As we shift our understanding of power from a focus on individual/intentional discrimination to a focus on norms that govern population management, different areas of law start to appear as the focal points of harm for vulnerable groups. The aim of getting the law to declare a group equal through anti-discrimination and hate crime legislation recedes and we become interested in the legal systems that distribute security and vulnerability at the population level and sort the population into those whose lives are cultivated and those who are abandoned, imprisoned, or extinguished. In this chapter, we turn toward the realm of administrative law—we look at the administrative agencies that are responsible for the bulk of government activities that impact the distribution of life chances. This is a set of operations of law that, compared to anti-discrimination and hate crime laws, are often ignored when it comes to analyzing the harms of racism, transphobia, ableism, homophobia, and sexism. However, when we shift our understanding of power and examine where and how harm and vulnerability operate and are distributed, it is this area of law that comes to the fore. Critical trans politics requires an analysis of how the administration of gender norms impacts trans people’s lives and how administrative systems in general are sites of production and implementation of racism, xenophobia,
sexism, transphobia, homophobia, and ableism under the guise of neutrality. This analysis is essential for building resistance strategies that can actually intervene on the most pressing harms trans people face and illuminate how and when law reform is a useful tactic in our work.

Control that operates through population-level interventions is particularly significant to trans politics because of the way trans people struggle with gender categorization in the purportedly banal and innocuous daily administration of programs, policies, and institutions (e.g., homeless shelters, prisons, jails, foster care, juvenile punishment, public benefits, immigration documentation, health insurance, Social Security, driver licensing, and public bathrooms). An understanding of power that looks at the distribution of life chances created by population-level interventions draws our attention to how the categorization of people works as a key method of control. Population-level interventions rely on categorization to sort the population rather than targeting individuals based on behaviors or traits. What characteristics are used for such categorization and how those categories are defined and applied creates vectors of vulnerability and security. Many of the administrative processes that vulnerable people find themselves struggling through are contests about such categorizations. Examples include public benefits hearings where applicants contest denials or terminations based on eligibility criteria, Social Security hearings where applicants contest their categorization as nondisabled, immigration proceedings where applicants contest administrative determinations of their asylum petitions, and, of course, the many contexts in which trans people struggle to change their gender classification with various administrative agencies. Our attention to how life chances are distributed rather than simply to what the law says about marginalized groups exposes how various moments of administrative categorization have lethal consequences.

The history of explicit uses of race and gender categorization in US law and policy to distribute certain types of life chances—and the resistance to and elimination of some of those uses—lead many people to falsely and perilously believe the conversation about racialized and gendered administrative categorization is over. The argument goes that since we got rid of Jim Crow laws, race segregation in the military, the Japanese internment, Asian exclusion laws in immigration, gender and racial exclusion in voting, and other overt uses of gender and race categories in population-level programs, things are now fair and equal. As previous chapters have discussed, the shift away from some of the explicit targeting of women and people of color in the written language of law and policy has merely reorganized those functions of maldistribution. As certain methods of control and distribution have become less politically viable, other methods have replaced them, preserving and producing race and gender disparities in the distribution of life chances. High levels of policing in neighborhoods with concentrations of people of color, the creation of tiered public benefits programs, the design of taxation schemes to tax work instead of wealth, the targeting of immigration enforcement to impact certain immigrants more than others, the structuring of public finance of education, health care, and other key necessities, all function to create and maintain these deadly disparities.²

One way to think about these population-level programs is that they are created as care-taking programs. They are invented to address perceived risks to the national population and to distribute resources across the population in ways that aim to address those risks. They are aimed at increasing health, security, and well-being—access to food, transportation, public safety, public health, and the like. Because they mobilize the idea of the population (sometimes “society” or “the nation” or “the people”), they are designed in ways that reflect and amplify contemporary understandings of who is “inside” and who is “outside” of the group whose protection and cultivation is being sought, which means they always include determinations of who deserves protection and who is a threat.³ Norms regarding race, gender, sexuality,
national origin, ability, and indigeneity always condition and determine who falls on either side of that line. Population-level care-taking programs always include population surveillance as a core function of their work. Mitchell Dean’s framing of care-taking population-level interventions—or to use Foucault’s term, “apparatuses of security”—illustrates the simultaneous and dual nature of the care-taker/surveillance state:

These apparatuses of security include the use of standing armies, police forces, diplomatic corps, intelligence services and spies . . . [but] also include health, education and social welfare systems . . . . It thus encompasses those institutions and practices concerned to defend, maintain and secure a national population and those that secure the economic, demographic and social processes that are found to exist within that population . . . [centralizing] this concern for the population and its optimization (in terms of wealth, health, happiness, prosperity, efficiency), and the forms of knowledge and technical means appropriate to it. 4

Standardized, categorized data collection is essential to the creation of these programs because it allows governments, institutions, and agencies (e.g., the US Census Bureau, the New York Department of Vital Statistics, the Centers for Disease Control, the Colorado Department of Motor Vehicles) to have a general picture of the population: its health, vulnerabilities, needs, and risks. Importantly, it is this way of thinking about population that allows such programs to exist at all. James C. Scott’s work shows how gathering information and creating population-level programs using this information is what defines the modern nation-state. 5 These programs make decisions about what kinds of data are relevant to their work, what the government/agency/institution/organization in each case needs to know in order to implement programs aimed at cultivating a “healthy” population while guarding against risks of various kinds. These decisions about what constitutes a proper data element/manner of classification and what does not rarely appear as controversial political decisions because people who find the commonly evoked societal norms used in classification familiar and comfortable tend to take these classification systems as neutral givens in their lives. 6 We are used to filling out forms with certain questions. We rarely question how we came to be asked for those particular pieces of information and not others except in moments when we personally have a hard time figuring out which box to check off. Because certain classifications become common and standard, there is often an implied shared understanding that certain things, like gender, are just necessary information for administering government programs. Scott writes, “Categories that may have begun as the artificial inventions of cadastral surveyors, census takers, judges, or police officers can end by becoming categories that organize people’s daily experience precisely because they are embedded in state-created institutions that structure that experience.” 7 The terms and categories used in the classification of data gathered by the state do not merely collect information about pre-existing types of things, but rather shape the world into those categories that, ultimately, are taken for granted by most and thus appear ahistorical and apolitical. Indeed, many such categorizations are assumed as basic truths.

However, each type of data collected by the US government and the choices made about what to collect and why have histories of controversy and resistance. The creation of birth registration programs and birth certificates, the creation of the Social Security Administration that included the assignment of a unique number to every eligible resident, the use of various racial categories (and changes to racial categorization) on the US Census, the collection of data about HIV infection and other stigmatized illnesses—all of these have met with controversy both regarding how and why government agencies were collecting certain data and how that data collection might impact particular populations. 8 Each of these data collection projects have been key moments of expanding the reach of the government and defining who are members
of the “us” of the nation and who are the “outsiders” who must be abandoned or eliminated. Data collection mechanisms that establish and utilize norms are essential to the type of sorting that population management requires.

For trans politics, an area of great concern is the ubiquity of gender data collection in almost every imaginable government and commercial identity verification system. From birth to death, the “M” and “F” boxes are present on nearly every form we fill out: on the identity documents we show to prove ourselves and in the computer records kept by government agencies, banks, and nonprofit organizations. Additionally, gender classification often governs spaces such as bathrooms, homeless shelters, drug treatment programs, mental health services, and spaces of confinement like psychiatric hospitals, juvenile and adult prisons, and immigration prisons (often called “detention centers” despite the fact that the word “detention” misleadingly denotes a relatively short-term confinement, which is, time and again, not the case for people placed in these facilities). The consequences of misclassification or the inability to be fit into the existing classification system are extremely high, particularly in the kinds of institutions and systems that have emerged and grown to target and control poor people and people of color, such as criminal punishment systems, public benefits systems, and immigration systems. The collection of standardized data and its use for identity surveillance have become even more widely implemented with the advent of the War on Terror, increasing vulnerability for many people whose lives and identities are made illegible or impossible by government classification schemes.

Administrative Gender Classification and Trans Lives

For trans people, administrative gender classification and the problems it creates for those who are difficult to classify or are misclassified is a major vector of violence and diminished life chances and life spans. Trans people’s gender classification problems are concentrated in three general realms: identity documentation, sex-segregated facilities, and access to health care. Mitchell Dean’s description of Foucault’s analysis of government is useful for thinking about the multiple locations of the production of sex classification standards and the incoherence of sex classification systems. Such an analysis attend[s] to . . . the routines of bureaucracy; the technologies of notation, recording, compiling, presenting and transporting of information, the theories, programmes, knowledge and expertise that compose a field to be governed and invest it with purposes and objectives; the ways of seeing and representing embedded in practices of government; and the different agencies with various capacities that the practices of government require, elicit, form and reform. To examine regimes of government is to conduct analysis in the plural: there is already a plurality of regimes of practices in a given territory, each composed from a multiplicity of in principle unlimited and heterogeneous elements bound together by a variety of relations and capable of polymorphous connections with one another. Regimes of practices can be identified whenever there exists a relatively stable field of correlation of visibilities, mentalities, technologies and agencies, such that they constitute a kind of taken-for-granted point of reference for any form of problematization.9

Using this kind of analytical approach to examine the places where trans people experience extremely harmful interfaces with legal systems helps us see the significance of gender classification practices across a variety of locations of regulation. In the United States, administrative systems have emerged out of and been focused on creation and management of racial and gender categories to establish the nation itself through gendered-racialized property regimes. Racializing and gendering are nation-making activities carried out through the creation
of population-level interventions, including administrative systems and norms, that preserve and cultivate the lives of some and expose others to premature death. Looking at particular regimes of practices related to the management of gender that impact trans people in significant ways, we can see this operation of population management at work. At each of these sites, significant consequences occur from gender classification problems, and the areas interact to create complex difficulties with far-reaching, long-term ramifications.

Identity Documents

Identity documentation problems often occur for trans people when an agency, institution, or organization that keeps data about people and/or produces identity documents (e.g., driver’s licenses, birth certificates, passports, public benefits cards, immigration documents) has incorrect or outdated information or information that conflicts with that of another agency, institution, or organization. For many trans people, this happens because they cannot change the gender marker on certain essential documents. Many agencies, institutions, and organizations have formal or informal gender reclassification policies that require proof of some kind of medical care. Every government agency and program that tracks gender has its own rule or practice (sometimes dependent on a particular clerk’s opinion) of what evidence should be shown to warrant an official change in gender status in its records or on its ID. The policies differ drastically. Some require evidence that the person has undergone a particular surgery; others ask for evidence that the person has had some surgery but do not specify which; and some require a doctor’s letter confirming that the person is trans and attesting to the medical authorization for or permanence of their membership in a particular gender category. Others will not allow a change of gender at all. A small set of policies allow a person’s self-identification to be proof enough to change their gender classification. 10

The wide range of policies and practices means that many people, depending on where they live and what kind of medical evidence they can produce, cannot get any records or ID corrected, or can only have their gender changed with some agencies but not with others. So, for example, one person born in New York and living in New York might have a birth certificate she cannot change from “M” to “F” because she has not had genital surgery; a driver’s license that correctly reflects “F” because she got a doctor’s letter; Social Security records that say “M” because she cannot produce evidence of surgery; a name change order that shows her new feminine name; and a Medicaid card that reads “F” because the agency had no official policy and the clerk felt the name change order and driver’s license were sufficient. Another person with the same medical evidence might have a completely different set of documents because she was born in California and currently lives in Massachusetts. Most likely, neither person will have a consistent set of documents that correlates to their current gender. For the many people who feel that neither “M” nor “F” accurately describes their gender, there is no possibility of obtaining records that reflect their self-identities. Gender reclassification policies are particularly problematic because they so frequently include surgical requirements. The vast majority of trans people do not undergo surgery, both because it is prohibitively expensive and because many people do not want or need it. The common misperception that surgery is the hallmark of trans experience is also particularly harmful to populations disproportionately lacking access to medical care, including low-income people, people of color, immigrants, and youth. According to a 2009 study, 80 percent of transgender women and 98 percent of transgender men have not undergone genital surgery. 11 Because it is difficult to include people in prisons, people without secure housing, and other highly vulnerable people with exceptionally poor access to health care in such studies, I would suggest that these numbers may even be higher than the study was able to confirm.
Having identity documents that misidentify gender causes extensive problems. An important consequence of identity documentation discrepancy is that it often serves as a significant barrier to employment. A recent study found that 47 percent of trans and gender nonconforming respondents reported having experienced an adverse job outcome, such as being fired, not hired, or denied a promotion, because of their gender.12 Another study found that only 58 percent of transgender residents of Washington, DC, were employed in paid positions: 29 percent reported no source of income, and another 31 percent reported annual incomes under $10,000.13 In yet another study, 64 percent of respondents based in San Francisco reported annual incomes in the range of $0–25,000.14 Possessing identity documents with incorrect gender markers can identify people as transgender in the hiring process, exposing them to discrimination. People whose identity documents do not match their self-understanding or appearance also face heightened vulnerability in interactions with police and other public officials, when traveling, or even when attempting to do basic things like enter age-barred venues or buy age-barred products, or confirm identity for purposes of cashing a check or using a credit card or a public benefits card. Conflicting identity information can also make it difficult to obtain certain identity documents that are vitally necessary for day-to-day survival. With the advent of the War on Terror, and as security culture continues to increase in the United States, identity verification procedures have expanded and intensified in governmental and commercial sectors. As a result, the barriers created by administrative misclassification are increasing, especially for people whose immigration status and race subjects them to intensified surveillance.

Sex-Segregated Facilities

Misclassification is also a significant problem because sex segregation is used to structure so many services and institutions. People who have gender markers on records and ID that do not match their identity face major obstacles in accessing public bathrooms, drug treatment programs, homeless shelters, domestic violence shelters, foster care group homes, and hospitals. They also face significant vulnerability to violence in those spaces, especially in institutions that cannot be avoided because of their mandatory nature. Such mandatory institutions, such as jails, prisons, juvenile punishment centers, psychiatric institutions, and immigration facilities also tend to be enormously violent already. For many, the inability to access sex-segregated programs that address addiction and homelessness results in an increased likelihood of ending up in criminal punishment systems. Trans women in need of shelter (a disproportionately large population because of the combination of employment discrimination, housing discrimination, and family rejection) often remain on the streets because they are unfairly rejected from women-only domestic violence programs and they know the homeless shelter system will place them in men’s facilities, guaranteeing sexual harassment and possibly assault. Many trans youth become street homeless when they run away from group homes that place them according to their birth-assigned gender, exposing them to violence from residents and staff alike. Trans people in distress often cannot receive the mental health treatment they want or need because their gender identity or expression will be seen as something that needs to be “cured” by the providers or facilities serving them. Trans people are also frequently rejected from drug treatment centers because these facilities are sex-segregated and administrators believe that trans patients will be “disruptive.” The gender norms that are adopted by mental health and drug treatment providers frequently result in the exclusion of trans people from these vital services. For those seeking court-mandated drug treatment as an alternative to imprisonment, this can result in increased time in prison or jail. Lack of access to treatment also increases the harms of addiction, including economic marginalization and vulnerability to violence and criminalization. Trans people in prisons and jails report extremely high rates of sexual assault.15
The operation of gender classification systems prevents access to essential services for trans people and sets up conditions of extreme violence in residential and imprisonment facilities. Gender segregation is a mechanism of management and control in the facilities and institutions where poor people, people of color, immigrants, and other marginalized people are concentrated and where gender norms are enforced with extreme violence. Trans and gender nonconforming people's experiences expose how population-management methods organized by race and gender produce structured harm and insecurity for people targeted by criminalization, immigration enforcement, and economic apartheid.

Health Care Access

Gender classification systems also have a significant impact on access to health care for trans people. Most state Medicaid policies and most health insurance programs exclude from coverage gender-confirming health care for trans people. Medicaid provides all of the gender-confirming procedures and medications that trans people request to nontrans people and only denies them to those seeking them based on a transgender diagnostic profile. For example, testosterone and estrogens are frequently prescribed to nontransgender people for a variety of conditions including hypogonadism, menopause, late onset of puberty, vulvaratrophy, atrophic vaginitis, ovary problems (including lack of ovaries), intersex conditions, breast cancer or prostate cancer, and osteoporosis prevention. Similarly, the chest surgery that transgender men often seek—removing breast tissue to create a flat chest—is regularly provided and paid for by Medicaid for nontrans men who develop the common condition gynecomastia, where breast tissue grows in what are considered abnormal amounts. Nontransgender women who are diagnosed with hirsutism—where facial or body hair grows in what are considered abnormal amounts—are frequently treated for this condition through Medicaid coverage. In addition, reconstruction of breasts, testicles, penises, or other tissues lost to illness or accident is routinely performed and covered. Further, treatments designed to help create genitals that meet social norms of appearance are frequently provided and covered for children born with intersex conditions (which has met increasing opposition in recent years).

Much of the care provided to nontrans people but routinely denied to trans people by Medicaid programs has the sole purpose of confirming the social gender of nontrans patients. Reconstruction of breasts or testicles lost to cancer, hormone treatment to eliminate hair that is considered gender-inappropriate, chest surgery for gynecomastia, and other treatments are provided solely because of the social consequences and mental health impact faced by people who have physical attributes that do not comport with their self-identity and social gender. Thus, the distinction made in refusing this care to transgender people appears to be based solely on diagnosis. Denying care to a politically unpopular group that is provided to others in need of such care, advocates have argued, constitutes "diagnosis discrimination," a violation of federal Medicaid regulations. However, recent cases alleging these charges have not been won, and Medicaid policies regarding trans health care are actually worsening nationwide.

For trans people who need this care, the health impact of this denial can have significant mental and physical health consequences. Depression, anxiety, and suicidality are conditions commonly tied to the unmet need for gender-confirming medical care. According to the few studies that have been done on the issue, rates of HIV infection are also extremely high among transgender people. One study found seroprevalence of 63 percent among African American trans women. A contributing factor to this may be the fact that many people seek treatments through the informal market and receive care without medical supervision because it is not available through other means. This avenue to care may result in inappropriate dosage, nerve damage, HIV, and/or hepatitis infection resulting from injecting without medical supervision or clean needles.
Seeking gender-confirming care without coverage is also an avenue to harassment, profiling, and imprisonment for many trans youth and adults who engage in criminalized work to pay for the care, or who face criminalization due to the circumstances of their acquisition of the care. Further, because of the ways that medical requirements are used in gender reclassification policies of all kinds, the impact of being denied this gender-confirming care has ramifications in all other areas of life that relate to recordkeeping and identity verification. Misclassification in all three of these realms—identity documentation, sex-segregated facilities, and health care access—combined with widespread family rejection and routinized stigmatization, produce conditions of exacerbated poverty, criminalization, and violence for trans populations. In each instance, the use of gender as a category of data for sorting populations—something that is taken as neutral and obvious to most administrators—operates as a potential vector of vulnerability. In the context of massive administrative systems mobilized to produce and manage targeted populations, such as public welfare systems, criminal punishment systems, and immigration enforcement systems, trans people face particular vulnerability to displacement, violence, and early death.

Gender Classification and Trans Vulnerability in the Context of Intensified Surveillance

The ongoing vulnerability of trans people stemming from administrative classifications of gender has become even more severe with the increase in identity verification procedures that have emerged since September 11, 2001. The declaration of the War on Terror ushered in a range of policy reforms and new government practices that have drastically increased surveillance and shifted the collection and use of identity data. One major element of this new surveillance is the increased sharing and comparison of different pools of data collected by different government agencies. Historically, the various state Departments of Motor Vehicles (DMVs), the Social Security Administration (SSA), the Internal Revenue Service (IRS), and other agencies that collect data about individuals mostly maintained their data for their own uses. Comparison of data between agencies about an individual only occurred during specific investigations.

The heightening of US security culture, inaugurated in the name of terrorism prevention, has drastically changed the deployment of this data. New practices have emerged and various agencies now compare their entire data sets and seek out mismatched information. The rationale for this activity is to track down people who have obtained identity documents or work authorization using false information. For example, when a DMV compares its records with the SSA, those people whose information is inconsistent between the two agencies will be contacted with a threat to revoke their driver’s licenses. When the IRS compares its data with the SSA, employers are contacted and urged to take action to rectify the conflicting information or to terminate the employee. Undocumented immigrants are the primary targets of this new use of government data. These policies have drastically increased the vulnerability of immigrants to exploitation by employers, violence from the police and immigration enforcement, poverty, lack of access to vital basic services, and deportation. These new rules have also increased the significance of the inconsistency of gender reclassification policies for immigrant and nonimmigrant trans people. The inability to have ID and records changed to reflect current gender—and the fact that some documents can be changed while others cannot—has dire ramifications: trans employees face being outed by the government to their employers, losing their driver’s licenses, encountering new hurdles when seeking government benefits and services, and in general experiencing greater difficulty with all administrative systems.

The enhanced focus on identity surveillance is increasing the problems that emerge due to having an inconsistent administrative identity. The augmentation of US security culture
has raised the level of stability demanded of our identities and has sharpened the tools that heighten the vulnerability of those who are not "fully authorized" in any particular administrative context. Data pool comparison practices are a significant problem given the inconsistency of gender reclassification policies in the United States. The War on Terror has prompted proposals for an even wider variety of population-tracking databases along with new uses of existing data sets collected by federal and state agencies. These proposals are usually aimed at identifying undocumented immigrants and bolstering military recruitment. For instance, there have been proposals for a database that would track information related to military recruitment for all US residents under a certain age. An FBI database currently in development would be the world's largest collection of biometric data, compiling palm prints, facial images, and iris patterns.

Purportedly banal and uncontroversial changes like the new requirement that gender be listed on plane tickets are emerging based on a cultural logic that gender is fixed and obvious and therefore an easy classification tool for verifying identity. As with all such state care-taking programs, the aim of creating increased security for the nation hangs on the assumption of a national subject that deserves and requires that protection: a subject for whom these identity classification and verification categories are uncontroversial. Because gender remains an ever-present vector of identity verification, it is being put to use to achieve the racialized nation-making goals of the War on Terror. These examples from the War on Terror are helpful not only in illustrating how surveillance associated with military and immigration control projects is implemented and operates, but also for illuminating the dangers of projects commonly perceived as benign. Data collection and management-focused programs like driver's licensing, Social Security benefits, and taxation are less often analyzed for their racist and sexist impacts. In reality, these systems are part of a national security project that constructs national norms to sort populations for the distribution of life chances.

What Gender Classification Problems Can Tell Us about Trans Politics and Law Reform

The moment of the War on Terror's bolstering of identity surveillance and increased exposure of poor people, immigrants, people of color, and gender outsiders to exploitation, imprisonment, and violence can help us comprehend the ways that racialized and gendered subjection and violence are presently operating, and can help us begin to examine approaches to intervention. First, this analysis points us to the realm of administrative, population-level intervention as an area of control and legal codification that may be more high-stakes for trans well-being even though it has been less visibly politicized than the symbolic realm of individual/intentional discrimination. The liberal rights-seeking strategy urges us to seek declarations from the state that trans lives are equal and worthy and that gender identity difference is not a formal barrier to citizenship. This model of inclusion and recognition, however, leaves in place the conditions that actually produce the disproportionate poverty, criminalization, imprisonment, deportation, and violence trans people face while papering it over with a veneer of fairness. Attention to the administration and distribution of life chances exposes the locations that generate that vulnerability, and that attention means we must refuse to use trans struggles to assert the neutrality of systems that reproduce racism, sexism, ableism, transphobia, xenophobia, and homophobia. Prioritizing analysis of and intervention in the distribution of life chances lets us get to what is really producing the harms trans people face, and to abandon law reform interventions that are primarily symbolic. Such an analysis can inform strategies that take up law reform campaigns tactically: when doing so provides immediate relief to harmful conditions, helps mobilize and build political momentum for more transformative change, provides an incremental step in dismantling a harmful system, and makes sense when weighed against dangers of legitimization and reification of violent systems.
Second, this inquiry gives us a vantage point for asking what a trans politics that is critical of surveillance might look like. It moves us away from an uncritical call to “be counted” by the administrative mechanisms of violent systems and instead allows us to strategize our interventions on these systems with an understanding of their operations and of their tendencies to add new categories of legibility as methods of expanding their control. This is particularly meaningful given that quests for recognition and inclusion tend to forgo such a politics in favor of being incorporated into harmful systems and institutions. The trend toward recognition and inclusion demands in the gay and lesbian legal rights context—the demands for inclusion in marriage, the military, the Census, and the police force—has created significant political division between people whose race, class, immigration, and gender positions and privileges give them the capacity to benefit from such inclusion, and those who will remain targets of systems of violence and control even if exclusion explicitly based on sexual orientation is legally prohibited. In the context of gender classification policies, a critical understanding of surveillance allows us to avoid making simplistic demands to have these policies “fixed” so that trans people can be more “accurately” classified. Rather, this analysis allows for the emergence of politics and resistance strategies that understand the expansion of identity verification as a key facet of racialized and gendered maldistribution of security and vulnerability. We can start to see how narrow demands to “fix” these policies for the least marginalized trans people—those who would have proper documentation if not for a gender classification problem—sharpens divisions between those who would benefit from inclusion and those who will remain locked out, or face worsened conditions, if new formal policies of inclusion or recognition are won. As we come to understand the broader context of racialized and gendered nation-making that population management is inherent to, we can comprehend how legal equality claims that fail to challenge the broader conditions of maldistribution can cause us to inadvertently produce a trans politics that supports and legitimizes those very systems and institutions that make trans people so vulnerable.

Third, these inquiries give us a new window for looking at the role of law and policy reform work in critical trans politics. As we critically examine law reform work that threatens to engender tools of legitimacy for harmful and dangerous social and political arrangements, and as we set our sights on developing strategies that actually impact trans people’s survival, we need a new way of looking at the legal problems trans people face. A central element, which will be discussed more fully in the next chapter, is deemphasizing law reform more broadly, and ensuring that law reform is not the primary demand of our movements. Decentralizing legal strategies, however, does not mean abandoning them altogether. Trans people’s lives are heavily mediated by a variety of legal barriers that create dire conditions, especially those related to the use of gender classification in a range of state care-taking/control programs. Legal work of various kinds can be a part of the arsenal of tools available for addressing those conditions. Using legal reform requires a careful, reflective analysis in each instance of the potential impact on the survival of trans populations. For example, we will have to ask ourselves, Is this change merely symbolic, or will it prevent trans poverty, criminalization, deportation, and death? Will this reform strengthen key systems of control or dismantle them? We must be acutely aware of the potential for dividing trans politics along lines of access and capacity to benefit from reforms, and we have to consciously work toward building shared analysis between and amongst trans and nontrans populations struggling against shared obstacles and mechanisms of control. These questions help us analyze what role legal work could play in mobilizing people for transformative change. Two examples will help illustrate how this kind of analysis can inform which law reform projects we do or do not take up.

A central question facing trans politics is if and how to use legal reform tools to intervene in the various problems trans people face in criminal punishment systems. As discussed in Chapter
Two, hate crime laws do not prevent violence against trans people but do add punishing power to a system that is a primary perpetrator of violence against trans people. Hate crime laws do not meet the criteria I am suggesting for law reform work because they create primarily symbolic change; hate crime laws co-opt the fear, grief, and rage of trans communities at the high levels of violence we face and the low worth our lives are given into the project of expanding a system that targets us. Instead of pursuing hate crime laws, we should turn toward legal work that relates directly to the criminalization of trans people and addresses issues like police harassment and violence, inadequate criminal defense, medical neglect, and the myriad violences facing imprisoned trans people. In the context of such work, our attention must stay focused on improving life chances for trans people and making sure that our work does not build up the criminal punishment system. When working to address conditions of imprisonment, then, 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. Alternatively, we should focus our efforts on decarceration tactics: increased access to adequate, safe drug treatment and other alternatives to imprisonment; access to competent/nontransphobic criminal defense counsel; access to resources for former prisoners to prevent the homelessness and poverty that often leads to additional criminalization; and direct support of prisoners who are experiencing medical neglect, violence, and retaliation. That direct support can include legal advocacy as well as emotional support and leadership development work. This approach, which uses direct individual legal services combined with mobilizing for systemic change that actually benefits the well-being of trans prisoners instead of expanding the criminal punishment system, requires continual reflection and evaluation to determine that each step considers the context of the work. This work needs to be based in a shared imagination of what ultimate transformative change we are pursuing, and what we think it will take to get there. For example, because this work seeks to mobilize a broad constituency to oppose criminalization and imprisonment, and sees trans prisoners and former prisoners as key leaders in that work because of their experience in and knowledge of criminal punishment systems, doing work to directly support their survival and political participation is an essential part of this strategy. Legal tools can be part of that struggle, but legal change is not its goal. Time and again, legal reforms of criminal punishment systems have resulted in expansions of those systems. Mindful of these dangers, we must ensure that legal work is always aimed at dismantling the prison industrial complex and supporting people entangled in it, knowing that the system is likely to try to co-opt our critiques to produce opportunities for expansion.

The matrix of the administrative programs that rely on gender classification is another location where we should apply this analysis in order to determine a path for legal reform. An understanding of the dire consequences of administrative gender classifications, especially given the expansion of identity surveillance in the wake of September 11th and the advent of the declaration of the War on Terror, points us to administrative law as a key site of the production of vulnerability for trans populations.24 Turning away from the notion that declarations of nondiscrimination by local, state, and federal legislatures will somehow produce improved life chances for trans people and instead turning toward an examination of how the operations of DMVs, shelters, group homes, jails, prisons, schools, taxation systems, work authorization systems, and immigration enforcement rely on gender surveillance and forced classification allows us to intervene more meaningfully on the technologies of governance that are most harmful to trans people. When choosing targets within administrative systems, we again want to ensure that we are not building their capacity for control and violence. This has to include how we formulate arguments about these interventions. If, for example, we want to do work regarding identity documentation and how trans people
are being adversely impacted by new uses of government surveillance, we need to avoid neoliberal rhetoric about the “privacy rights of hard-working, tax-paying trans Americans.” Such arguments mobilize the same “us” versus “them” logic that fuels the racist, anti-immigrant sentiments that support the growth of security culture and suggest that the main problem with the War on Terror is how it accidentally creates problems for “law-abiding” nonimmigrant trans people. Instead, we can be more effective by joining forces with the many populations facing heightened vulnerability to surveillance, and devise shared opposition to the new practices and policies.

An example of this kind of work is the Sylvia Rivera Law Project’s participation in a coalition of immigrant rights organizations that formed in the mid-2000s in New York State to resist changes that were being made by the state DMV with the aim of eliminating driver’s license access to undocumented immigrants. The coalition opposed particular new policies and practices and took a stand against the implementation of the REAL ID Act. New York State had begun comparing its DMV records to the federal Social Security Administration records and suspending the driver’s license of any person whose records had mismatching information between the two sets of data. Trans and nontrans immigrants were impacted, as were many trans nonimmigrant people who had different genders on their driver’s license than on their Social Security records, differences resulting from different administrative requirements. Social Security required evidence of genital surgery to change gender on its records while the New York DMV only required a doctor’s letter stating that the person was trans. The Sylvia Rivera Law Project (SRLP) joined the coalition and shared information with the coalition members about how trans immigrants and nonimmigrants were being affected. Building relationships with groups in the coalition expanded understandings of trans policy issues of other coalition members and gave SRLP members (immigrants and nonimmigrants alike) a political space in which to take up urgent local immigrant justice work. SRLP spread the word about what was happening to its constituents, brought members to rallies and protests, and participated in the coalition’s activities.25 This collaboration provides a model for a trans political practice that refuses law and policy changes that would solely try to exempt trans nonimmigrants from the issue, thereby possibly further legitimizing these policies by refining their impact to those deliberately targeted during the racist, xenophobic uproar that produced these policy changes. Instead, SRLP’s approach stands up for trans immigrants, nontrans immigrants, and trans nonimmigrants with a coalition of people targeted by these policies. It recognizes that anti-immigrant sentiment was the primary motivation for these policies, though some nonimmigrant vulnerable populations have been harmed as well, and demands change from a place of shared struggle and collective analysis. Working in coalitions of groups affected by immigration enforcement, poverty, criminalization, housing insecurity, and other key sites of the maldistribution of life chances, we can aim to have no one’s messaging contribute to scapegoating another vulnerable population.

We can also approach administrative policies that govern gender classification with a strategy focused on demedicalization—for example, reducing and removing medical treatment requirements for gender reclassification. This work is important to reduce the racist and classist impacts of these policies. Reducing and eliminating medical evidence requirements for gender reclassification directly addresses trans people’s survival issues, especially low-income people, youth, and people of color who are disproportionately deprived of health care access. These strategies are already being used effectively by activists around the country and have the additional benefit of building local leadership and relationships as people struggle with a range of local administrative systems (e.g., shelters, DMVs, foster care programs, drug treatment programs, jails, and prisons) that have harmful gender reclassification policies.26 Many of these campaigns focus on the policies of various sex-segregated facilities and institutions to
address the violence trans people face within them. At all times, attention to how the work is being done, how it interacts with the broader context of neoliberal trends (surveillance, abandonment of the poor, criminalization, cooptation), and whether it can actually impact trans survival is required. Such an analysis necessitates contextualizing law reform in a set of broader understandings about power and control and with demands for transformation rather than inclusion and recognition.

This kind of contextualization moves us away from what critics have called the “single issue politics” that has produced much-lauded but illusory “success” in lesbian and gay politics. Further, this analysis illuminates neoliberal “victories” for what they truly are: betrayals of those most targeted by homophobia and transphobia, and successes for systems that want to be declared “fair” and “equal” while they worsen disparities in life chances with every passing year. The most popular law reform interventions imagine a world of white lesbians and gay men who face some kind of exclusion solely on the basis of sexual orientation and seek narrow changes that provide only formal inclusion. That narrow focus on sexual orientation means that the ways that race, class, immigration status, indigeneity, ability, gender, and other vectors of identity and experience interact with sexual orientation to create certain kinds of vulnerability are left unaddressed. The resultant legal reforms are so narrow in their understanding of the issues that they only provide access to the sought-after right for those who do not have other intervening vectors of marginality, if for anyone at all. For this reason, one might observe that the lesbian and gay rights agenda primarily operates to restore privileges of the dominant systems of meaning and control to those gender-conforming, white, wealthy gay and lesbian US citizens who are enraged at how homophobic laws and policies limit access to benefits to which they feel entitled. Advocates of single issue politics seek to restore the ability of wealthy gay and lesbian couples to inherit from each other with limited taxation, to share each other’s private health benefits, to call on law enforcement to protect their property rights, and other such privileges of whiteness and wealth. In order to avoid a similar trajectory in the name of trans politics, our legal reform interventions need to do more than pick out the specific narrow ways that the law explicitly excludes trans people or that legal systems create obstacles for the most enfranchised trans people.

We need to conceptualize the ways that population-level interventions—the War on Drugs, the War on Terror, and the gutting of welfare and Medicaid programs—interact with regimes of gender classification and enforcement and utilize gender as a technology of control. We must examine how racism, sexism, capitalism, xenophobia, settler colonialism, and ableism combine to produce and sustain these violent systems of distribution while we simultaneously explore the specific vulnerabilities of trans populations in these systems. This analysis can facilitate strategies based in a broad understanding of how power and control operate and help us determine which interventions might yield the most redistribution of life chances with the least danger of legitimizing and reproducing the very conditions we oppose. Because individual rights-focused law reform operates as a cover for population-based practices of abandonment and imprisonment, we must resist logics that frame harm as primarily individual and that seek narrowly focused remedies accessible only to those already deemed “legitimate” bodies for claiming rights (white, noncriminalized, nonimmigrant, nondisabled, nonindigenous). Because reform projects always carry the danger of compromise and co-optation, and since law reform in particular tends to reproduce ideas of governmental fairness and justice, we have to employ an especially cautious analysis when using legal reform tools.

We must return for reflection frequently and look out for the common traps—building and legitimizing systems of control, dividing constituencies along the lines of access to legal rights, and advancing only symbolic change. We must not only refuse reforms that require dividing and leaving behind more vulnerable trans populations, but also try to assume that the most easily
digestible invitations to be included are the very ones that bring us into greater collusion with systemic control and violence. It is not surprising that the first federal legislation formally to address harm against trans people was the Matthew Shepard and James Byrd, Jr. Act—a hate crime bill that would bring enormous resources to the criminal punishment system and do little or nothing to prevent trans death. To the extent that the mobilization of trans people and our allies begins to expose the crises of coercive and violent gender systems, those systems will respond, at least in part, with solicitation to join their projects and expand themselves in our names—and then tell us we have won victories, that enough has been done. In the face of that trend, we must think deeply and critically about how law reforms can be part of dismantling violent regimes of administering life and death and forgo them when they cannot.

NOTES

1. I intentionally left xenophobia and settler colonialism off this list, because administrative law has been articulated as a primary vector of harm in these areas of struggle. Although some anti-discrimination laws include “national origin” as a protected category, the bulk of discussion about xenophobia is rightly and necessarily focused on immigration and criminal law enforcement, often specifically on the administration of those systems. The federal administrative agencies that receive perhaps the most attention from people involved in resistance movements focused on immigration and that more of those activists and organizations understand as harmful vectors of state violence are agencies that manage immigration under the Department of Homeland Security, such as US Citizen and Immigration Services, Immigration and Customs Enforcement (ICE), and Customs and Border Protection. Resistance to settler colonialism has often identified the range of policies that target indigenous people for erasure and elimination as including the work of various administrative agencies such the Bureau of Indian Affairs, the Bureau of Land Management, and the Fish and Wildlife Service. Many scholars and activists opposing settler colonialism have highlighted how civil rights strategies, or strategies seeking inclusion in key institutions of US governance, fail to question the existence of the United States itself and its basis in land theft and genocide. Nandita Sharma and Cynthia Wright, “Decolonizing Resistance, Challenging Colonial States,” Social Justice 35 (2008-2009): 120–138, 122. Of course, because immigrants and indigenous people are also people who are direct targets of homophobia, transphobia, racism, ableism, and sexism, their concerns are even further marginalized and less likely to be addressed when resistance is framed through narrow inclusion struggles focused on those vectors because such struggles fail to question, and even misguidedly embrace, the terms of citizenship and belonging that are established, defined and perpetuated through genocide and immigration exclusion policies. People struggling in the crosshairs, for example, of immigration enforcement and transphobia need both to be abolished—an anti-discrimination law that includes gender identity will not prevent them from being detained in a deadly immigration prison or deported. While saying all this, though, I also acknowledge that the greater focus on administrative systems in these struggles does not preclude them from the tensions this book identifies of separating impacted populations into more or less “deserving” groups through reforms that only reach a select few. Highly visible campaigns for various immigration campaigns going on right now seek policy changes for “good” immigrants and affirm the exclusion of all others, using factors like history of criminal conviction, military service, or access to college education as axes of division. These might be understood as falling into the neoliberal inclusion and recognition traps faced by social movements described in this book.

2. One widely discussed example is the differential punishment for possession and sale of crack versus powder cocaine. As many have described, a significant contribution to Black imprisonment in the United States stems from the policy decision to make the prison sentences for crack, which is more highly trafficked in Black communities, much harsher than sentences for powder cocaine, which is more frequently associated with white populations. Though the sentencing standards do not mention race or identify racist enforcement as a goal, the profoundly


5. In an article that examines the development of standardized patronyms, Scott and his co-authors write, “There is no State-making without State-naming. . . . To follow the progress of state-making is, among other things, to trace the elaboration and application of novel systems which name and classify places, roads, people, and, above all, property. These state projects of legibility overlay, and often supercede, local practices. Where local practices persist, they are typically relevant to a narrower and narrower range of interaction within the confines of a face-to-face community.” Scott’s work shows how the “pacification of a territory” that state-making requires involves replacing diverse local practices with national standards of naming and categorization that make people, places, and things legible to the state so that they can be counted, maintained, cultivated, and controlled. James C. Scott, John Tehranian, and Jeremy Mathias, “The Production of Legal Identities Proper to States: The Case of the Permanent Family Surname,” Comparative Studies in Society and History 44, no. 1 (January 2002): 4–44.

6. “On the one hand, we govern others and ourselves according to what we take to be true about who we are, what aspects of our existence should be worked upon, how, and with what means and to what ends. . . . On the other hand, the ways in which we govern and conduct ourselves give rise to different ways of producing truth.” Mitchell Dean, Governmentality: Power and Rule in Modern Society, 2nd ed. (London: SAGE Publications, 2010), 18. See also Geoffrey C. Bowker and Susan Leigh Star, Sorting Things Out: Classification and Its Consequences (Cambridge, MA: The MIT Press, 1999).


9. Dean, Governmentality, 26, 27.

10. For a detailed listing of many of these policies in the United States and what each requires, see Spade, “Documenting Gender.”


16. For additional information, please visit the Intersex Society of North America website at www.isna.org. The struggle to end surgeries on children with intersex conditions has important political parallels with the struggles of trans people to obtain gender-confirming health care. Both point to the ways that medical authority polices gender categories by establishing and enforcing gender norms on bodies.

17. In recent years, Washington State and Minnesota have both undertaken changes in Medicaid policy to reduce coverage for gender-confirming health care for trans people. New York State courts have denied claims of trans litigants seeking to challenge the state’s regulation that bars coverage of this care to Medicaid recipients. Dean Spade with Gabriel Arkel, Phil Duran, Pooja Gehi, and Huy Nguyen, “Medicaid Policy and Gender-Confirming Health care for Trans People: An Interview with Advocates,” Seattle Journal for Social Justice 8 (Spring/Summer 2010): 497.


19. A recent study of trans and gender nonconforming people found high rates of HIV in trans populations, especially among people of color and immigrants. “Respondents reported an HIV infection rate of 2.64%, over four times the rate of HIV infection in the general United States adult population . . . People of color reported HIV infection at substantially higher rates: 24.90% of African-Americans, 10.92% of Latino/as, 7.04% of American Indians, and 3.70% of Asian-Americans in the study reported being HIV positive. This compares with national rates of 2.4% for African Americans, 0.8% Latino/as, and .01% Asian Americans. Non-US citizens in our sample reported more than twice the rate of HIV infection of US citizens.” The study further found that those without high school diplomas, those with household income below $10,000/year, and those who had lost a job due to bias or were unemployed had substantially higher rates of HIV. Grant, Mottet, and Tanis, Injustice at Every Turn, 80.


21. Rates of deportation have continued to increase under the Obama administration. In July 2010 the Washington Post reported, “The Immigration and Customs Enforcement agency expects to deport about 400,000 people this fiscal year, nearly 10 percent above the Bush administration’s 2008 total and 25 percent more than were deported in 2007. The pace of company audits [seeking employment of undocumented workers] has roughly quadrupled since President George W. Bush’s final year in office.” Peter Slevin, “Deportation of illegal immigrants increases under Obama administration.” Washington Post July 26, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/07/25/AR2010072501790.html


26. Activists in Colorado won a policy change in 2005 to remove surgery requirements from their state DMV gender designation change policy. In 2008, activists in Washington State successfully advocated for a birth certificate gender designation change policy that does not require any specific evidence of specific medical procedures. Activists in New York have been working since 2004 to win similar policy changes in New York City and New York State Departments of Health. Spade, “Documenting Gender.”

27. Activists in San Francisco, New York City, Washington, DC, and Boston have won city policies that prevent the shelters systems of those cities from forcing trans people into homeless shelters correlated to birth-assigned gender. Spade, “Documenting Gender.”