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The Dangers of Reform: NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW

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Recommended Citation
The Dangers of Reform, WOMEN'S REVIEW OF BOOKS, July/Aug. 2012, at 30 (2012) (reviewing DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW (2011))

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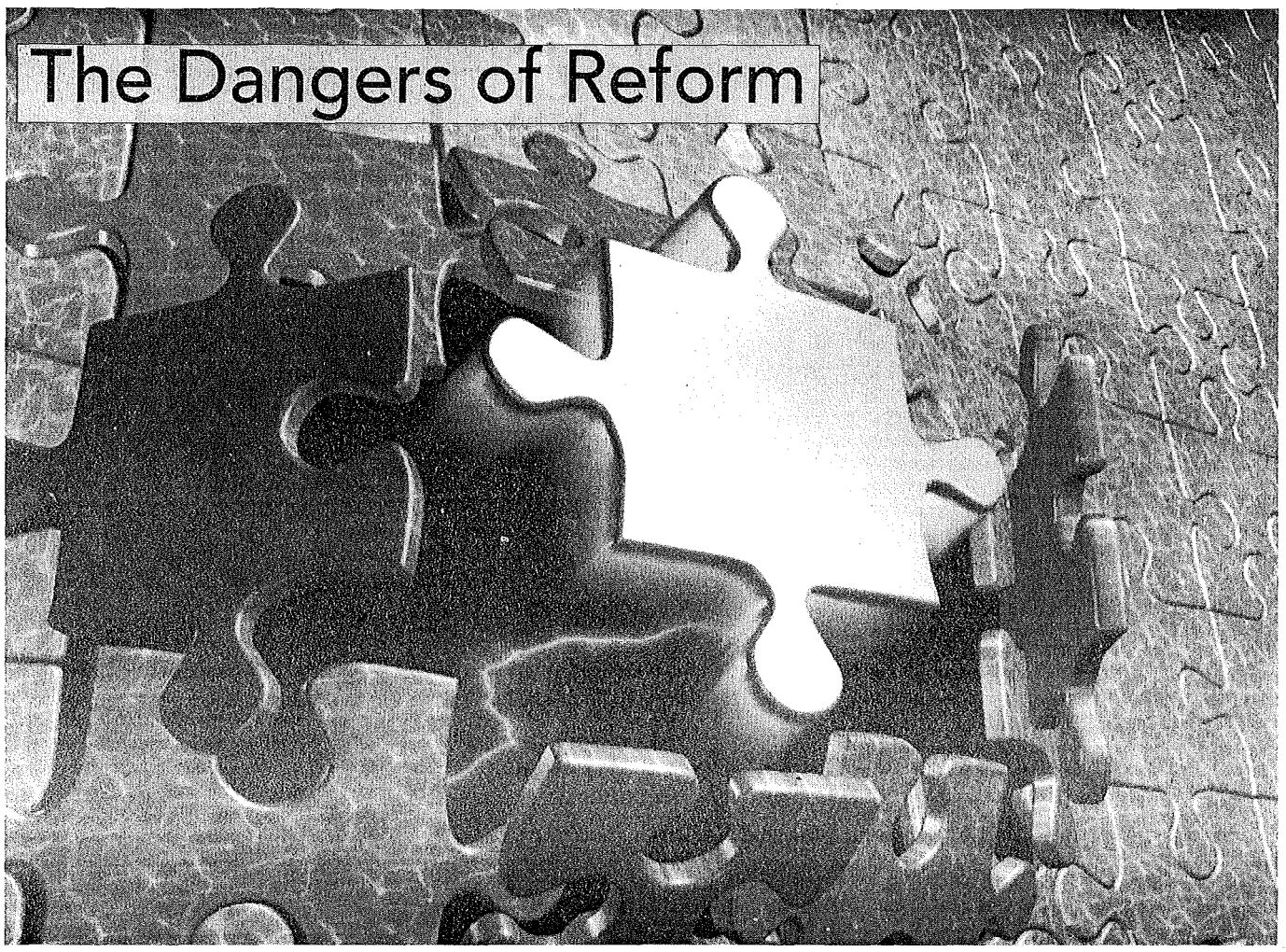
The Dangers of Reform



Normal Life:
Administrative Violence, Critical Trans Politics, and the Limits of Law

By Dean Spade

Brooklyn, NY: South End Press, 2011, 246 pp., $16.00, paperback

Reviewed by Jennifer Levi and Giovanna Shay

"We must stop believing that what the law says about itself is true and that what the law says about us is what matters."

—Dean Spade

In his recent book, *Normal Life*, Dean Spade, a law professor at Seattle University School of Law and noted transgender activist, criticizes several law-reform movements, including those to improve prison conditions, win marriage equality for same-sex couples, and ensure that hate crimes and antidiscrimination laws include transgender people. Spade finds fault with LGBTQ rights organizations' efforts to win mainstream acceptance, arguing that instead of pursuing an equality agenda, they should focus on changing "the distribution of life chances," by "demand[ing] radical redistribution of wealth and an end to poverty." Spade's critique has the most force in the context in which it originated—calling for an end to what David Garland first described as mass incarceration, the system many refer to as the "prison industrial complex." It is less persuasive when applied to the realm of free-world LGBTQ rights.

Spade's perspective is shaped by the prison-abolitionist movement, as well as, he says, by critical race theory and "woman of color feminism." In 2002, Spade founded the Sylvia Rivera Law Project (SRLP), which provides free legal services to transgender and gender nonconforming people, and whose mission, according to its website (slrp.org/about), is "to guarantee that all people are free to self-determine their gender identity and expression, regardless of income or race, and without facing harassment, discrimination, or violence." *Normal Life* is rooted in this experience, and fits comfortably within a series of recent prison-abolitionist works focusing on the experiences of queer and transgender people, including *Queer (In)Justice: The Criminalization of LGBT People in the United States* (2010), and *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (2011), a collection of essays to which Spade contributed.

Spade writes that his purpose in *Normal Life* is to describe a "critical trans politics ... that demands more than legal recognition and inclusion." Arguing that equality of life chances, or distributive justice, cannot be achieved through law reform alone, he calls for a broader agenda: "prison abolition, the elimination of poverty, access to full health care, and an end to immigration enforcement." These goals, he submits, "cannot be conceptualized or won within the realm of US law."

Citing the work of critical race theorist Alan Freeman, Spade questions the focus of antidiscrimination law on violations of individual rights, which, he argues, tends to obscure more systemic and structural kinds of disadvantage. Instead of pursuing a rights-based law reform strategy, Spade writes, the trans movement should focus on "population-level operations of power," such as ending mass incarceration. The models he recommends for pursuing "transformative change" will resonate with those familiar with the work of organizers such as "rebellious lawyering" proponent Gerry Lopez, Brazilian educational reformer Paolo Freire, or civil rights campaigner Ella Baker: "[M]eaningful change," Spade says, "comes from below," and "those most directly impacted" should lead the fight.

Normal Life's leftist critique of liberal reform has deep roots in the history of US social movements. For example, in his book *Stories of Scottsboro*, James Goodman describes how, in 1931, during the trial of

the Scottsboro Boys (nine African American teenagers falsely accused of raping two white women), leaders of the International Labor Defense (ILD) organization attacked the NAACP as "an instrument of the white capitalist class for the perpetuation of the slavery of the negro people." ILD members marched with signs equating "lynchers, reformers, and enemies of the Negro people." Then as now, leftists viewed the racialized criminal-punishment system as a tool of broader economic oppression.

Spade writes that advocates seeking to remedy prison conditions should beware of inadvertently strengthening the prison system. He explains:

> We must avoid proposals that include constructing buildings or facilities to house trans prisoners, to hire new staff, or make any other changes that would expand the budget and/or imprisoning capacities of the punishment system.

He goes on to say, "[W]e must ensure that legal work is always aimed at dismantling the prison industrial complex... [k]nowing that the system is likely to try to co-opt our critiques to produce opportunities for expansion."

This is essentially the criticism of prison reform leveled by Angela Y. Davis in her 2003 book, *Are Prisons Obsolete?* She argues that, despite the good intentions of advocates, prison reform can produce more prisons—new and sanitized versions built to reduce overcrowding. Davis warns that discussions of prison reform focus "almost inevitably on generating the changes that will produce a *better* prison system." Although some reforms may be significant, she writes, "frameworks that rely exclusively on reforms help to produce the stultifying idea that nothing lies beyond prison."

It is not only prison abolitionists who share Spade's concern about the unintended consequences of prison reform. The sociologist Heather Schoenfeld writes that prison-conditions litigation in Florida contributed to a prison building boom there. Other commentators—including James Jacobs, Malcolm Feeley, and Van Swearingen—argue that prisoners' rights litigation contributed to the "bureaucratization" of prisons, consolidating administrators' power even as it asserted prisoners' rights.

Examples of double-edged US criminal-punishment reforms extend well beyond prison conditions. As described by Kate Stith and Steve Y. Koh (in "The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines," *Wake Forest Law Review*, 1993), some of the initial proponents of federal sentencing guidelines were liberal academics and judges, who wanted to rationalize sentencing to make it fairer and more consistent. Unfortunately, as innumerable commentators have recounted, the implementation of the guidelines produced draconian sentences, ultimately contributing to the growth of US prisons.

In adopting an all-or-nothing approach, however, Spade fails to acknowledge ways in which the liberal prisoners' rights movement has helped to advance critical trans politics. At a minimum, prison-reform litigation generated information, through civil discovery, that advocates used to draw attention to prison conditions. Access to prisoners has been facilitated by the minimal legal protections and professional norms that the prisoners' rights movement helped to achieve. Rather than undermining the radical project that Spade promotes, liberal law-reform efforts arguably laid foundations for the prison-abolitionist movement.

> "Law reform is only one piece of a strategy. It cannot achieve everything, but it is sometimes a necessary precondition to reaching other goals and, at a minimum, is not a causative element for diminished opportunities and status."

As for hate crimes prohibitions, Spade writes that they "strengthen and legitimize the criminal punishment system," which targets poor people of color and singles out poor trans people of color for particular harassment. "Changing what the law explicitly says about a group," he points out, "does not necessarily remedy the structured insecurity faced by that group." We ourselves are agnostic on the question of hate crimes penalties for crimes against LGBTQ people: the exclusion of sexual orientation and gender identity from existing laws not only minimizes the seriousness of anti-LGBTQ violence but also nearly guarantees a dearth of law enforcement resources. Nevertheless, we are also acutely aware of the danger of expanding the already massive criminal-punishment system in any way.

In the context of mass incarceration, in which reform can produce ever cleaner and more technologically advanced human warehouses, Spade's arguments are well-taken. His critique is less persuasive when he moves into the broader arena of LGBTQ rights. Spade believes that law reform is at odds with distributive justice. In his view, advocacy that departs from the idealized approach he champions harms the transgender community. While we laud his critique of some elements of liberal law reform, we disagree with his zero-sum frame. Law reform is only one piece of a strategy. It cannot achieve everything, but it is sometimes a necessary precondition to reaching other goals and, at a minimum, is not a causative element for diminished opportunities and status. A transgender equality movement that includes expansion of antidiscrimination laws and marriage equality among its goals is coextensive with the project of "transformative change."

Spade argues that antidiscrimination laws "create the false impression that ... fairness has been imposed, and the legitimacy of the distribution of life chances restored." But such protections merely ensure that a person's sexual orientation or gender identity cannot be an obvious basis for an adverse employment action. They are nowhere near broad enough to promise substantive equality, for transgender people or anyone else. However, excluding gender identity and sexual orientation from existing employment protections is far more damaging than committing the resources for the advocacy required to expand them. In addition, organizing to pass antidiscrimination laws has activated and radicalized LGBTQ advocacy organizations. The California-based Transgender Law Center (incubated by the National Center for Lesbian Rights) and the Massachusetts Transgender Political Coalition (first envisioned by GLAD staff members and interns) are two examples of the generativity of liberal law reform efforts. Both organizations share many of the distributive justice goals of SRLP.

Spade is not the first to criticize the movement for marriage equality for same-sex couples. In "Arguing Against Arguing for Marriage" (*University of Pennsylvania Law Review*, 2010), Shannon Gilreath claims that "marriage is dangerous for Gays conceptually, in its patriarchal and heteropatriarchical foundations." In less absolute terms, Katherine Franke writes in the *New York Times* (June 23, 2011) that same-sex marriage is a "mixed blessing," which may undermine other arrangements that LGBTQ people have used to "order our lives in ways that have given us greater freedom than can be found in the one-size-fits-all rules of marriage."

Spade goes too far in applying the same critique to both prison reform and marriage equality. Removing gender discrimination from the institution of marriage does not strengthen it in the way that modifying the criminal-punishment system reinforces mass incarceration. The institution of marriage has an evolving social meaning. Extending it to lesbians, gay men, bisexual and transgender people reaffirms our human dignity. Even the most steadfast critics of the marriage-equality movement—including the lesbian activists and law professors Nancy Polikoff

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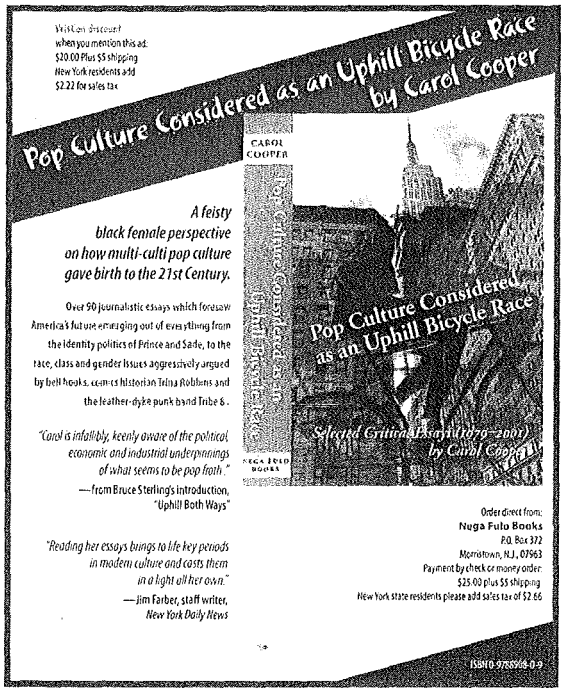
and the late Paula Ettelbrick—have acknowledged that critiques of marriage and the marriage equality movement need not be on a collision course.

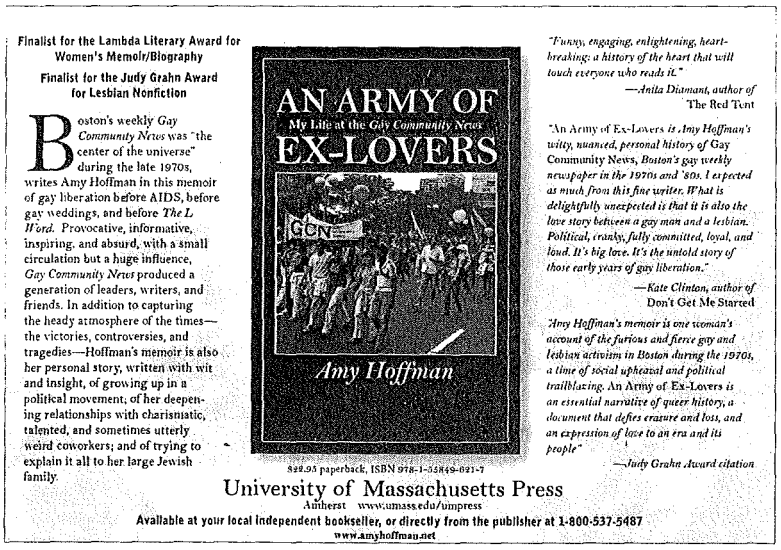
In addition, Spade ignores law-reform efforts spearheaded by LGBTQ legal organizations other than those focused on hate crimes, antidiscrimination, and marriage. These include challenges to discriminatory health care access and to prison regulations that deny essential medical care to transgender inmates; immigration reform advocacy; and support for transgender students and homeless LGBTQ youth. To ignore these efforts is to miss the ocean for the tidal pool beside it.

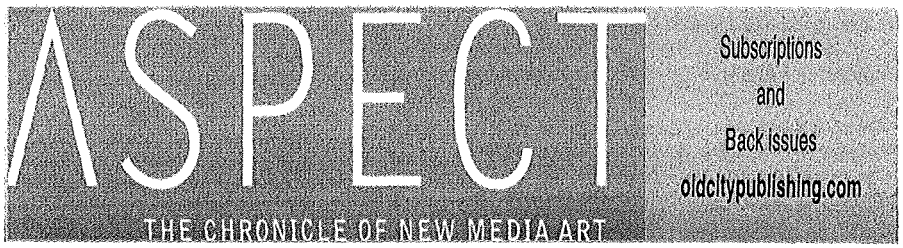
Although we do not subscribe unreservedly to the paradigm described by *Normal Life*, we believe that the book makes an important contribution to a new and emerging critical trans politic. It is provocative, comprehensive, and engaging. It should be widely discussed as an important strategic framework for work within the LGBTQ movement.

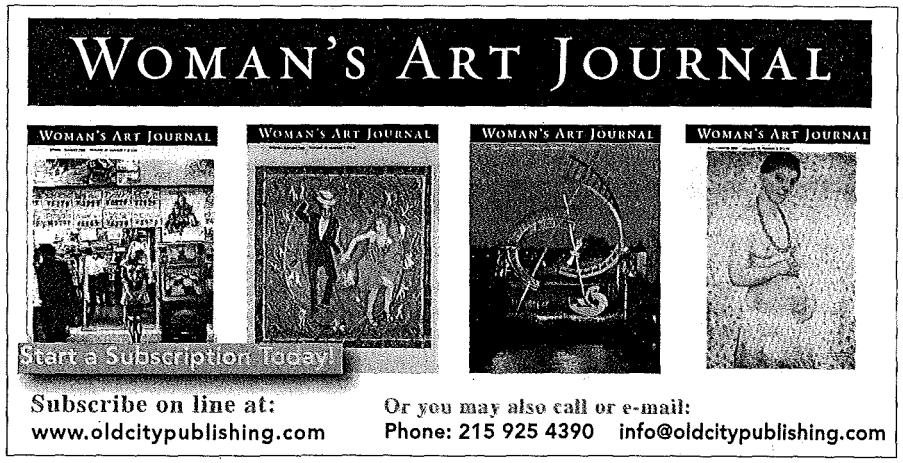
Jennifer Levi is the director of the Transgender Rights Project of GLAD (Gay and Lesbian Advocates and Defenders). Jennifer was co-counsel in the cases achieving marriage equality for same-sex couples in Connecticut and Massachusetts and has participated in successful efforts to pass transgender-inclusive antidiscrimination laws throughout New England.

Giovanna Shay is a co-chair of the Corrections Committee of the American Bar Association Criminal Justice Section. She has participated in institutional change litigation involving prisons, as well as efforts to enforce the Prison Rape Elimination Act (PREA) and amend the Prison Litigation Reform Act (PLRA). Both serve on the faculty of Western New England University School of Law.









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