman-takes-on-pinkwashing-at-out-magazine.html>.

29. Wendy Elsheva Somerson, *Revealing the Truth Behind the Rainbow: Seattle's Anti-Pinkwashing Success*, TIKKUN (July 3, 2012), <http://www.tikkun.org/nextgen/revealing-the-truth-behind-the-rainbow-seattles-anti-pinkwashing-success>; *(In)Equality Forum 2012: Pinkwashing and Palestinian Queer Community*, ALTERNATIVE NEWS (May 6, 2012), <http://www.alternativenews.org/english/index.php/news/news/4366-inequality-forum-2012-pinkwashing-a-palestinian-queer-community.html>; Toshio Meronek, *De-Pinkwashing Israel*, TRUTHOUT (Nov. 17, 2012), <http://truth-out.org/news/item/12553-de-pinkwashing-israel>; Phan Nguyen, *Northwest Pinkwashing Events Cancelled, StandWithUs's Record of Queer Exploitation Exposed*, MONDOWEISS (Mar. 19, 2012), <http://mondoweiss.net/2012/03/northwest-pinkwashing-events-cancelled-standwithuss-record-of-queer-exploitation-exposed.html>.

30. See Weiss & Horowitz, *supra* note 28; Meronek, *supra* note 29; Schulman, *Israel and 'Pinkwashing'*, *supra* note 22; Terry Conway, *No to Brand-Israel Pinkwashing*, INTERNATIONAL VIEWPOINT (Sept. 6, 2012), <http://www.internationalviewpoint.org/spip.php?article2733>; *Tel Aviv Declared World's Best Gay Tourism Destination*, HAARETZ (Jan. 11, 2012, 11:18 AM), <http://www.haaretz.com/travel-in-israel/tel-aviv-declared-world-s-best-gay-travel-destination-1.406699>.

31. Katherine Franke, *PFLAG Holds Israeli Pinkwashing Event (Updated)*, HUFFINGTON POST (Feb. 22, 2012), [http://www.huffingtonpost.com/katherine-franke/pflag-israel-pinkwashing\\_b\\_1290935.html](http://www.huffingtonpost.com/katherine-franke/pflag-israel-pinkwashing_b_1290935.html); *(In)Equality Forum 2012: Pinkwashing & Palestinian Queer Community*, ALTERNATIVE NEWS (May 6, 2012), <http://www.alternativenews.org/english/index.php/news/news/4366-inequality-forum-2012-pinkwashing-a-palestinian-queer-community.html>; *(In)Equality Forum 2012—The Year's Biggest Pinkwashing Event—Take Action*, PALESTINIAN QUEERS FOR BOYCOTT, DIVESTMENT & SANCTIONS (March 29, 2012), <http://www.pqbds.com/2012/03/29/inequality-forum-2012-the-years-biggest-pinkwashing-event-take-action/>; *LGBT Film Festival: No Pride in Apartheid!*, QUEERS UNDERMINING ISRAELI TERRORISM, <http://www.quitpalestine.org/actions/frameline.htm> (last visited Nov. 19, 2012); Dave Markland, *Pinkwashing at Queer Film Fest: Queers Against Israeli Apartheid Picket*, COOP MÉDIA DE MONTRÉAL (Aug. 23, 2012), <http://montreal.mediacoop.ca/story/pinkwashing-queer-film-fest/12272>; Meronek, *supra* note 29; *Queers Against Israeli Apartheid*, *Vancouver Queer Film*

These controversies bring up tensions inherent to efforts to be included in government institutions and systems, like marriage and the military that have come to define the most visible contemporary gay rights advocacy in recent decades. When a multi-city U.S. tour of lesbian and gay rights activists from Israel funded by the Israeli Consulate visited Seattle in 2012, these tensions came to the surface. Queer and trans people concerned about the tour, myself included, reached out to organizations and institutions that had agreed to host events featuring the touring speakers.<sup>32</sup> As a result, several events were cancelled, and significant controversy erupted.<sup>33</sup> During that controversy, I had the opportunity to engage in dialogue with many people about what happened, including leaders of organizations that chose to cancel an event, leaders of organizations that chose not to cancel an event, constituents who thought it was a mistake that any of the events were canceled, and those who advocated for their cancellation. Those conversations exposed how the tensions outlined above about the nature of marriage and military service and their relationship to queer and trans resistance are particularly important to questions of international policy in this moment.

I heard two particular responses to the Seattle events in my conversations that are especially illuminating. First, many people who supported the tour and thought that none of the events should be cancelled argued that even if we opposed Israel's war crimes and treatment of Palestinians, we should be celebrating the Israeli government's embrace of gay rights. They argued that Israel's sponsorship of such speakers is a sign of progress to be celebrated by LGBT people everywhere. Second, in conversations with an LGBT legal organization that hosted one of the events with Israeli-Consulate sponsored visiting speakers, which was not cancelled, board members argued that because the event they hosted focused only on presentations by the visiting speakers about Israeli same-sex marriage litigation, it was "apolitical" and had nothing to do with the occupation or Israel's treatment of Palestinians. When this same group was invited to co-sponsor an event in the weeks that followed featuring Professor Katherine Franke talking about gay and lesbian rights in Israel/Palestine and her consultation with the Palestinian Bar Association about

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*Festival Urged to Come out Against Israeli Apartheid*, BDS MOVEMENT (Aug. 24, 2012), <http://www.bdsmovement.net/2012/vancouver-queer-film-festival-urged-to-come-out-against-israeli-apartheid-9450>; QUIT!, *Queers Tell LGBT Film Festival, Stop Pinkwashing Israeli Crimes*, INDYBAY (June 22, 2010 at 11:42 AM), <http://www.indybay.org/newsitems/2010/06/22/18651535.php>; *Vancouver Queer Film Festival: Come Out Against Israeli Apartheid!*, PINKWATCHING ISRAEL (Aug. 24, 2012), <http://www.pinkwatchingisrael.com/portfolio/vancouver-queer-film-fest/>.

32. Nguyen, *supra* note 29; Somerson, *supra* note 29; Dean Spade, *Response to Seattle Pinkwashing Events*, FACEBOOK (March 12, 2012), [http://www.facebook.com/notes/dean-spade/response-to-seattle-pinkwashing-events/389074711104912?comment\\_id=5290171](http://www.facebook.com/notes/dean-spade/response-to-seattle-pinkwashing-events/389074711104912?comment_id=5290171).

33. Lornet Turnbull, *Gay Leaders from Israel Snubbed by Seattle's Gay Commission*, SEATTLE TIMES (Mar. 17, 2012), [http://seattletimes.com/html/localnews/2017771557\\_israeligays17m.html](http://seattletimes.com/html/localnews/2017771557_israeligays17m.html); Nguyen, *supra* note 29.

supporting women lawyers,<sup>34</sup> they declined. They said that the board had decided that the event would be “political” because it would talk about the occupation of Palestine. They distinguished the event from the one they had hosted with the visiting speakers by stating that a discussion of same-sex marriage in Israel was not political and did not have to do with the occupation. Both of these responses reveal how efforts to politicize marriage and military service have been undermined by the last few decades of gay and lesbian legal equality politics. Both articulate an understanding of the reforms of these institutions as separate from issues of occupation and colonization—not relevant to the politics of state violence.

### III.

#### MARRIAGE AND MILITARY SERVICE IN CONTEXT

These responses are helpful to consider because of the questions they raise about the relationship between marriage and military service as goals of lesbian and gay rights advocates and the broader context of what marriage and militarism are. As I described above, U.S. queer and trans scholars and activists are engaged in significant debate about whether accessing marriage and military service are, on the one hand, important markers of progress on the road to equality or, conversely, investments in harmful institutions that are unlikely to benefit queer and trans people unless they are members of the elite classes within societies sharply divided by racism, wealth inequality and colonialism. Are marriage and the military essentially neutral (or even beneficial) institutions, inclusion in which is desirable as a marker of equal citizenship and an opportunity to access benefits denied to those excluded? This framing is certainly the loudest one, benefiting from state and corporate funding and media coverage, in both Israel and the United States, yet a look at these institutions in both contexts raises questions.

Critics of same-sex marriage and military service advocacy in the U.S. and critics of pinkwashing have suggested that it is necessary to look at what these institutions are in order to assess whether inclusion in them is a felicitous goal for queer and trans politics. The militaries of both the U.S. and Israel have been accused of war crimes, and operate daily in what have been identified as illegal and immoral occupations of Palestine in the case of Israel and of Puerto Rico, Guam, Hawaii, Alaska, the part of North America currently known as the continental United States, the Northern Mariana Islands, the Marshall Islands and more in the case of the U.S. Internally, the U.S. military has a culture and practices of sexism, racism, and torture that have been consistently identified by survivors and critics.<sup>35</sup> Recent publications and the exposure of classified

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34. Dean Spade, *LGBT and Women's Rights in Israel/Palestine*, FACEBOOK, <http://www.facebook.com/events/366538346718301/> (last visited Jan. 18, 2013).

35. See, e.g., PHYSICIANS FOR HUMAN RIGHTS, *BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY U.S. FORCES* (2005), available at <https://s3.amazonaws.com/>

documents have further highlighted the lawless violence of the U.S. military and the ways that its operations, such as the occupation of Iraq, are often motivated by profit-seeking corporations with high-level government ties rather than the democracy-spreading rationales commonly employed as justification.<sup>36</sup> The Israeli military's record similarly shows that from the initial ethnic cleansing project undertaken in 1948 when over 400 Palestinian villages were destroyed, the Israeli government has used military power to forcibly settle the land it now occupies and remove, destroy and erase the prior inhabitants. The recent outcry against the atrocities committed by Israel on the inhabitants of Gaza as well as the Israeli military's brutal 2010 attack on the flotilla bound for Gaza to deliver aid, have drawn further international attention.<sup>37</sup> Israel's increasing threats

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PHR\_Reports/break-them-down.pdf (describing consistent torture undertaken by U.S. military); PHYSICIANS FOR HUMAN RIGHTS, *BROKEN LAWS, BROKEN LIVES: MEDICAL EVIDENCE OF TORTURE BY U.S. PERSONNEL AND ITS IMPACT* (2008), available at [https://s3.amazonaws.com/PHR\\_Reports/BrokenLaws\\_14.pdf](https://s3.amazonaws.com/PHR_Reports/BrokenLaws_14.pdf) (describing consistent torture undertaken by U.S. military); PHYSICIANS FOR HUMAN RIGHTS, *LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY* (2007), available at [https://s3.amazonaws.com/PHR\\_Reports/leave-no-marks.pdf](https://s3.amazonaws.com/PHR_Reports/leave-no-marks.pdf) (describing consistent torture undertaken by U.S. military); SERVICEMEMBERS LEGAL DEFENSE NETWORK, *CONDUCT UNBECOMING: THE NINTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS"* (2003), available at [http://sldn.3cdn.net/d7e44bb7ad24887854\\_w6m6b4y13.pdf](http://sldn.3cdn.net/d7e44bb7ad24887854_w6m6b4y13.pdf) (describing homophobic harassment in the military and disproportionate impact of DADT on women); *Congress Asked to Address Racism in Military*, MSNBC (July 10, 2009), [http://www.msnbc.msn.com/id/31854789/ns/us\\_news-military/t/congress-asked-address-racism-military/](http://www.msnbc.msn.com/id/31854789/ns/us_news-military/t/congress-asked-address-racism-military/) (describing racism in U.S. military); Matt Kennard, *The Modern U.S. Army: Unfit for Service?*, THE GUARDIAN (Aug. 31, 2012), <http://www.guardian.co.uk/world/2012/aug/31/us-army-racism-iraq-afghanistan> (describing racism in U.S. military); Anna Mulrine, *Pentagon Report: Sexual Assault in the Military up Dramatically*, CHRISTIAN SCIENCE MONITOR (Jan. 19, 2012), <http://www.csmonitor.com/USA/Military/2012/0119/Pentagon-report-Sexual-assault-in-the-military-up-dramatically> (describing increasing sexual assault in the U.S. military); Kirk Semple, *Army Prosecutor Details Racial Abuse That Preceded Soldier's Suicide*, N.Y. TIMES (July 24, 2012), <http://www.nytimes.com/2012/07/25/nyregion/army-prosecutor-details-racial-abuse-that-preceded-soldiers-suicide.html> (describing racial harassment in U.S. military); Mark Thompson, *Is Sexual Violence Endemic to the U.S. Military?*, TIME (July 18, 2012) (describing sexual violence in the U.S. military), <http://nation.time.com/2012/07/18/is-sexual-violence-endemic-to-the-u-s-military/>; *Demand Accountability for Torture and Abuse*, AMNESTY INT'L, <http://www.amnestyusa.org/our-work/issues/torture/accountability-for-torture> (last visited Jan. 18, 2013); Lynette Holloway, *'Don't Ask Don't Tell' Hurts African-American Women the Most*, ROOT (Oct. 6, 2010), <http://www.theroot.com/views/dont-ask-dont-tell-hurts-african-american-women-most> (showing that African American women were disproportionately targeted under DADT because of sexism and racism).

36. See, e.g., NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* 389–94 (2007); Randall Amster, *WikiLessons: War Is a Joke But It Isn't Funny*, HUFFINGTON POST (Oct. 29, 2010), [http://www.huffingtonpost.com/randall-amster/wikilessons-war-is-a-joke\\_b\\_776084.html](http://www.huffingtonpost.com/randall-amster/wikilessons-war-is-a-joke_b_776084.html); James Glanz & Andrew W. Lehren, *Use of Contractors Added to War's Chaos in Iraq*, N.Y. TIMES (Oct. 23, 2012), [http://www.nytimes.com/2010/10/24/world/middleeast/24contractors.html?\\_r=0](http://www.nytimes.com/2010/10/24/world/middleeast/24contractors.html?_r=0); Robert Greenwald & Derrick Crowe, *No Success in Iraq — Unless You're a War Profiteer*, HUFFINGTON POST (Dec. 15, 2011), [http://www.huffingtonpost.com/robert-greenwald-and-derrick-crowe/no-success-in-iraq--unles\\_b\\_1151171.html](http://www.huffingtonpost.com/robert-greenwald-and-derrick-crowe/no-success-in-iraq--unles_b_1151171.html).

37. See, e.g., ILAN PAPPE, *THE ETHNIC CLEANSING OF PALESTINE* (2007); Isabel Kershner, *Deadly Israeli Raid Draws Condemnation*, N.Y. TIMES (May 31, 2010), <http://www.nytimes.com/2010/06/01/world/middleeast/01flotilla.html> (describing controversy surrounding the Israeli's

toward Iran are further building international opposition to Israeli militarism.<sup>38</sup>

Despite the long-term critique in many movements that define the American Left of militarism generally and U.S. and Israeli militarism specifically, the discourse about gay and lesbian soldiers serving in the U.S. and Israeli militaries has garnered support from many people who otherwise oppose the wars in Iraq and Afghanistan, Israeli attacks on Gaza in 2008-2009 and 2012, and other highly publicized Israeli and U.S. military activities. Images of gay and lesbian servicemembers in uniform holding hands and kissing in front of national flags have successfully stirred patriotic and pro-military sentiment, deadening critical thinking about patriotism and militarism by asserting such sentiments as a form of sympathy for gay and lesbian people. This linking of anti-homophobia with pro-military sentiment is not solely operating in the symbolic realm, it is has also manifested in the material world. In 2009, the passage of the Matthew Shepard, James Byrd Jr. Act—the bill that added “sexual orientation” and “gender identity or expression” to the federal hate crimes statute as an amendment to the Fiscal Year 2008 Department of Defense Authorization bill—was hailed as a victory by gay and lesbian rights advocates. The bill set aside the highest amount of money ever provided to the Department of Defense in U.S. history.<sup>39</sup> The increase in funding to the Department was made to cover the expense of Obama’s 100,000-person troop surge in Afghanistan.<sup>40</sup> Chandan Reddy has described the attachment of the hate crimes bill to the NDAA as “an act of genius” on the part of Congressional Democrats. Tying the federal LGBT hate crime legislation to a bill that raised military spending to its highest level in U.S. history brought

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military’s attack on the Gaza-bound Freedom Flotilla that killed nine people); Richard Falk, *Israel’s War Crimes*, THE NATION (Dec. 29, 2008), <http://www.thenation.com/signupad/12806?destination=article/israels-war-crimes> (describing how “Israeli airstrikes on the Gaza Strip represent severe and massive violations of international humanitarian law as defined in the Geneva Conventions”); Robert Fisk, *Why Do They Hate the West So Much, We Will Ask*, THE INDEP., Jan. 7, 2009, <http://www.independent.co.uk/voices/commentators/fisk/robert-fisk-why-do-they-hate-the-west-so-much-we-will-ask-1230046.html> (describing Israeli attacks on Gaza as war crimes); Jerrold Kessel & Pierre Klochender, *Israeli Soldiers Expose Atrocities in Gaza*, THE ELECTRONIC INTIFADA (Mar. 20, 2009), <http://electronicintifada.net/content/israeli-soldiers-expose-atrocities-gaza/8146> (describing Israeli soldiers’ descriptions of recent attacks on Gaza).

38. See, e.g., Thomas Erdbrink, *Nonaligned Nations Back Iran’s Nuclear Bid, But Not Syria*, N.Y. TIMES (Aug. 31, 2012), <http://www.nytimes.com/2012/09/01/world/middleeast/iran-criticizes-egypts-mohamed-morsi-over-syria-comments.html> (describing support for Iran’s nuclear program by the 120 nation Nonaligned Movement, and describing Israel’s threats against Iran’s nuclear program); Steven Lee Meyers, *Israeli Leader Makes Case Against Iran on U.S. TV*, N.Y. TIMES (Sept. 16, 2012), <http://www.nytimes.com/2012/09/17/world/middleeast/netanyahu-says-iran-is-20-yards-from-nuclear-bomb.html> (describing Israeli Prime Minister Benjamin Netanyahu’s pressure on the U.S. to establish a stronger response that would sooner trigger military intervention against Iran); CNN Wire Staff, *Netanyahu Urges U.S. to Set ‘Red Line’ for Iran*, CNN (Sept. 16, 2012), <http://www.cnn.com/2012/09/16/politics/israel-netanyahu-interview/index.html> (describing Israel’s mounting adversarial rhetoric regarding Iran and concerns about Israel making a pre-emptive strike against Iran).

39. CHANDAN REDDY, *FREEDOM WITH VIOLENCE: RACE, SEXUALITY AND THE U.S. STATE* 2 (2011).

40. *Id.*

Republican support needed to pass the hate crime law, since Republicans would favor the military expansion, and helped provide cover from attacks from the left on the military spending.<sup>41</sup>

The attachment of the hate crime bill to the military spending hike is a literal illustration of the broader operation of anti-homophobic justifications for quieting critiques of the growing military and police apparatuses.<sup>42</sup> Just as right-wing rhetoric about “family values” and backlash against feminism has helped critiques of marriage virtually disappear from American culture, the “War on Terror” context of heightened security rationales and feverish war-making has dimmed critical frameworks about defense spending and enabled new levels of secrecy in military actions to be justified and legitimized in U.S. culture and media.<sup>43</sup> In this environment, romantic narratives about desire to serve in the U.S. military appear to be sufficiently stirred by the Don’t Ask, Don’t Tell (“DADT”) controversy, aided by ubiquitous imagery of gay soldiers kissing in uniform, to obscure the current realities of U.S. military imperialism. More and more information circulates about heightening military violence, uses of torture, profit-based reasons for military occupations and the looting of U.S. tax dollars in those operations. Meanwhile the loud drumbeat of anti-Muslim racism combines with the sentimental lovesongs of gay and lesbian military pride to drown out critiques of war and militarism. Anti-homophobia operates as a fresh talking point in the portrayal of a U.S. military that brings “equality” and “democracy” to the Arab world.

Similarly, long-term left critiques of marriage have been silenced by the combination of relentless right wing family values rhetoric and the articulation of the desirability of marriage by same-sex marriage advocacy. Messages long contested by feminists and anti-racists—such as that children benefit from being raised by married parents, that married people are healthier and contribute more to society, or that marriage recognizes the most important relationship people

41. *Id.* at 3–4.

42. The Matthew Shepard, James Byrd Jr. Act also provides \$5 million per year in funding for fiscal years 2010 through 2012 to help state and local agencies. For more on the critique of hate crimes legislation and the move toward an anti-homophobic justification for expanding policing and criminalization, see KATHERINE WHITLOCK, IN A TIME OF BROKEN BONES: A CALL TO DIALOGUE ON HATE VIOLENCE AND THE LIMITATIONS OF HATE CRIMES LAWS (2001), available at <http://srjp.org/files/Broken%20Bones-1.pdf> (hate crimes legislation); Morgan Bassichis, Alexander Lee & Dean Spade, *Building an Abolitionist Trans & Queer Movement with Everything We've Got*, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 15 (Nat Smith & Eric A. Stanley eds., 2011).

43. Jose L. Gomez de Prado, *Beyond Wikileaks: The Privatization of War*, TRUTHOUT (Dec. 26, 2010), <http://archive.truthout.org/beyond-wikileaks-files-the-privatization-war66239> (describing lack of transparency regarding activities of private military and security companies contracting with the U.S. government who have been found to engage in torture, summary executions, arbitrary detention and human trafficking); COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC & CENTER FOR CIVILIANS IN CONFLICT, THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS 51–66 (2012) (describing how secrecy regarding drone strikes makes accountability to courts or Congress impossible).

can have—are now mobilized by same-sex marriage advocates and judges writing decisions that are victories for same-sex marriage advocacy. These pro-marriage messages are now articulated as anti-homophobic statements in the arguments for same-sex marriage.

Marriage is how the state ranks relationships by tying various property, parenting and tax statuses to how people organize their sexuality and families and register such arrangements with government agencies. Laws relating to marriage have traditionally operated to discipline unruly subjects, managing categorizations of race, gender, poverty, ability, criminality and nationality by imposing restrictions and/or avenues for relief reliant on marriage and parentage. The rules have changed over time but marriage's operation as an apparatus of social control remains. Despite reforms such as the elimination of anti-miscegenation laws by *Loving v. Virginia*,<sup>44</sup> which some like Judge Reinhardt may believe operated to fix marriage and eliminate injustice because racism and sexism "were never part of the historical core of the institution of marriage,"<sup>45</sup> marriage has consistently operated in explicitly and implicitly racialized and gendered ways to control family formation, migration, health, and wealth. The U.S. has a significant history of using laws and policies related to illegitimacy to exclude black people from key services and privileges. The fight against illegitimacy laws in the U.S. was primarily waged by advocates aimed at addressing the educational and economic marginalization that the laws caused for black people. In the post-*Brown* era, illegitimacy laws became a favored way to exclude black children from programs and services.<sup>46</sup> This history might give pause to same-sex marriage advocates and judges who invoke the desirability of legitimate children as a neutral indicator of the desirability of marriage. Instead, anti-racist and feminist concerns about marriage law and how it structures

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44. *Loving v. Virginia*, 388 U.S. 1 (1967).

45. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. 2012) (No. 12-144).

46. Serena Mayeri, *What's Wrong with Illegitimacy? A Brief History*, Address at American University Washington College of Law: The New Illegitimacy Conference (Mar. 15, 2011) (on file with author). Mayeri writes:

Although illegitimacy penalties were centuries-old and firmly rooted in religious and civil traditions, in the post-*Brown* period many efforts to punish non-marital childbirth were thinly veiled attacks on the civil rights movement and on racial desegregation. Ostensibly race-neutral illegitimacy penalties adopted in the 1960s purposefully targeted African Americans, often in ways that reinforced both racial segregation and poverty . . . . In cases like *Levy v. Louisiana*, the first Supreme Court case to invalidate an illegitimacy-based classification on constitutional grounds, plaintiffs argued that illegitimacy penalties had the purpose and effect of discriminating on the basis of race, and therefore violated equal protection. They had powerful statistical evidence of what we would now call disparate impact on African Americans—often upwards of 75-90 percent of the families affected by illegitimacy penalties were black.

*Id.* at 3-4.

racialized-gendered social control have fallen away and conservative pro-marriage arguments have been resuscitated by same-sex marriage advocacy. Feminist activism in the 1960s and 1970s included advocacy for legal reforms that made it easier to get out of marriages and to separate certain rights and statuses from marital status. In the backlash against feminism that emerged strongly in the 1970s and has continued through today, anti-poor and anti-black discourse and policymaking have increasingly framed poverty as a result of the lack of marriage in black populations.<sup>47</sup> Under both President George W. Bush and President Barack Obama, “Health Marriage Promotion” initiatives have been used to encourage low-income women to marry, including at times through cash incentives.<sup>48</sup> Thus, the U.S. has continued its tradition of managing outsider and disposable populations with marriage and pretending that unmarried parenting, rather than racism, austerity, deindustrialization, war, and the dismantling of welfare and labor protections is responsible for growing poverty.

In Israel, marriage law is also very controversial. Like in the U.S., it plays a key role in maintaining basic conditions of racialized hierarchy necessary to settler colonialism. This happens in a number of ways that are very obvious parts of the ethnic cleansing project that seeks to win a demographic war to ensure that

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47. Perhaps the most infamous document in this trend is the 1965 paper, OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NAT’L ACTION* (1965), usually referred to as the Moynihan report. The report argued that Black family life was a “tangle of pathology . . . capable of perpetuating itself without assistance from the white world” and that “at the heart of the deterioration of the fabric of Negro society is the deterioration of the Negro family.” *Id.* at 47. It asserted that economic and political equality for Black people hinged on increasing the prevalence of heterosexual nuclear families among Black people. It was a key document in establishing the racist, sexist, anti-poor idea that welfare receipt is a cause and effect of non-adherence to patriarchal norms of family structure. This reasoning was also exceptionally visible during the debates regarding Clinton-era “welfare reform” and the findings of the Personal Responsibility and Work Opportunity Act clearly link childbirth outside of marriage to poverty in a way that, given the debates leading up to it that centered on references to the mythical black “welfare queen,” are highly racialized. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193 § 101 (1996) (linking poverty to having children out of wedlock); KENNETH J. NEUBECK & NOEL A. CAZENAVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA’S POOR* 30–38 (2001) (describing the targeting of black women in welfare policy debates and reforms); Holloway Sparks, *Queens, Teens and Model Mothers: Race, Gender and the Discourse of Welfare Reform*, in *RACE AND THE POLITICS OF WELFARE REFORM* 170, 188–89 (Sanford F. Schram, Joe Soss & Richard C. Fording eds., 2003) (describing the invocation of racist and sexist images of “welfare queens” to justify punitive policy reforms); Priya Kandaswami, *State Austerity and the Racial Politics of Same-Sex Marriage in the U.S.*, 11 *SEXUALITIES* 706, (2008) (describing the gendered and racialized dynamics of the operation of marriage promotion as part of austerity measures designed to reduce welfare roles).

48. See, e.g., Phoebe G. Silag, *To Have, To Hold, To Receive Public Assistance: TANF and Marriage Promotion Policies*, 7 *J. GENDER RACE & JUST.* 413, 419 (2003) (describing West Virginia’s \$100 bonus to public assistance recipients who are married); Sarah Olson, *Marriage Promotion, Reproductive Injustice, and the War Against Poor Women of Color*, *DOLLARS & SENSE*, Jan.–Feb. 2005, at 14, available at <http://www.dollarsandsense.org/archives/2005/0105olson.html> (describing marriage promotion programs that “provid[e] extra cash bonuses to recipients who get married, deduct[] money from welfare checks when mothers are living with men who are not the fathers of their children, [and] increase[] monthly welfare checks for married couples”).

Jews outnumber Arabs and that a particular narrowly defined kind of Jewish life is cultivated. One obvious example is that civil marriage does not exist in Israel so marriage between people of different religions, or even between people who have different matrilineal or patrilineal Jewish heritage, is not allowed and hundreds of Israeli couples fly to Cypress every month to marry.<sup>49</sup> This approach to marriage is contested by many Israelis who see it as a threat to freedom of religion, but it more broadly attests to the use of marriage as a tool of population control aimed at settlement and population displacement and replacement.<sup>50</sup> Another prominent example is the Citizenship and Entry into Israel Law (Temporary Order) (2003)<sup>51</sup>—the 2003 law that established that Palestinian citizens of the Occupied Territories who marry Israeli citizens cannot acquire Israeli residency. Israeli citizens who marry people from other places win family unification through their marriages—their new spouses can come and live with them in Israel. Since most of the Israeli citizens who marry Palestinians from the Occupied Palestinian Territories (“OPT”) are part of the 20 percent of Israeli citizens who are Palestinian, this primarily means that Palestinian families are divided in citizenship by the 2003 law. While Jewish people all over the world have the right to citizenship in Israel, and others who marry Israeli citizens can acquire residency in Israel, Palestinians in the OPT cannot access residency status through their spouses in Israel. Critics of the law argue that it is motivated by Israel’s desire to keep a Jewish demographic majority in Israel.<sup>52</sup> Immigration

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49. Suraya Daddo, *Love and Marriage in Israel: Palestinians and Non-Orthodox Israelis Need Not Apply*, IF AMERICANS KNEW, [http://www.ifamericansknew.org/cur\\_sit/marriage.html](http://www.ifamericansknew.org/cur_sit/marriage.html) (last visited Feb. 5, 2013); Jonah Mandel, “Israel Is the Only Democracy in the World Where Jews Don’t Have Freedom of Religion”, FAILEDMESSIAH.COM (July 27, 2011), [http://failedmessiah.typepad.com/failed\\_messiahcom/2011/07/israel-is-the-only-democracy-in-the-world-where-jews-dont-have-freedom-of-religion-456.html](http://failedmessiah.typepad.com/failed_messiahcom/2011/07/israel-is-the-only-democracy-in-the-world-where-jews-dont-have-freedom-of-religion-456.html); Sarah Stricker, *Wedding Refugees*, JEWISH WORLD (Nov. 20, 2009, 7:58 AM), <http://www.ynetnews.com/articles/0,7340,L-3807730,00.html>.

50. A parallel can be seen in the history of European settlement in the U.S., which similarly encouraged settlement and marriage simultaneously, seeking to populate the land with settlers while removing the indigenous population. Laws like the Homestead Act (1862) and the Donation Land Law (1850) granted land to adult male settlers who would move west and settle the land, and offered to double the acreage if the settler was married. *Northwest Homesteader*, CENTER FOR THE STUDY OF THE PACIFIC NORTHWEST, <http://content.lib.washington.edu/curriculumpackets/homesteaders/intro.html> (last visited Feb. 5, 2013).

51. See Albert K. Wan, *Israel's Conflicted Existence as a Jewish Democratic State: Striking the Proper Balance Under the Citizenship and Entry into Israel Law*, 29 BROOK. J. INT'L L. 1345, 1346 (2004) (arguing that the Citizenship and Entry into Israel Law is an example of the paradox facing Israel in its simultaneous efforts to maintain a Jewish majority and its purported commitment to principles of equality regarding religion, race and sex).

52. See ADALAH – LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL, *INEQUALITY REPORT: THE PALESTINIAN ARAB MINORITY IN ISRAEL* 11 (2011). The report further describes how the law has developed since its 2003 passage:

Temporary visitor permits are granted to Palestinian spouses in very restricted circumstances since July 2005, and in May 2006 the Israeli Supreme Court upheld the law in a split 6-5 decision. In 2007 the ban was extended to include spouses from “enemy states” Syria, Lebanon, Iraq and Iran, and “anyone living in an area in which operations that constitute a threat to the State of Israel are

policy in Israel, generally, is focused on prioritizing immigration of Jewish people. The three-track immigration system prioritizes Jewish immigration with immediate and automatic citizenship, places non-Jewish foreign immigration second with a multi-year process for gaining residency or citizenship, and provides a third track for spouses of Palestinian citizens of Israel as long as they are not residents of the OPT or states that Israel has declared “enemy states.”<sup>53</sup> Unequal marital privileges are part of the ethnic cleansing project of the state of Israel and impact thousands of families, maintaining forced separations, depriving Palestinian citizens of Israel of access to state resources for their families that are available to Jewish citizens of Israel, and restricting movement for Palestinians. Clearly, increased access to Israel’s marriage regime for same-sex couples does not change or reform the fundamental role of Israeli marriage law in enforcing occupation and state-sponsored racism. Lesbian and gay Palestinian citizens of Israel whose partners are from the OPT or “enemy states” face the same restrictions that straight people do. What does it mean to seek recognition in a marriage system overtly created to forward an ethnic cleansing process? What does it mean to declare such recognition a victory for equality or evidence of enlightened human rights policy, and what does it mean to discuss the litigation of such recognition as “apolitical” or separate from the occupation?

The intensifying discourse of U.S. and Israeli human rights leadership buoyed by same-sex marriage and LGB (and, in Israel, T) military service brings to the surface in new ways ongoing tensions in queer and trans politics about efforts at inclusion in central state institutions and systems. In the context of contemporary projects of security and state violence, lesbian and gay rights discourse occupies a recuperative role for institutions and practices long-contested by anti-racist, anti-colonial, feminist and queer intellectual traditions and social movements. The most well-funded and visible white-centered lesbian and gay rights advocacy organizations have spent the last few decades building a legal equality agenda that is complementary to key conservative trends such as “War on Terror”-era militarism, surveillance and patriotism, the racist and anti-poor valorization of marriage of the family values discourse, and the “law and order” politics that bolsters criminalization and imprisonment in the U.S. and

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being carried out,” according to the security services. The Gaza Strip was added to this list in June 2008.

*Id.* at 10–11.

53. *Id.* at 17. Adalah notes:

International organizations, including United Nations human rights treaty bodies, have repeatedly called on Israel to revoke the law. Most recently, in July 2010, the UN Human Rights Committee “reiterate[d] its concern that the Citizenship and Entry into Israel Law . . . remains in force and has been declared constitutional by the Supreme Court.” The committee recommended that Israel revoke the law and “review its policy with a view to facilitating family reunifications of all citizens and permanent residents without discrimination.”

*Id.*

Israel.<sup>54</sup> The Israeli and U.S. governments have taken up this framing with increasing fervor, using it to articulate Israel and the U.S. as the most enlightened democratic nations, authorized to police and control “backward” others globally. Gay rights is operating to “pinkwash” the terrifying expansion of racist violence, colonial occupation, and warfare being perpetrated by these regimes.

#### IV.

#### CRITICAL QUEER AND TRANS POLITICS

While the divides within queer and trans politics are not new, particularly between white gay and lesbian rights politics and racial justice centered queer and trans politics, the increasing use of the claim of gay-friendliness to obscure, justify and legitimize systems of racial and colonial violence are sharpening discernment in U.S. queer and trans politics regarding legal inclusion campaigns. As such campaigns have grown, primarily focusing on marriage, military service, and hate crimes legislation, so has the critical scholarship examining the pitfalls of these strategies, as well as the infrastructure of activist organizations and groups formed to pursue strategies that directly attack state violence against queer and trans people and that seek to dismantle, rather than join, institutions primarily responsible for such violence.

These scholars and activists are suspicious of reforming institutions that are central nodes of racialized-gendered social control. They ask questions about the nature of the institutions themselves, rather than believing that wrapping those things—police, prison cells, tanks, bulldozers, checkpoints, or family formation norms that determine immigration and health care access—in rainbow flags redeems them. The movement for Boycott, Divestment and Sanctions against Israel (which Israel has criminalized<sup>55</sup>) has worked to promote an understanding of Israel as an apartheid state often making comparisons to apartheid South Africa.<sup>56</sup> This framework has helped many in the U.S. think more critically

54. ADDAMEER, QUARTERLY UPDATE PALESTINIAN PRISONERS (15 JANUARY–30 AUGUST 2012), available at [http://www.addameer.org/files/Addameer%20Quarterly%20Update%20on%20Palestinian%20Prisoners%20\(15%20January%20-%2030%20August\)\(1\).pdf](http://www.addameer.org/files/Addameer%20Quarterly%20Update%20on%20Palestinian%20Prisoners%20(15%20January%20-%2030%20August)(1).pdf) (providing statistics about Palestinian prisoners in Israeli prisons and describing recent hunger strikes by Palestinian prisoners); *NYPD Opens Branch in Kfar Saba*, TIMES OF ISR. (Sept. 7, 2012), <http://www.timesofisrael.com/nypd-opens-local-branch-in-kfar-saba/> (describing the opening of the New York City Police Department’s new branch in Israel, created to strengthen ties between the NYPD and Israeli security forces).

55. Edmund Sanders, *Israel Law Targets Boycott Campaigns*, L.A. TIMES (July 12, 2011), <http://articles.latimes.com/2011/jul/12/world/la-fg-israel-boycott-20110712>; Danna Harman & Jonathan Lis, *European Union Expresses Concern over Israel’s Boycott Law*, HAARETZ (July 13, 2011), <http://www.haaretz.com/news/diplomacy-defense/european-union-expresses-concern-over-israel-s-boycott-law-1.373076>; *Israel Anti-Boycott Law an Attack on Freedom of Expression*, AMNESTY INT’L (July 12, 2011), <http://www.amnesty.org/en/news-and-updates/israel-anti-boycott-law-attack-freedom-expression-2011-07-12>.

56. In December 2012, the African National Congress in South Africa, South Africa’s ruling party, made Boycott, Divestment and Sanctions against Israel part of its official policy. Ali

about Israeli institutions like Israeli marriage law that maintain separate tracks based on religious, ethnic and national identity. The idea that “good” policies about gay and lesbian rights in Israel and/or the U.S. are clear victories is increasingly contested. Critics argue that the purported progress on these fronts has failed to actually address the ongoing harms queer and trans people face and the broader systems of gender and sexual normalization that make queer and trans life precarious. Instead, the reforms advocated for primarily by white elites have offered symbolic change, or change that is only beneficial or most beneficial to elites, and/or have actually expanded or deepened technologies of control and violence.<sup>57</sup>

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Abunimah, *In Historic Decision, South Africa's ANC Makes Support for Israeli Boycott Its Official Policy*, THE ELECTRONIC INTIFADA (Dec. 20, 2012), <http://electronicintifada.net/blogs/ali-abunimah/historic-decision-south-africas-anc-makes-support-israel-boycott-its-official>.

57. A common example of this analysis is the critique of hate crime legislation. Critics argue that hate crime laws have no deterrent effect and do not and cannot actually increase the life chances of the people they purportedly protect. However, they do strengthen and legitimize the criminal punishment system, which targets the very people these laws are supposedly passed to protect. The criminal punishment system was founded on and constantly reproduces the same biases (racism, sexism, homophobia, transphobia, ableism, xenophobia) that advocates of these laws want to eliminate. This is no small point, given the rapid growth of the U.S. criminal punishment system in the last few decades, and the gender, race, and ability disparities in whom it targets. The U.S. now imprisons 25 percent of the world's prisoners, although it has only 5 percent of the world's population. Imprisonment in the United States has quadrupled since the 1980s and continues to increase despite the fact that violent crime and property crime have declined since the 1990s. The U.S. has the highest documented rate of imprisonment per capita of any country. More than 60 percent of U.S. prisoners are people of color. THOMAS P. BONCZAR, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001* (2003); WILLIAM J. SABOL & HEATHER COUTURE, *PRISON INMATES AT MIDEAR 2007* (2008). Critics of hate crime legislation argue that it expands punishment in the name of marginalized groups, while those punishment systems continue to target those same groups and to seek expansion (especially in the context of prison privatization) under any rationale. Further, the fight for hate crime legislation tends to mobilize the myths about policing and law enforcement in the U.S. that obscure its central role in controlling and harming people of color and poor people. For queer and trans people, who face significant targeting and violence on the streets by police and inside prisons, the question of whether promoting hate crime legislation is at all beneficial for queer and trans well-being has become hotly contested. See generally JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* (2011) (describing the historical and contemporary criminalization of queer and trans people); STOP PRISON RAPE & NATIONAL PRISON PROJECT, *AMERICAN CIVIL LIBERTIES UNION, STILL IN DANGER: THE ONGOING THREAT OF SEXUAL VIOLENCE AGAINST TRANSGENDER PRISONERS* (2005), available at <http://www.justdetention.org/pdf/stillindanger.pdf> (describing pervasive violence against trans people in U.S. prisons); SYLVIA RIVERA LAW PROJECT, “IT’S WAR IN HERE”: A REPORT ON THE TREATMENT OF TRANSGENDER & INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS (2007), available at <http://srp.org/files/warinhere.pdf> (describing violence against trans prisoners in New York prisons); WHITLOCK, *supra* note 42 (critiquing hate crime legislation); Bassichis, Lee & Spade, *supra* note 42 (critiquing hate crime legislation and proposing that queer and trans resistance should work on abolishing police and prisons rather than reforming criminal law in ways that expand its reach); Sarah Lamble, *Retelling Racialized Violence, Remaking White Innocence: The Politics of Interlocking Oppressions in Transgender Day of Remembrance*, 5 *SEXUALITY RES. & SOC. POL’Y* 24 (2008) (examining race dynamics in the common responses to anti-trans violence that often lead to pro-criminalization messaging); Alexander L. Lee, *Gendered Crime & Punishment: Strategies to Protect Transgender, Gender Variant & Intersex People in America’s*

As material conditions continue to worsen, including the maldistribution of wealth, environmental degradation and climate change, rising rates of criminalization and deportation, growing aggression toward Iran, continuing U.S. drone strikes and Obama's embrace of austerity and preventive detention practices, continuing imprisonment and intermittent bombing of the population of Gaza, and theft of Palestinian land and water, the U.S. and Israel are heightening the use of gay and lesbian rights as a screen for conditions that are far from democratic or humane. Now more than ever, queer and trans people and others who care about dismantling violent gender, sexuality and family formation norms need to understand that the supposed privileges and indicators of human dignity being offered to select gay and lesbian citizens may be less desirable than the mystification of romantic love, military uniforms, and police protection make them appear to some. In fact, our imagination of a world without coercive and violent gender, sexuality, and family formation norms requires the elimination of militaries, borders, prisons, and civil marriage. It is more important than ever for queer and trans people in the U.S. to see through the mystique around marriage practiced by the *Perry v. Brown* court, to think about the material conditions that are matters of survival for queer and trans people and everyone, and imagine resistance that actually addresses those needs. Fighting oil wars, taking on wedding debt only to find that neither you nor your new spouse have a pension or wealth to share and that other government programs you hoped to benefit from have been gutted by austerity measures, or living under criminal punishment statutes that will in no way prevent you from being harmed but that continue to fill the prisons in your town is unlikely to satisfy our urgent need for change. The contemporary gay rights agenda is not satisfying, but it has on its side more advertising dollars, closer connections to existing government institutions, the support of the wealthiest, whitest gay and lesbian people who have the least to complain about in the current system, and deeply racist and sexist national mythology. As its alignment with settler colonialism, militarism, and criminalization continue to be revealed in sharp definition by the actions of U.S. and Israeli leaders, the nature of marriage and the military become more pressing areas for analysis and discernment for queer and trans politics.

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*Prisons* 4 GIC TIP J. 1, 4 (Fall 2004), available at [http://gicofcolo.org/Upload/TIP/PDF/2004/tip\\_2004\\_fall.pdf](http://gicofcolo.org/Upload/TIP/PDF/2004/tip_2004_fall.pdf) (arguing that efforts to reduce violence against trans prisoners should focus on decarceration); Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference"*, 92 J. CRIM. L. & CRIMINOLOGY 127 (2001) (examining the root causes of sexual violence in prisons and the inadequacy of legal regimes that purportedly aim to remedy it); Dean Spade, *Methodologies of Trans Resistance*, in A COMPANION TO LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER STUDIES 237 (George E. Haggerty & Molly McGarry eds., 2007), available at <http://ssrn.com/abstract=1230403> (critiquing hate crime legislation); Dean Spade & Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, 21 CHICANO-LATINO L. REV. 38 (2000) (critiquing hate crimes legislation); CRUEL AND UNUSUAL (Reid Productions 2006) (documenting the violence and medical neglect faced by trans prisoners).