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**WHEN THE SPIRIT SAYS DANCE:
A QUEER OF COLOR CRITIQUE OF BLACK JUSTICE
DISCOURSE IN ANTI-TRANSGENDER POLICY RHETORIC**

ANTRON D. MAHONEY*
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INTRODUCTION

In a closed-door forum on July 11, 2017, United States Attorney General Jeff Sessions invoked Martin Luther King, Jr. in a speech given to and in support of the Alliance Defending Freedom (ADF), an anti-LGBT religious freedom group responsible for crafting many early anti-transgender bathroom bills.¹ Employing King, Sessions parallels the racial civil rights struggle of the past to the current “important work” of the ADF—by representing a divine moral right that he suggests be protected by the state.² Besides the personal criticism of Sessions’ civil rights record by Coretta Scott King when he was nominated for federal judgeship in 1986,³ Sessions’ deployment of King seems paradoxical on

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¹ Samantha Michaels, *Sessions Thanks Anti-LGBT Group for Its “Important Work,”* MOTHER JONES (July 13, 2017, 6:39 PM), <https://www.motherjones.com/crime-justice/2017/07/sessions-thanks-anti-lgbt-group-for-its-important-work/>.

² *Id.*

³ See Wesley Lowery, *Read the Letter Coretta Scott King Wrote Opposing Sessions’s 1986 Federal Nomination*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/01/10/read-the-letter-coretta-scott-king-wrote-opposing-sessionss-1986-federal-nomination/?utm_term=.3b7351f22ad5 (discussing and reprinting the 1986 letter).

many levels. However, of particular interest to this study, is how Sessions' rhetorical use of King forms a racialized fate-linking discursive logic. A logic predicated on religion that aligns the state and the Civil Rights Movement in a commemorative fashion to demonstrate a popular will for anti-LGBT policies and practices.

This racial framing raises questions about what Judith Butler describes as democratic expressions of popular will— “[W]ho really are ‘the people’? And what operation of discursive power circumscribes ‘the people’ at any given moment, and for what purpose?”⁴ Never an all-inclusive or a given material reality of a population, Butler contends claims at “the people” are “a bid for hegemony” rooted in a performative field of power that always demarcates who are not “the people.”⁵ In this case, Sessions' use of a racial justice discourse to frame the work of the ADF consigns queer people, specifically trans people, as those outside the boundaries of state recognition.

In the past two years, there has been proliferation of anti-transgender “bathroom bills” in the United States that discriminate against trans people, including students, by barring access to the use of appropriate facilities.⁶ In 2016, at least nineteen states considered anti-transgender bathroom bills, and in 2017, at least sixteen states considered similar bills with at least twelve states proposing bills that specifically address accommodations in public schools.⁷ To date, North Carolina is the only state to have enacted this type of legislation, and as of March 2017, the public restroom accommodation portion of the bill has been repealed.⁸ However, with the Trump administration rescinding Obama-era policy, which protected trans students and allowed them to use bathrooms corresponding with their gender identity, it can be expected that the propagation of these anti-transgender bills will continue in the foreseeable future.⁹

⁴ JUDITH BUTLER, NOTES TOWARD A PERFORMATIVE THEORY OF ASSEMBLY 3 (2015) [hereinafter BUTLER, PERFORMATIVE THEORY OF ASSEMBLY].

⁵ *Id.* at 3–4.

⁶ Joellen Kralik, “*Bathroom Bill*” *Legislative Tracking*, NAT’L CONF. ST. LEGISLATURES (July 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx#2>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*; Sandra Battle, Acting Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. & T.E. Wheeler, II, Acting Assistant Att’y Gen. for Civil Rights, U.S. Dep’t of Just., Dear Colleague Letter: Withdrawal of May 2015 and 2016 Guidance on Transgender Students (Feb. 22, 2017), <http://i2.cdn.turner.com/cnn/2017/images/02/23/1atransletterpdf022317.pdf>.

Moreover, the use of racial justice framing, specifically invoking King, has become a popular discursive strategy by state actors and conservative evangelicals in attempting to garner multiracial support for bathroom bills.¹⁰ As such, we will analyze two case studies in which abstract memorializing rhetoric of Martin Luther King, Jr. and the Civil Rights Movement is employed in the framing of anti-transgender bathroom legislation.¹¹ Butler suggests for a more radical form of democracy, equality cannot be solely based on extension of recognition (which inevitably leaves a group out), perhaps instead, a change in the social relations between the recognizable and unrecognizable would ultimately change how we conceive “the people.”¹²

In order to uncover these relations of power and challenge the configurations between the recognizable and unrecognizable, we examine a performance-in-resistance by black transwoman activist Micky Bradford in a public protest in opposition to anti-transgender legislation in North Carolina.¹³ This black queer embodied disposition constitutes a queer of color critique which centers the queer of color subject, revealing the often-obscured interconnected logics of race, gender, sexuality and class in cultural formations to map and remap the contours of power propagated by state forces.¹⁴ Through the spectacle of Bradford’s performance, we, as black queer scholars, conceptualize a queer womanist reading of King that undermines and reconstitutes the state’s logic of popular will.¹⁵

II. ADMINISTRATIVE VIOLENCE

A month before the incoming Trump administration would overturn Obama-era public school guidance on trans students, on January 5, 2017, Texas Lt. Governor Dan Patrick held a press conference to announce the filing of a new bill, the Texas Privacy Act.¹⁶

¹⁰ See Alex Bollinger, *Tennessee Introduces Bathroom Bill, Marriage Equality Ban*, LGBTQ NATION (Feb. 10, 2017), <https://www.lgbtqnation.com/2017/02/tennessee-introduces-bathroom-bill-marriage-equality-ban/>; Kristina Marusic, *Texas Politician Invokes MLK in Announcement of New Anti-Trans Bathroom Bill*, LOGO NEWNOWNEXT (Jan. 5, 2017), <http://www.newnownext.com/texas-lt-gov-dan-patrick-press-conference-privacy-protection-act-senate-bill-6-anti-trans-bathroom-bill/01/2017/>.

¹¹ See *infra* Part II.

¹² BUTLER, *PERFORMATIVE THEORY OF ASSEMBLY*, *supra* note 4, at 5–6.

¹³ See *infra* Part III.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Press Conference: Lt. Governor Dan Patrick, TEX. SENATE (Jan. 5, 2017), http://tlcsenate.granicus.com/MediaPlayer.php?view_id=42&clip_id=11502; see also Alexa Ura et al., *Following*

Authored by Republican State Senator Lois Kolkhorst, the bill requires that students use restrooms according to their, as the bill states, “biological sex”—by which they mean “the physical condition of being male or female, which is stated on a person’s birth certificate.”¹⁷ In May 2016, the Obama administration directed its Departments of Justice and Education’s civil rights divisions to issue a guidance to schools to not prohibit students from using bathrooms that matched their gender identity but may not align with the sex indicated on their birth certificate.¹⁸ Thus, under Title IX provisions, treating a student’s gender identity as their sex.¹⁹

This legal conception of sex as gender was a progressive stance taken throughout much of the Obama administration.²⁰ The category of sex has been a contested ground in transgender anti-discrimination law.²¹ The (re)reading of sex as a protected class in federal law has been employed for transgender law reform, providing three distinctive readings of the category—sex as biology, sex as anatomy, and sex as gender—with the latter characterizing a still limiting but “an advance over prior approaches to anti-discrimination law concepts of sex in transgender contexts.”²² Limited by its propensity to reify binary gendered norms, nonetheless, sex as gender interpretations are not constituted on anatomical considerations but on transgressive gendered behavior, or as Alex Sharpe states, “gender performance replaces a concern with transgender ‘authenticity’ that characterizes prior anti-discrimination law reform jurisprudence.”²³ Thus, during the Obama era,

North Carolina’s Lead, Dan Patrick Unveils So-Called “Bathroom Bill”, TEXAS TRIBUNE (Jan. 5, 2017, 1:00 PM), <https://www.texastribune.org/2017/01/05/texas-lt-gov-dan-patrick-unveils-so-called-bathroom/>.

¹⁷ S.B. 6, 85th Leg., Reg. Sess. (Tex. 2017).

¹⁸ Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. & Vanita Gupta, Principal Deputy Assistant Att’y Gen. for Civil Rights, U.S. Dep’t of Just., Dear Colleague Letter on Transgender Students (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

¹⁹ *Id.*

²⁰ See Juliet Eilperin, *Obama’s Quiet Transgender Revolution*, WASH. POST (Dec. 1, 2015), https://www.washingtonpost.com/politics/obamas-quiet-transgender-revolution/2015/11/30/6879527e-95e4-11e5-b5e4-279b4501e8a6_story.html?utm_term=.28166ab9d0fd.

²¹ ALEX N. SHARPE, *TRANSGENDER JURISPRUDENCE: DYSPHORIC BODIES OF LAW* 136–37 (2006); see also Sandhya Somashekhar, *Is Discrimination Against Transgender People a Form of Sex Discrimination?*, WASH. POST (May 5, 2016), https://www.washingtonpost.com/national/is-discrimination-against-transgender-people-a-form-of-sex-discrimination/2016/05/05/deff7450-12df-11e6-81b4-581a5c4c42df_story.html?utm_term=.d69d9be3b42b.

²² SHARPE, *supra* note 21, at 139–54.

²³ *Id.* at 155.

with push from trans advocate organizations and activists, similar interpretations of sex were implemented in the Social Security Administration (SSA), removing the requirement of sex-confirmation surgery for changing the sex indicator on federal legal documents,²⁴ and Equal Employment Opportunity Commission protections, which ruled in 2012 that gender identity-based employment discrimination is “sex” discrimination violating Title VII of the Civil Rights Act of 1964.²⁵

However, the Trump administration would not only overturn the Title IX Obama-era mandates in February 2017, but a year later, would go as far as to no longer investigate complaints filed by trans students who had been banned from restrooms that match their gender identity.²⁶ These inconsistencies and possibilities in proscribing anti-discrimination law to protect trans people highlight Dean Spade’s critical push for a trans politics that “move beyond the politics of recognition and inclusion,”²⁷ as found in anti-discrimination/hate crime law, to focus on the administrative realm of governance.²⁸ Administrative governance includes the federal agencies, such as the SSA, and state agencies like departments of health, transportation, education, etc., that actually create and produce meaning for the category of sex.²⁹ Laws and policies in the administrative realm can enact a form of trans violence through their rules that govern gender, whether that’s gender reclassification ID policies, healthcare access, or sex-segregation of public institutions—these policies effect the security and vulnerability of trans populations.³⁰ This has been especially true in the age of the “War on Terror” where an increased scrutiny of immigration and funding of United States militarism has led to an increase policing of national standardization of categorizing gender, a “state-building project, a project that increases the

²⁴ NAT’L CTR. TRANSGENDER EQUALITY, TRANSGENDER PEOPLE AND THE SOCIAL SECURITY ADMINISTRATION (June 2013), https://transequality.org/sites/default/files/docs/kyr/SSAResource_June2013.pdf; *see also* Eilperin, *supra* note 20.

²⁵ *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, U.S. EEOC (July 8, 2016), https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm.

²⁶ Moriah Balingit, *Education Department No Longer Investigating Transgender Bathroom Complaints*, WASH. POST (Feb. 12, 2018), https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints/?utm_term=.73dce7ba491d.

²⁷ DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 8* (2015) [hereinafter SPADE, *NORMAL LIFE*].

²⁸ *Id.* at 9.

²⁹ *Id.* at 11.

³⁰ *Id.* at 11–12.

reach of the state through the use of a national standard.”³¹ Therefore, resisting anti-transgender administrative policies directly affect the survival of trans people while limiting the expansive power of the state.³²

A. *Framing Race and Religion through Fate*

Lt. Governor Patrick’s public proclamation of a Texas “bathroom bill” can be seen as the initiation of the anti-trans insurgency to come.³³ Patrick’s announcement would also set another precedent in the anti-trans political movement. It would be one of the first citations, or framing, of anti-trans policy and rhetoric with a black justice discourse.³⁴ Patrick opened the press conference with a quote from Martin Luther King, Jr. stating, “Martin Luther King said, ‘Our lives begin to end the day we become silent on things that matter.’”³⁵ Patrick goes on to say, “This legislation, the Texas Privacy Act . . . is unquestionably one of the things that matters. It’s the right thing to do. I know it. Texans know it. And Senator Kolkhorst knows it.”³⁶

“Framing” is typically defined as methods of mobilization in which social actors discursively translate policy and social conditions while making meaning of their issue on a collective level.³⁷ Framing can be employed by both progressive and conservative social movements in

³¹ Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 738 (2008) [hereinafter Spade, *Documenting Gender*].

³² SPADE, NORMAL LIFE, *supra* note 27, at 74–75.

³³ See Press Conference: Lt. Governor Dan Patrick, *supra* note 16.

³⁴ *Id.*; see also Jeff Taylor, *Texas Introduces Anti-Transgender Bathroom Bill with Quote From MLK, Jr.*, LGBTQ NATION (Jan. 5, 2017), <https://www.lgbtqnation.com/2017/01/texas-introduces-anti-transgender-bathroom-bill/>.

³⁵ Press Conference: Lt. Governor Dan Patrick, *supra* note 16; see also Alex Zielinski, *Lt. Gov. Patrick Unleashes Anti-Transgender Bill*, SAN ANTONIO CURRENT (Jan. 5, 2017, 3:40 PM), <https://www.sacurrent.com/the-daily/archives/2017/01/05/lt-gov-patrick-unleashes-anti-transgender-bill>.

³⁶ Press Conference: Lt. Governor Dan Patrick, *supra* note 16.

³⁷ See David A. Snow et al., *The Framing Perspective on Social Movements: Its Conceptual Roots and Architecture*, in THE WILEY BLACKWELL COMPANION TO SOCIAL MOVEMENTS 392, 393–95 (David A. Snow et al. eds., 2d ed. 2019) (defining “framing” in the social movement context). See also Holly J. McCammon et al., “No Weapon Save Argument”: *Strategic Frame Amplification in the U.S. Woman Suffrage Movements*, 45 SOC. Q. 529, 530–31, 539 (2004) (“[F]raming [is] the interpretive and communicative work that movement actors do to bolster support for their movement and its cause.”); Deana A. Rohlinger, *Framing the Abortion Debate: Organizational Resources, Media Strategies, and Movement-Countermovement Dynamics*, 43 SOC. Q. 479, 480 (2002) (“Framing is the process of constructing and defining events for an audience through the control of the agenda and vocabulary.”).

efforts to enact political social change.³⁸ Often on a given issue, progressive and conservative framing are co-influential as movement actors continuously adjust and establish new frames to meet internal and external conditions to optimize their respective political and social trajectories.³⁹ Recently, in the political struggle over LGBT rights in the United States, some scholars have noted the deployment of racially-based framing by both affirmative and oppositional movements.⁴⁰

In other words, social actors on both sides of the political issue have conveyed their arguments based on historical conceptions of racial inequality and/or justice in the United States.⁴¹ Though analogizing racial and queer politics in both approaches can often erase the experiences of queer people of color, this development is particularly interesting when framed by oppositional movements because it creates a disjunction between interrelated systems of oppression and civil rights—concealing the instability, inter-performative dynamics of race, sex and gender to construct multiracial coalitions or what Butler might call performative collectives.⁴² Furthermore, these collectives are typically constructed through fate-linking strategies—political unity,

³⁸ See, e.g., Rohlinger, *supra* note 37, at 483–84 (noting that oppositional groups “counter frame[]” issues or attempt to “undermine another organization’s collective action framework”). See David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC. 1628 (exploring the “face-to-face confrontations” between opposing social movements).

³⁹ Meyer & Staggenborg, *supra* note 38, at 1647–53 (discussing the influence of the “strategies and tactics” have on opposing movements).

⁴⁰ See Darren E. Sherkat, *Intersecting Identities and Support for Same-Sex Marriage in the United States*, 4 SOC. CURRENTS 380, 395 (2017) (noting that “research shows that ethnicity plays a strong role in structuring how religious and political identities inform attitudes toward same-sex marriage, and also how gender and sexuality intersect with ethnicity and family factors to influence support for marriage equality”); Nancy D. Wadsworth, *Intersectionality in California’s Same-Sex Marriage Battles: A Complex Proposition*, 64 POL. RES. Q. 200, 212 (2011) (“Battles over same-sex marriage are best understood through a lens of foundational intersectionality because an intersectional history of privilege and exclusion produced marriage as a political institution in the first place.”).

⁴¹ See Sherkat, *supra* note 40, at 383 (discussing how ethnicity “plays a crucial role in the ongoing political discussion of civil rights for GLBT persons” because of the “historical connection with dominant political, religions, and family institutions” which have held to “construct institutions like marriage”); Wadsworth, *supra* note 40, at 201 (“It is the foundational intersectionality of these categories—that is, their profoundly intertwined historical development—that best explains why marriage law has historically been written the way it has and why different citizens now choose to align via particular axes of identity.”).

⁴² See BUTLER, PERFORMATIVE THEORY OF ASSEMBLY, *supra* note 4, at 1–9 (describing the theory of plural performativity).

alliance, and support predicated on framing how subjects see themselves and their destiny in relation to a defined “other.”⁴³

Lt. Governor Patrick’s opening statement, thus, constitutes an emotional fate-linking strategy, which as Sara Ahmed writes, “work[s] by aligning subjects with collectives by attributing ‘others’ as the ‘source’ of our feelings.”⁴⁴ Here, through an affective moral plea invoked in part by employing a King quote, support of the Texas Privacy Act is something “that matter[s]” to those who understand “rightness,” or specifically, “righteousness” given the religious context of King.⁴⁵ The sentiment invites the listener to adopt “the one who knows and speaks,” constituting the “us” and the legitimate subjects of the state through an emotional fear of the illegitimate others—those in opposition to the bill—who threaten “our lives” with their “silence” and complicity with “immorality.”⁴⁶ As such, privacy, as indicated in the bill’s title, is relegated to only the legitimate citizens of the state and constituted by the disclosure and surveillance of the “other.”⁴⁷

Precisely, as used here, “our lives” signify the nation-state and the white cis-heteropatriarchy that constitutes its sovereign body.⁴⁸ The recognition of unintelligible trans bodies, then, threaten to “end” our lives, or maybe reconstitute the state body and its hierarchies.⁴⁹ Furthermore, this narrative particularly invites people of color to the “collective” with its invocation of King, and subsequently, the Civil Rights Movement—a period of recognition and inclusion of racial minority difference into the national identity according to the configurations of the national body.⁵⁰ Patrick’s use of this racial archive is in some ways

⁴³ Wadsworth, *supra* note 40, at 202, 206–09 (exploring the rhetorical fate-linking strategies used by both sides of California marriage equality battles).

⁴⁴ SARA AHMED, *THE CULTURAL POLITICS OF EMOTION* 1 (2d ed. 2015).

⁴⁵ See Press Conference: Lt. Governor Dan Patrick, *supra* note 16. Lt. Governor Patrick states that those who support the bill are on the “right side of the issue and the right side of history.” *Id.*

⁴⁶ AHMED, *supra* note 44, at 1.

⁴⁷ See *id.* (discussing how those who are “‘not us’ . . . endanger what is ours” and “threaten to take away from what ‘you’ have, as the legitimate subject of the nation”).

⁴⁸ See Andrea Smith, *Heteropatriarchy and the Three Pillars of White Supremacy: Rethinking Women of Color Organizing*, in *COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* 66, 71–73 (INCITE! Women of Color Against Violence ed., 2016) (“Heteropatriarchy is the building block of the US empire. In fact, it is the building block of the nation-state form of governance.”).

⁴⁹ See AHMED, *supra* note 44, at 12 (noting how one becomes the ‘you’ by “feel[ing] rage against those who threaten . . . to destroy ‘the nation’, which would signal the end of life itself”).

⁵⁰ See John A. Powell, *Tracing the History of Racial Inclusion and Debunking the Color-Blind/Post-Racial Myth*, AM. BAR ASS’N (Sept. 26, 2018),

emblematic of Spade's warning of a trans politics based solely on rights claims—once those rights are extended, previously excluded subjects can be employed by the state to progress its interest.⁵¹

However, this was not the only occasion where this type of racial framing was employed to progress anti-transgender public policy. During the week of February 7, 2017, two bills were introduced in the Tennessee legislature by State Senator Mae Beavers and Representative Mark Pody aimed at restricting the rights of LGBT people.⁵² Senate Bill 752, labeled the Tennessee Natural Marriage Defense Act, contends that the state should only recognize marriage between one man and one woman,⁵³ and thus, requires the state to ignore the Supreme Court decision in *Obergefell v. Hodges* which outlawed discrimination against same-sex couples in marriage law.⁵⁴ The other bill, Senate Bill 771, authorizes public schools and universities to “require that a student use student restroom and locker room facilities that are assigned for use by persons of the same sex as the sex indicated on the student’s original birth certificate.”⁵⁵ Along with claiming that the *Obergefell v. Hodges* decision is “a lawless opinion with no basis in American law or history,”⁵⁶ the introduction of Senate Bill 752 invokes both Martin Luther King, Jr. as well as the 1857 *Dred Scott*⁵⁷ decision in framing the anti-gay marriage legislation, having the ability to be framed in a way to appeal to multiracial coalitions of opposition.⁵⁸

The Tennessee bills, as well as Texas Lt. Governor Patrick’s press conference, construct an interesting paradoxical alignment with race, gender and sexuality. Siobhan Somerville examines the historical deployment of race and sexuality at the turn of the twentieth century in the United States to illustrate how the demarcation of bodies as either “homosexual” or “heterosexual” correlated with the categorizing of bodies as “black” and “white.”⁵⁹ In doing so, Somerville was able to

https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_1_50_years_later/history_racial_inclusion_color_blind_myth/ (discussing the changes in racial inclusion over the past fifty years).

⁵¹ See SPADE, *NORMAL LIFE*, *supra* note 27, at 43–44, 49.

⁵² Bollinger, *supra* note 10.

⁵³ S.B. 0752, 110th Assemb. (Tenn. 2017).

⁵⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

⁵⁵ S.B. 0771, 110th Assemb. (Tenn. 2017).

⁵⁶ S.B. 0752, 110th Assemb. (Tenn. 2017).

⁵⁷ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

⁵⁸ S.B. 0752, 110th Assemb. (Tenn. 2017).

⁵⁹ See SIOBHAN B. SOMERVILLE, *QUEERING THE COLOR LINE: RACE AND THE INVENTION OF HOMOSEXUALITY IN AMERICAN CULTURE* 166 (2000).

“connect the ideological work of race to the historical emergence of models of homo- and heterosexuality at the turn of the century.”⁶⁰ Produced through state knowledge regimes, specifically framed by racist eugenic ideology, sexual deviance or “abnormality” was adopted as an indicator of racial degeneration, and as a result, a trans-historical logic of race and sexuality emerged.⁶¹ With this logic, progression or transgression of either race or gendered sexual norms is contingent on fixing, correspondingly, race or gendered sexuality to a stable or natural state.⁶² This logic is deployed within the framing of the Tennessee and Texas anti-LGBT legislation.

The Tennessee bills leverage racial progress to conceptualize heterosexuality and gender conformity as (bio)logical, or thus, naturalized.⁶³ The nine-page introduction to Senate Bill 752 makes mention of “natural” marriage or law approximately twenty-five times.⁶⁴ In the bill’s framing, naturalness is invoked as a means to challenge the *Obergefell v. Hodges*⁶⁵ United States Supreme Court decision, such as stating, “WHEREAS, the decision in *Obergefell* purporting to overturn natural marriage flies in the face of reality, the created order, and the law of nature, just as if the Court were to claim authority to strike down the law of gravity or other natural laws.”⁶⁶ This discourse works as a regulatory idea in which over time it has produced a regulatory force for controlling the body through a compulsive heterosexuality.⁶⁷ Therefore, when you take the Tennessee bills together, the anti-gay marriage bill and the bathroom bill, collectively, the heteronormativity of the marriage bill incites a cultural intelligible gender and sex binary—giving credence to the bathroom bill’s sex as assigned at birth or (bio)logical necessity.⁶⁸ Hence, in a legislative sense, Sharpe contends, “the

⁶⁰ *Id.* at 7.

⁶¹ *Id.*

⁶² See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 8 (2007) [hereinafter BUTLER, *GENDER TROUBLE*] (“What sense does it make to extend representation to subjects who are constructed through the exclusion of those who fail to conform to unspoken normative requirements of the subject?”).

⁶³ Bollinger, *supra* note 10. See generally Karin A. Martin, *Normalizing Heterosexuality: Mothers’ Assumptions, Talk, and Strategies with Young Children*, 74 AM. SOC. ASS’N 190 (2009) (noting that heteronormativity, “the everyday ways that heterosexuality is privileged and taken for granted as normal and natural,” is a social problem).

⁶⁴ S.B. 0752, 110th Assemb. (Tenn. 2017).

⁶⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁶⁶ S.B. 0752, 110th Assemb. (Tenn. 2017).

⁶⁷ BUTLER, *GENDER TROUBLE*, *supra* note 62, at 31.

⁶⁸ See *id.* at 24 (“The cultural matrix through which gender identity has become intelligible requires that certain kinds of ‘identities’ cannot ‘exist’ – that is, those in which gender does not

homophobia of law proves important, if not central, to an understanding of the transgender/law relation.”⁶⁹

In order to consolidate this naturalizing logic of gender, sex and sexuality, race becomes central to the propagation. Race, in part, becomes necessary in this instance because the state is making a case against or to occlude the federal ruling, and therefore, needs precedence. Thus, historical legal cases in which social actors, or even states, have been defiant of the federal government on the basis of racial progress are employed in the framing of the bill.⁷⁰ The introduction to SB752 states:

Whereas, Dr. Martin Luther King, Jr., in his famous ‘Letter from a Birmingham Jail’ stated, ‘How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law.’⁷¹

The introduction goes on to cite Wisconsin and other states’ nullification of the 1850 Fugitive Slave Act⁷² and the 1857 *Dred Scott v. Sandford*⁷³ United States Supreme Court decision.⁷⁴ Going back to Somerville’s race/gendered sexuality logic, race is enacted here in a way in which racial progression is a discursive device hailed for the exclusion of nonnormative gendered sexualities.⁷⁵ The Texas announcement enacts a similar, less explicit discursive scheme.⁷⁶ As discussed previously, the use of King and the moralistic racial justice rhetoric aligns racial progress and inclusion with the content of the bill—naturalizing its gendered effects. Both the Texas and Tennessee discourse produces a state-configured rendering of racial history in the United States that situate black political movements around ideas of national unity.⁷⁷ This

follow from sex and those in which the practices of desire do not ‘follow’ from either sex or gender.”).

⁶⁹ SHARPE, *supra* note 21, at 141.

⁷⁰ See S.B. 0752, 110th Assemb. (Tenn. 2017).

⁷¹ *Id.*

⁷² Fugitive Slave Act of 1850, 9 STAT. 462 (1850).

⁷³ 60 U.S. 393 (1857).

⁷⁴ S.B. 0752, 110th Assemb. (Tenn. 2017).

⁷⁵ See SOMERVILLE, *supra* note 59, at 7.

⁷⁶ See Press Conference: Lt. Governor Dan Patrick, *supra* note 16.

⁷⁷ See *id.*; Bollinger, *supra* note 10.

ideology positions the state as the great protector and equalizer while absolving it of the forms of disparity and violence it produces.

B. Constituting “The People”

The Texas and Tennessee bills illustrate how anti-LGBT legislation can be framed racially (and religiously).⁷⁸ This is particularly interesting in terms of performative collectives.⁷⁹ The universalist discursive frames employed by state agents to promote these bills raise fundamental democratic questions of, “who are ‘the people?’” and “what is ‘popular will?’”⁸⁰ Butler contends that whenever “the people” is invoked, whether implicitly or explicitly, the discourse works within a performative field of power where demarcations between legitimate and illegitimate citizens are made and inequalities and exclusions are reproduced.⁸¹ Butler argues that to make meaning of public assemblies and demonstrations, “we have to read such scenes not only in terms of the version of the people they explicitly set forth, but in relations of power by which they are enacted.”⁸² Recognizing the connection and distinction between linguistic and bodily performativity, thus establishing “the people” as a discursive and material field of struggle, Butler asserts, “The gathering signifies in excess of what is said, and that mode of signification is a concerted bodily enactment, a plural form of performativity.”⁸³ As such, performative collectives are by no means representative of a given population but have the ability to reinforce or subvert systems of intelligibility and legitimacy.⁸⁴

This “plural form of performativity”⁸⁵ is especially evident in the gatherings in response to the Texas Privacy Act and the state’s fate-linking approach.⁸⁶ On August 3, 2017, the *Houston Chronicle* reported more than 200 religious leaders from across Texas rallied at the State Capitol Building during a special legislative session in support of the

⁷⁸ See Press Conference: Lt. Governor Dan Patrick, *supra* note 16; Bollinger, *supra* note 10; see also S.B. 6, 85th Leg., Reg. Sess. (Tex. 2017).

⁷⁹ See BUTLER, PERFORMATIVE THEORY OF ASSEMBLY, *supra* note 4, at 7–8.

⁸⁰ *Id.* at 2–3.

⁸¹ *Id.* at 3–5.

⁸² *Id.* at 7.

⁸³ *Id.* at 8.

⁸⁴ *Id.* at 4–5, 19.

⁸⁵ BUTLER, PERFORMATIVE THEORY OF ASSEMBLY, *supra* note 4, at 8.

⁸⁶ Jeremy Wallace, *Faith Leaders Rally in Support of Bathroom Bill*, HOUSTON CHRON. (Aug. 3, 2017), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Faith-leaders-rally-oppose-bathroom-bill-11733170.php#photo-13635257>.

bathroom bill which at the time had passed the Senate with revisions but stalled in the House where it would eventually die.⁸⁷ The rally was organized by David Welch, a white conservative activist pastor and leader of the U.S. Pastors Council; however, the rally featured a predominate line up of black Christian clergy.⁸⁸ In opposition to challengers of the bill who framed their cause as a civil rights issue, the article asserts Welch intentionally wanted black church leaders to speak as a counter-framing maneuver.⁸⁹ Just two days prior to this religious support rally, a rally was held at the capital by religious leaders opposed to the bill.⁹⁰ As indicated in their open letter to legislators, the bathroom bill supporters perceived some opponents as “hijacking the righteous cause of civil rights.”⁹¹ Rev. Bill Owens, one of the rally speakers and leader of the Coalition of African American Pastors, claiming to have marched with Martin Luther King Jr., states, “I marched to be able to go to the school of my choice, to get a job that I was qualified for . . . I did not march one foot, one yard, one mile for men to go into women’s restrooms.”⁹² These sentiments are further fortified by conservative Christian rhetoric, as Dallas Pastor Stephen Broden contends “we are engaged in a spiritual warfare here” because opponents of the bill encourage “doctrines of demons.”⁹³

The state fate-linking discourse, as articulated by Texas Lt. Governor Patrick, can be seen by this performative collective as a hegemonic device with material effects.⁹⁴ The state’s power is consolidated by its ideological construction of “the people” through “the production of an interlocking system of ideas which persuades people of the rightness of any given set of often contradictory ideas and perspectives.”⁹⁵ Religion works as a mediator for this racial and heteronormative ideological fate-linking process.⁹⁶ The state-produced memorializing rhetoric, then, constructs and affirms racial memories and collective identities, thereby through citational acts, where particular bodies coalesce

⁸⁷ *Id.*; see also Associated Press, *How the Texas ‘Bathroom Bill’ Keeps Faltering*, L.A. TIMES (Aug. 15, 2017), <https://www.latimes.com/nation/nationnow/la-na-texas-bathroom-bill-20170815-story.html>.

⁸⁸ Wallace, *supra* note 86.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See BUTLER, PERFORMATIVE THEORY OF ASSEMBLY, *supra* note 4, at 19–20 (discussing the struggle over “legitimation” and the “hegemonic struggle over who ‘we’ are”).

⁹⁵ JUDITH HALBERSTAM, *THE QUEER ART OF FAILURE* 17 (2011).

⁹⁶ See Wadsworth, *supra* note 40, at 203.

under the state discursive regimes, conditioned by state knowledges and histories.⁹⁷

Like the fate-linking operations Nancy Wadsworth found in the political battle over California's Proposition 8, a 2008 ballot initiative to abolish same-sex marriage rights, anti-LGBT organizers formed multiracial coalitions—often more effectively than their challengers—by relying on religion as a cultural connector between unlikely racial collaborators.⁹⁸ These coalitions are “superficial” or “short-term” because they rarely manifest in addressing anti-racist politics.⁹⁹ Though the black male pastors reference the anti-racist work of the Civil Rights Movement, the alliances they have formed with Welch and other white conservative evangelicals will likely never work to address systemic racism.¹⁰⁰ Furthermore, the race/gendered sexuality logic present in the framing of the bills erases queer people of color as it essentializes blackness and employs a conservative religious metrics to ordain morality and il/legitimate subjectivity.¹⁰¹

The implications of such racial framing, building multiracial, or specifically in this case, black and white biracial coalitions in support of anti-transgender policies, raises questions about what Butler describes as “expressions of popular will”.¹⁰² As Butler states, “Who really are ‘the people’? And what operation of discursive power circumscribes ‘the people’ at any given moment, and for what purpose?”¹⁰³ Indeed,

⁹⁷ See G. Mitchell Reyes, *Memory and Alterity: The Case for an Analytic of Difference*, 43 PHIL. & RHETORIC 222, 223, 227 (2010) (discussing how “remembrance offers resources for transforming individuals into citizens, and the rhetoric of public memory that constitutes community” and how public memory “emphasize[s] the political motives behind its recollection and mobilization in the present”).

⁹⁸ Wadsworth, *supra* note 40, at 209 (“[A]lthough religion is often the implicit anchor of this commonality, as evidenced by group affiliations, the discursive strategy of referencing heterosexuality [or, heteronormativity in this case] as a cultural tradition allows race or culture, and not religion, to do the political legwork.”).

⁹⁹ *Id.* at 208.

¹⁰⁰ See Wallace, *supra* note 86; see also Nancy Wadsworth, *Race-ing Faith and Fate: The Jeremiad in Multiracial “Traditional Marriage” Alliances*, 1 RACE/ETHNICITY: MULTIDISCIPLINARY GLOBAL CONTEXTS 313, 332 (2008) (concluding that the “shared interest and independent resource bases” of multiracial faith-based alliances “does not mean these alliances serve racial justice or, indeed, are ‘multiracial’ coalitions in any substantive way . . . [as they are] strategic and temporary, [and] appear to be no mechanisms within them that challenge white members to address racial privilege, or that allow members to address racial differences between themselves”).

¹⁰¹ See BUTLER, PERFORMATIVE THEORY OF ASSEMBLY, *supra* note 4, at 6 (discussing how demarcation and “exclusion” leads to only “partial[] recogni[tion]” of ‘the people’”).

¹⁰² *Id.* at 2.

¹⁰³ *Id.* at 3.

establishing who “the people” are is a strategic discursive act of garnering power and control, one in which race has come to play a significant role in the post-civil rights era.¹⁰⁴ Particularly in conservative moments as outlined here, in a period of supposed “color-blindness”—a dominant ideology that claims the United States has rectified its tensions over the color line—the presence and inclusion of people of color has come to signify a claim at “the people.”¹⁰⁵ In a sense, people of color are commodified in the “discursive wager” to demarcate who are not “the people” (i.e., queer people).¹⁰⁶ Therefore, as Butler states, “the act of delimitation operates according to a performative form”¹⁰⁷ in which the “full” recognition of people of color is constituted restrictively within national terms, reproducing inequality in their alignment with “the people.”¹⁰⁸

As a result, these multiracial coalitions in opposition to trans rights must be called into question as to “whether such movements can be interpreted as true or promising examples of the popular will.”¹⁰⁹ Furthermore, given the discursive logic we have examined here, we must ask what type of public assembly brings into view abject bodies, “one that asserts and instates the body in the midst of the political field, and which, in its expressive and signifying function, delivers a bodily demand for a more livable set of economic, social, and political conditions?”¹¹⁰ Hence, we are seeking an assembly that enacts a critical trans politics— “that is, a trans politics that demands more than legal recognition and inclusion, seeking instead to transform current logics of state, civil society security, and social equality.”¹¹¹

C. Archiving Race

This racial justice discursive maneuver cannot be solely reduced to legal or tactical strategy.¹¹² Instead, it demonstrates how power

¹⁰⁴ *Id.* at 6.

¹⁰⁵ EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 1–4 (5th ed. 2018); *see* SPADE, *NORMAL LIFE*, *supra* note 27, at 43 (noting the concept of “‘colorblindness’ undermines the possibility of remedying the severe racial disparities in the United States”).

¹⁰⁶ BUTLER, *PERFORMATIVE THEORY OF ASSEMBLY*, *supra* note 4, at 4.

¹⁰⁷ *Id.* at 6.

¹⁰⁸ *Id.* at 3–4.

¹⁰⁹ *Id.* at 7.

¹¹⁰ *Id.* at 11.

¹¹¹ SPADE, *NORMAL LIFE*, *supra* note 27, at 1.

¹¹² *Id.* at 8, 50.

operates as a complex, multidimensional force.¹¹³ Employing Michel Foucault's biopower conceptualization of discipline of the body and regulation of population,¹¹⁴ Spade argues this framework is useful in tracing how life chances are disproportionately distributed through trans populations contact with administrative systems that promote certain forms of life over and against others.¹¹⁵

Spade goes on to adapt Foucault's framework and define disciplinary power as "how racism, transphobia, sexism, ableism, and homophobia operate through the norms that produce ideas about types of people and proper ways to be."¹¹⁶ The political intervention of bathroom bills and the fate-linking discursive techniques employed by the state respectively represent forms of population and disciplinary power. Taken together, Spade has found that support for population interventions like bathroom bills have relied on social and political mobilization through "racist and sexist images that construct ideas of 'us' and 'them'—a national population that needs protection and constitute others who are cast as threats and drains to that population."¹¹⁷ In the case of Texas, as we have discussed, this has meant making trans people a threat to "legitimate" citizens' "privacy."¹¹⁸

However, what's unique about the Texas and Tennessee framing is that instead of relying on racialized-gendered imagery, they employ a state racial archival history—invoking a collective memory—through the predominate use of Martin Luther King, Jr. Roderick Ferguson outlines how power reached a new configuration during the mid-twentieth century political uprisings in the United States.¹¹⁹ Here, the United States higher education system acted as an archival intermediary using state epistemic logics to reframe minoritized subjects. Specifically, through the establishment of interdisciplinaries like black studies, Ferguson states, "the interdisciplines were both the midwives and the children of affirmative and regulatory modes of power."¹²⁰ The inclusion of

¹¹³ *Id.* at 2–3.

¹¹⁴ Foucault's theory of biopower is "that one must proceed with caution to avoid simply supporting a strategy of power while thinking oneself rebellious." Mark Kelly, *Michael Foucault: Political Thought*, INTERNET ENCYC. OF PHIL., <https://www.iep.utm.edu/fouc-pol/#H7>.

¹¹⁵ SPADE, *NORMAL LIFE*, *supra* note 27, at 50–51.

¹¹⁶ *Id.* at 52.

¹¹⁷ *Id.* at 59.

¹¹⁸ See *supra* text accompanying notes 42–51.

¹¹⁹ RODERICK FERGUSON: THE REORDER OF THINGS: THE UNIVERSITY AND ITS PEDAGOGIES OF MINORITY DIFFERENCE 4–8 (2012).

¹²⁰ *Id.* at 111.

minority difference in the landscape of the university, expanded the university's reach to once "nonuniversity" communities.¹²¹ As such, the social movements of the 1960s and their interdisciplinary counterparts, transformed ideas of responsibility for marginalized communities.¹²²

There are two primary ways a state archival racial history has manifested.¹²³ One, it is true that the Civil Rights Movement integrationist and survivalist standpoint, particularly as conceptualized through King, was not affirming of sexual freedom and homoerotic agency.¹²⁴ However, the notions of responsibility that undergirded the movement were informed by the knowledge/power regimes of the Western academy—a process in which "deviant" and "perverse" sex and sexuality demarcated race, and thus, incited regulation of gender and sexuality in the public image of black people by African American leaders seeking full recognition and protection under the law.¹²⁵ Ferguson argues the movement's ideology "evoked the historic function of the university as the domain for defining responsibility according to the dictates and errands of the national identity."¹²⁶ Therefore, the moral, liberal appeal of the bathroom bills in a racial justice context obscures the United States nation-state's historical and contemporary role in gendered racialization.¹²⁷

Secondly, King has become memorialized, and thus, institutionalized within the academy and the nation through the archival networks of the social movements of the 1960s.¹²⁸ Scholars argue that King has been relegated to a tactical and rhetorical figure within a romanticized

¹²¹ *Id.*

¹²² *Id.* at 111–12.

¹²³ Ashley Farmer, *Archiving While Black*, CHRON. HIGHER EDUC. (July 22, 2018), <https://www.chronicle.com/article/Archiving-While-Black/243981>.

¹²⁴ *Id.* at 136.

¹²⁵ CATHY J. COHEN, *THE BOUNDARIES OF BLACKNESS: AIDS AND THE BREAKDOWN OF BLACK POLITICS* 72–73 (1999).

¹²⁶ FERGUSON, *supra* note 119, at 136.

¹²⁷ See Mark L. McPhail & David A. Frank, *Racing the Trump Card: Rhetorics of Whiteness and the Politics of Adaptive Resistance After Obama*, 36 RHETORIC REV. 282, 282–83 (2017) (noting how Obama's election "represented a superficial embrace of 'acceptable' blackness, a racial rapprochement that ignored and obscured the nation's long history of racial violence and victimization beneath the veil of 'postracial' possibilities").

¹²⁸ Brandon M. Terry & Tommie Shelby, *Martin Luther King, Jr. and Political Philosophy*, in *TO SHAPE A NEW WORLD: ESSAYS ON THE POLITICAL PHILOSOPHY OF MARTIN LUTHER KING, JR.*, 1, 2 (Tommie Shelby & Brandon M. Terry eds., 2018) ("[D]espite King's having been memorialized so widely and quoted so frequently, serious study and criticism of his writings, speeches, and sermons remain remarkably marginal and underdeveloped within philosophy, political theory, and the history of political thought . . .").

master narrative of the Civil Rights Movement in which “the defining meaning . . . is understood as derivative of long-standing American ideals, enshrined within the founding documents, and thus most crucially realized via the impassioned insistence that America simply live up to its creed.”¹²⁹ In this case, King’s institutionalization has resulted in a contradictory effect—his glorification and management, in that, little to no intellectual work has been done to understand King theoretically in both a historical and contemporary political framework.¹³⁰

How people remember or make meaning of historical events or persons is a critical element of disciplinary power.¹³¹ As Foucault states:

Since memory is actually a very important factor in struggle...if one controls people’s memory, one controls their dynamism. And one also controls their experience, their knowledge of previous struggles...It’s vital to have possession of this memory, to control it, administer it, tell it what it must contain.¹³²

As such, the state fate-linking discourse enacts a form of disciplinary power that conceals the state knowledge/power regimes and disseminate a neutralized commemoration of our racialized past.¹³³ The ahistorical fate-linking practices of the state serve to bolster a contemporary colorblind ideology—one largely grounded in an abstract liberalism that decontextualizes racial inequality.¹³⁴ This “new” racial ideology operates in part based on how blackness is defined through narrow conceptions of gender, sexuality, and religion.¹³⁵ In this case, the interpellation of the state historico-political liberal discourse facilitates a conjoining of traditionally disparate racial and religious bodies predicated on the exclusion and erasure of queerness, particularly queer people of color.¹³⁶

¹²⁹ *Id.* at 3.

¹³⁰ See generally Terry & Shelby, *supra* note 128, at 3–5 (arguing that King is “uniquely vulnerable to having the richness and complexity of his thought ignored”).

¹³¹ See LINDA ELDER ET AL., STUDENT GUIDE TO HISTORICAL THINKING, THINKER’S GUIDE LIBR. 1, 5 (2012).

¹³² Michel Foucault & Cahiers du Cinema, *Film and Popular Memory: An Interview with Michel Foucault*, 11 RADICAL PHIL. 24, 25–26 (Martin Jordin trans., 1975) (1974).

¹³³ MICHEL FOUCAULT, THE FOUCAULT READER 204–05 (Paul Rabinow ed., 1984).

¹³⁴ BONILLA-SILVA, *supra* note 105, at 100–04.

¹³⁵ See COHEN, *supra* note 125, at 42.

¹³⁶ Jafari S. Allen, *Black/Queer/Diaspora at the Current Conjunction*, 18 GLQ: J. LESBIAN & GAY STUD. 212, 217 (2012).

As a result, this hegemonic ideology rests on complex interlocking systems of race, gender, sexuality, and religion.¹³⁷ In essence, this state racial justice archival and framing—which we can think of as one form of state documentation—intersects with the state’s administrative function to do the “invisible work of naturalizing” gender classification through another form of state documentation—birth certificates via bathroom bills.¹³⁸ Conceptually, we might consider the textual conjoining of gender documentation with racial documentation in state fate-linking discourse as an amendment.¹³⁹ Chandan Reddy conceptualizes amendments as a way to think about how state violence is formulated through race, sexuality, and United States globalism.¹⁴⁰ Bathroom bills, and their racial justice framing, “modify and authorize the prior textual body, it is because only through their frames can the body continue to figure as meaningful.”¹⁴¹ In this fashion, the bathroom bill discourse amends the state archival of race because it is through a regulated gendered sexuality that race is absorbed and used by the state.¹⁴² In return, this amendment logic consolidates a state-building project of national standardization of gender that extends the reach of the state in the name of “privacy” and “security” of legitimate citizens while legitimizing violence towards trans people.¹⁴³ Therefore, to think about a performative collective that enacts a critical trans politics, it must destabilize the structural components of this amendment and its specific historical, political, and epistemological alignment of race, gender, sexuality and religion.¹⁴⁴

III. DISIDENTIFYING KING: A QUEER OF COLOR CRITIQUE

It seems that if we are to provide a disjuncture in this state archival amendment, we must reclaim the black queer subject in our historical and contemporary memory and consciousness.¹⁴⁵ Here, reclaiming the black queer subject would reconstitute a racial history and

¹³⁷ *Id.* at 214.

¹³⁸ Spade, *Documenting Gender*, *supra* note 31, at 738.

¹³⁹ See CHANDAN REDDY, *FREEDOM WITH VIOLENCE: RACE, SEXUALITY, AND THE US STATE* 17 (2011) (noting that “in our contemporary moment, sexuality is an iteration of – an amendment to and of – race”).

¹⁴⁰ *Id.* at 14–17.

¹⁴¹ *Id.* at 15.

¹⁴² Vincent J. Samar, *The Right to Privacy and the Right to Use the Bathroom Consistent with One’s Gender Identity*, 24 *DUKE J. GENDER L. & POL’Y* 33, 54–55 (2016).

¹⁴³ *Id.* at 51–53.

¹⁴⁴ See Elena Kiesling, *The Missing Colors of the Rainbow: Black Queer Resistance*, 11 *EUR. J. AM. STUD.* 1, 4, 16–17 (2017).

¹⁴⁵ See *id.* at 16–17.

memory not void of sexual and gender variance but predicated on such.¹⁴⁶ Insights from Ferguson’s seminal text, *Aberrations in Black: Toward a Queer of Color Critique*, is integral to our analysis.¹⁴⁷ Ferguson illustrates how women of color and queer of color critiques have been essential to challenging liberal conceptions of the “black experience” that have been interpellated by state heteropatriarchal epistemologies and regulated gendered sexualities.¹⁴⁸ Ferguson states, “These subjects present history as the intersections of race, nation, class, *and* gender and sexuality. . . . [T]he gender and sexual regulations that descended on women and queers of color compelled critical interventions that would illuminate a more ‘total picture.’”¹⁴⁹ By positioning women and queers of color as subjects of knowledge from which to critique, is to “dismiss the theoretical services of identity politics. Instead of identity driving critical interventions, the heterogeneous formations that make up the social drive critical interventions.”¹⁵⁰ Thus, women and queer of color subjects reveal and reconceive the racialized, sexualized, and gendered configuration of the state racial archive, fate-linking rhetoric and religious-based performative collectives.¹⁵¹

A queer of color critique, then, works on these social formations from within—employing the components of their very logic.¹⁵² As Ferguson theorizes, as a critical intervention concerned with historical materialism (i.e., social formations), a queer of color critique is predicated on disidentification.¹⁵³ Citing José Muñoz’s theory of disidentification, Ferguson states:

If to disidentify means to ‘[recycle] and [rethink] encoded meaning’ and ‘to use the code [of the majority] as raw material for representing a disempowered politics of positionality that has been rendered unthinkable by the dominate culture’ . . . Queer of color analysis disidentifies with historical materialism to *rethink* its categories and how they might conceal the materiality of race, gender,

¹⁴⁶ *Id.* at 13.

¹⁴⁷ See RODERICK A. FERGUSON, *ABERRATIONS IN BLACK: TOWARD A QUEER OF COLOR CRITIQUE* (2004).

¹⁴⁸ *Id.* at 142–43.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 143.

¹⁵¹ *Id.*

¹⁵² *Id.* at 2–3.

¹⁵³ FERGUSON, *supra* note 119, at 4–5.

and sexuality. In this instance, to disidentify in no way means to discard.¹⁵⁴

We see a queer of color critique as a way to re-envision the social logic of state anti-transgender racial justice discourse and its performative collectives—thus, undermining the social relations that undergird their claims at “the people.”¹⁵⁵

To disidentify with the state logic would be to disidentify with King. Or more specifically, how the state has archived King, to *rethink* the memorializing logic that employs religion to connote a naturalizing arrangement where race normalizes gender and sexuality.¹⁵⁶ In the introduction to *Disidentifications: Queers of Color and Performance of Politics*, Muñoz illustrates the power of queer of color public performances to retrieve, and even reconceive, historical memory.¹⁵⁷ While witnessing a disidentifying performance by lesbian Cuban and Puerto Rican-American artist, Marga Gomez, where she reenacts and reconfigures a stereotypical depiction of the first “lady homosexuals” she encountered on a TV show as a child, Muñoz is rendered to a reflective state.¹⁵⁸ Muñoz is able to recall similar childhood experiences, including seeing the show Gomez viewed and others like it and the feelings of terror, pleasure and desire in these early deviant depictions of the queer subject.¹⁵⁹ However, after further research, Muñoz realizes that he had likely not seen the show Gomez re-depicted—the show aired eight years before he was born.¹⁶⁰ Instructive here, is the ability of queer of color identity performances-in-difference to alter historical recollection to “offer the minoritarian subject a space to situate itself in history and thus seize social agency.”¹⁶¹ As we seek to theoretically reconfigure the historical logics of the state, it is only made possible through the practical survival strategy of public and counter-public performance of queer of color disidentification.¹⁶²

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 3.

¹⁵⁶ *Id.* at 2–4.

¹⁵⁷ JOSÉ ESTEBAN MUÑOZ, *DISIDENTIFICATIONS: QUEERS OF COLOR AND THE PERFORMANCE OF POLITICS* 1–5 (1999).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1.

¹⁶² *Id.* (“Her performance permits the spectator, often a queer who has been locked out of the halls of representation or rendered a static caricature there, to imagine a world where queer lives, politics, and possibilities are representable in their complexity.”).

A. *Embodied Justice: A New Queer Womanist Logic*

If we are to disidentify with that state appropriated King to restore the black queer body in our socio-historical consciousness, then we must first understand how queerness is situated in mainstream Christian practices in the United States. Far from a separation of church and state, hegemonic religious-based values and ethics within the United States are closely intertwined with every branch of the public realm.¹⁶³ Dominant expressions of Christianity infiltrate the way policy is constructed and inform public notions of just and unjust and moral or immoral.¹⁶⁴ Policy is often constructed without interrogating and confronting the problematics within these moral perceptions.¹⁶⁵ Queerness as a category of *otherhood* becomes trapped in this corrupt understanding of morality and emerges as a deviant subsection of an otherwise “righteous” society.¹⁶⁶ Therefore, queerness is treated as a thing that must be controlled in both the private and public realms for the continuation of a moral society and for the protection of its “legitimate” citizenry.¹⁶⁷

Queer bodies, seen as a politico-religious issue, struggle to manumit themselves from governmental control.¹⁶⁸ This obscurement between hegemonic Christian moral ethics and the artificially-secular realm of government, allow for there to be the simultaneous existence of hate crime legislation and anti-transgender policy formation.¹⁶⁹ In other words, it allows for a society where it is considered immoral (and thus illegal) to actively injure the body of a queer person physically while considering it morally and politically acceptable to control that body and dictate where, when and how it may enter.¹⁷⁰ The queer body is controlled physically, and the queer person is portrayed as a sexually

¹⁶³ Elizabeth Bernstein & Janet R. Jakobsen, *Sex, Secularism and Religious Influence in US Politics*, 31 *THIRD WORLD Q.* 1023, 2023–24 (2010).

¹⁶⁴ *See id.* at 1025 (discussing the controversies between the role of religion and law and politics within the American “way of life”).

¹⁶⁵ *See id.* at 1030 (commenting on how tracing the development of policy can shift the definition towards a “singular focus on gender and sexuality”).

¹⁶⁶ *See id.* at 1032 (examining moderate Christianity and locating “social problems in deviant individuals rather than mainstream institutions”).

¹⁶⁷ *See* Yuvraj Joshi, *Respectable Queerness*, 43 *COLUM. HUM. RTS. L. REV.* 415 (2012) (proposing that “public recognition of gay people and relationships is contingent upon their acquiring a respectable social identity that is actually constituted by public performances of respectability and by privately queer practices”).

¹⁶⁸ Roderick A. Ferguson, *Race-ing Homonormativity: Citizenship, Sociology, and Gay Identity*, in *BLACK QUEER STUDIES: A CRITICAL ANTHOLOGY* 52, 60 (E. Patrick Johnson & Mae G. Henderson eds., 2005).

¹⁶⁹ *See* Bernstein & Jakobsen, *supra* note 163, at 1025–26.

¹⁷⁰ *Id.* at 1027.

degraded predator as a means of justifying that control and power over the other.¹⁷¹ In extension, if the trans person is portrayed as dangerous, that perception can then be used to inform and frame policy that attempts to literally control the physical being.¹⁷²

In a sense, hegemonic Christianity and a generalized fear of difference, housed within the constructs of a white hetero-patriarchal society is how societal monsters are made.¹⁷³ Those marginalized by the intersecting oppressive forces of racism, cissexism, and heterosexism, become victims of imaginations run rampant about the other, while simultaneously attempting to delineate the self.¹⁷⁴ Christian hegemonic patriarchy, and transphobia, especially as it relates to the feminine, cloaks itself under the guise of paternalistic protection.¹⁷⁵ Fear of the other (real or imagined) allows for the focus to be on “what could happen” versus reality – a person simply trying to use the restroom that matches their gender identity.¹⁷⁶ This is further complicated by the white socio-historical practice of creating racialized monsters who are portrayed as sexually deviant predators, indiscriminate of gender.¹⁷⁷

The reproduction of hegemonic Christian theology is occasionally confronted, but all too often adopted within black church spaces.¹⁷⁸

¹⁷¹ JOEY L. MOGUL ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 31 (2011).

¹⁷² *See id.* at 31–33.

¹⁷³ *See* SOPHIA ROSE ARJANA, *MUSLIMS IN THE WESTERN IMAGINATION* 12 (2015) (“Monsters serve an important function in the construction of identity as characters against which we define ourselves The creation of monsters is a political act, and monsters are political creatures.”).

¹⁷⁴ *See* J.E. Sumerau & Eric Anthony Grollman, *Obscuring Oppression: Racism, Cissexism, and the Persistence of Social Inequality*, 4 *SOC. RACE & ETHNICITY* 322, 323 (2018) (defining “obscuring oppression” as the “ways people maintain racist patterns, meanings, and structural arrangements by appealing to existing norms, code words, and negative depictions of racial minorities without mentioning race explicitly, and ‘benign sexism,’ or the ways people maintain sexist and cissexist patterns, meanings, and structural arrangements by appealing to gendered traditions, stereotypes, and assumptions about socially constructed distinctions between cisgender womanhood and manhood”).

¹⁷⁵ J.E. Sumerau et al., *Contemporary Religion and the Cisgendering of Reality*, 3 *SOC. CURRENTS* 293, 307 (2016) (noting how “cisnormative version[s] of reality promoted by many contemporary religions . . . provides symbolic ‘weaponry’ for enforcing heteronormativity and patriarchy within and beyond any given religion”).

¹⁷⁶ Sumerau & Grollman, *supra* note 174, at 325, 333.

¹⁷⁷ Eric Lott, *Love and Theft: The Racial Unconscious of Blackface Minstrelsy*, 39 *REPRESENTATIONS* 23, 30 (1992).

¹⁷⁸ *See* LEWIS V. BALDWIN, *THE VOICE OF CONSCIENCE: THE CHURCH IN THE MIND OF MARTIN LUTHER KING, JR.* 4–5 (2010) (analyzing Martin Luther King’s attitude toward the church); KELLY BROWN DOUGLAS, *SEXUALITY AND THE BLACK CHURCH: A WOMANIST PERSPECTIVE* 89–91 (1999) (noting that “not unlike others who condemn homosexuality, the Black community appeals to the Bible”).

The Civil Rights Movement, with its emphasis on responsibility, or respectability politics, based on state normalizing logics predicated on race, gender, sexuality, and religion, effected the tolerance the black church, as a movement, had for queer people in general, including its own members.¹⁷⁹ In part, this is because of the emphasis the Civil Rights Movement put on racial progress, irrespective of other supporting identities.¹⁸⁰ Bayard Rustin, the main organizer for the 1963 March on Washington, is perhaps the most now-well-known historical figure who was integral to the movement, but due to his sexuality, was often relegated.¹⁸¹ However, there have been others. Prophet Jones, a black queer minister who led one of the largest congregations in Detroit in the 1940s, had his congregation disbanded when the Civil Rights movement came to Detroit.¹⁸² At that point, civil rights leaders declared that Prophet Jones' sexual perversions would hinder black peoples' pursuit of full citizenship.¹⁸³ The archiving of King by the state erases these queer black lives from the collective memory of the black liberation struggle as well as black religious life.¹⁸⁴

The black church and the state have used King in not dissimilar ways.¹⁸⁵ The black church defied the states harmful racial discourses while gaining power through assimilation within the hegemonic ethics of the state at large.¹⁸⁶ In a theological sense, the black church has corroborated with the state archival of King.¹⁸⁷ In general, King is symbolically referenced in the black church, but few black churches, back then and now, actually practice the type of radical black liberation theology

¹⁷⁹ See DOUGLAS, *supra* note 178 at 88–89 (explaining the pervasive homophobia that was and still is present in the Black community).

¹⁸⁰ *Id.* at 89.

¹⁸¹ See JOHN D'EMILIO, *THE LOST PROPHET: THE LIFE AND TIMES OF BAYARD RUSTIN* 1–3 (2004) (introducing Bayard Rustin, an “enormous contribut[or]” to racial equality who has been neglected in history books because of his sexual orientation).

¹⁸² MARLON M. BAILEY, *BUTCH QUEENS UP IN PUMPS: GENDER, PERFORMANCE, AND BALLROOM CULTURE IN DETROIT* 12–13 (2013).

¹⁸³ Thaddeus Russell, *The Color of Discipline: Civil Rights and Black Sexuality*, 60 *AM. Q.* 101, 114–15 (2008).

¹⁸⁴ *Id.* at 116–18, 124.

¹⁸⁵ *Id.* at 112–14.

¹⁸⁶ Rinaldo Walcott, *Outside in Black Studies: Reading from a Queer Place in the Diaspora*, in *BLACK QUEER STUDIES: A CRITICAL ANTHOLOGY* 90, 92–93 (E. Patrick Johnson & Mae G. Henderson eds., 2005).

¹⁸⁷ See Paul R. Garber, *Black Theology: The Latter Day Legacy of Martin Luther King, Jr.*, 2 *J. INTERDENOMINATIONAL THEOLOGICAL CTR.* 100 (2018) (discussing the “real ties that bind Black theology and King together”).

preached by King.¹⁸⁸ The King most seen in the black church is the liberal state mediated King, predicated largely on respectability politics.¹⁸⁹ The politics of respectability have allowed the black church to condemn images of black men as dangerous creatures with aberrant sexualities, who, because of their imagined animalistic nature, have out of control heterosexual appetites; but do not force them to denounce the racialized gender injustice being done to transgender black people.¹⁹⁰ E. Patrick Johnson highlights the complex relationship between black queer people and the black church.¹⁹¹ For many, the black church is a refuge from the racism experienced within daily life, yet for queer black people, the church as a source of hope falls short.¹⁹² The church must “name us and claim us if we are to obtain any liberation within our own communities.”¹⁹³ Black church doctrines are rooted in a theology of liberation yet have not, on any large scale, recognized the queer body as a site in need of liberation.¹⁹⁴

Womanist theologians have worked to redeem black theologies of liberation to women and queer people by asserting new interpretations of traditions and ideologies.¹⁹⁵ Womanist theologians have done this through revising where possible, or calling out when necessary, practices that do not serve all black people and black women in particular.¹⁹⁶ Queer womanist theologian Pamela Lightsey writes, “to many, the black pervert is the most dangerous to the American ideal. Because the black conservative bourgeoisie has joined the attack on our personhood. Black LGBTQ persons cannot allow the discourse to be controlled such that our existence within the black community is denied or

¹⁸⁸ *Id.* at 112–13 (arguing that King’s legacy is “not yet known, but it may well be bound up with . . . developing new Black theologies”); James H. Cone, *Black Theology and the Black Church: Where Do We Go From Here?*, 27 *CROSSCURRENTS* 147, 151–52 (1977)

¹⁸⁹ Garber, *supra* note 187, at 103–04.

¹⁹⁰ See Mikaela Pitcan et al., *Performing a Vanilla Self: Respectability Politics, Social Class, and the Digital World*, 23 *J. COMPUTER-MEDIATED COMMUNICATION* 163, 165 (2018) (defining respectability politics and how it “reinforces within-group stratification to juxtapose a respectable us against a shameful other, such as unrespectable Black people or promiscuous gay men”).

¹⁹¹ E. Patrick Johnson, “*Quare*” *Studies, or (Almost) Everything I Know About Queer Studies I Learned From My Grandmother*, *BLACK QUEER STUDIES: A CRITICAL ANTHOLOGY* 125, 149 (E. Patrick Johnson & Mae G. Henderson eds., 2005).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Kendric Coleman, *The Difference Safe Spaces Make: The Obstacles and Rewards of Fostering Support for the LGBT Community at HBCUs*, 6 *SAGE OPEN* 1, 2–4 (2016) (discussing the Black church’s perspective of homosexuality and the need for “liberating biblical discourse” that is “abusive” to homosexual men).

¹⁹⁵ EMILIE M. TOWNES, *WOMANIST ETHICS AND THE CULTURAL PRODUCTION OF EVIL* 2 (2006).

¹⁹⁶ *Id.* at 149.

made invisible.”¹⁹⁷ Black conservatives have joined white conservative coalitions on the basis of what they consider the right kind of black body – one which has a normative gendered-sexual expression and gender identity.¹⁹⁸ Black conservative Christian leaders are on borrowed power by joining the white conservative political leaders in their attempt to control the discourse about transgender lives.¹⁹⁹ To be sure, the utilization, and in part creation, of black queer-phobia is part and parcel to black exploitation by whites in power.²⁰⁰

Womanist theologian M. Shawn Copeland insists that the body makes visible what cannot be seen, it is the mediator between the public and private self.²⁰¹ The body is the human sacrament and it is through embodiment that we experience freedom, “through engagement and communion with other embodied selves.”²⁰² Copeland posits that the Christian church has forgotten the body of Jesus, the body with flesh, with genitals – with sexuality and gender.²⁰³ If the church remembered and saw the physical body of the historical Jesus as a signifier of the sacredness of sex, gender, and sexualities they would be able to approach other bodies with compassion.²⁰⁴ This queer womanist theologizing allows for the employment of a new logic.

Womanist theologians attempt to disrupt harmful gender-based doctrines, while not separating completely from, black liberation theology and black churches.²⁰⁵ The tendency for black church doctrines to preach a doctrine of containment when it comes to the body, has created a distrust of all bodies, but especially the bodies of those who the very-human-trinity of dominant religion, socially constructed moral systems, and empire have deemed deviant.²⁰⁶ Copeland purports that black church teachings that are based in queer-phobia “exposes us to the

¹⁹⁷ PAMELA R. LIGHTSEY, *OUR LIVES MATTER: A WOMANIST QUEER THEOLOGY* 31 (2015).

¹⁹⁸ See Wallace, *supra* note 86.

¹⁹⁹ See DOUGLAS, *supra* note 178, at 139–43 (finding the “the Black church has been “shamefully unresponsive to [issues of sexuality] even while it provides a sacred canopy for sexist and heterosexist structures and behavior”).

²⁰⁰ *Id.* at 142 (arguing that a “sexual discourse of resistance is needed also to help Black men and women recognize how the White cultural exploitation of Black sexuality has corrupted Black people’s concept of themselves, one another, and their God”).

²⁰¹ M. SHAWN COPELAND, *ENFLESHING FREEDOM: BODY, RACE, AND BEING* 7 (2010).

²⁰² *Id.* at 8.

²⁰³ *Id.* at 62–65.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 62–65, 89.

²⁰⁶ *Id.* at 74–77.

manipulation of agents of empire.”²⁰⁷ True liberation would come, according to Copeland, with a re-imagining of the body of the historical Jesus as a body in alignment with the bodies of the oppressed.²⁰⁸ Just as reimagining a black Christ heals the anthropological impoverishment of black bodies according to black liberation theologians, Copeland insists a queer Christ is capable of healing the impoverishment of queer bodies.²⁰⁹ Copeland situates the historical Jesus of Nazareth as stationed at the heart of all Christian theologies of liberation, and places him on the side of the poor, excluded, and despised.²¹⁰

The black church, rooted in the politically-infused liberation theology of Rev. King, does not, or chooses not, to see the connection between one form of racialized gender violence – fear of black men – and another – fear that transwomen are trying to cause harm through gender deceit.²¹¹ Black churches have served as change agents for their communities since their founding on issues of racism as well as poverty and other forms of exploitation.²¹² However, conservative black church leaders have largely remained silent on issues of gender and sexuality, or worse, have spoken in defense of patriarchy, cissexism, and queer/transphobia.²¹³ While King drew connections between the interlocking oppressions of racism, poverty, and war (i.e., “the triple evils”), he did not locate gender and sexuality regulation as integral to these evils;²¹⁴ therefore, it is no wonder that church leaders who rely on a shared collective memory of King’s theological politics do not feel a need to address injustice based on gender and sexuality. Theologian Karen Guth offers a feminist ethicist perspective on how to approach King’s apparent silence within his justice ministry.²¹⁵ Guth advocates for a (re)reading of King in order to re-understand King’s political theology of non-violence as community building.²¹⁶ According to Guth, at

²⁰⁷ COPELAND, *supra* note 201, at 77.

²⁰⁸ *Id.* at 77–78.

²⁰⁹ *Id.* at 78–81.

²¹⁰ *Id.* at 83–84.

²¹¹ Garber, *supra* note 187, at 106 (noting James H. Cone’s comment that King “‘demonstrate[d] that the ‘soul’ of the black community is inseparable from liberation but always liberation grounded in Jesus Christ”).

²¹² Cheryl Townsend Gilkes, *Plenty Good Room: Adaptation in a Changing Black Church*, 558 ANNALS AM. ACAD. OF POL. & SOC. SCI. 101, 103 (1998).

²¹³ PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM* 88–89 (2004).

²¹⁴ Karen V. Guth, *Reconstructing Nonviolence: The Political Theology of Martin Luther King Jr. After Feminism and Womanism*, 32 J. SOC’Y CHRISTIAN ETHICS 75, 75 (2012).

²¹⁵ *Id.* at 76.

²¹⁶ *Id.* at 80–81.

the core of King's understanding of the concept of agape, or divine love, was an active love that had the capacity to create community, sustain justice, and provoke self-love for those who have been dehumanized by oppression.²¹⁷ It was this kind of love-in-action that fueled King's political theology.²¹⁸

Guth highlights King's commitment to the creative capacity of agape, and his belief in its ecclesiastical possibilities, where churches could become creative communities that hold community creating practices as the goal of their political mission.²¹⁹ This theological responsibility to divine love as expressed through relationality, creativity, and community formation was the full expression of an agapeic love - a love enacted.²²⁰ Guth defines King's hermeneutical understanding of agape love as self-loving, reciprocal, and passionate; while identifying the creative capacity of agape love as the center of King's justice ministry.²²¹ This was the foundation of his political ecclesiology: one that allows for imagining churches as divine co-creators of just communities.²²²

Guth finds that King's articulations of agapeic love shares commonalities with womanist theological thought.²²³ King's vision resonates with the emphasis womanists place on relational community building, as well as a politics of love born out of creativity that is both divine - as co-creators with God - and learned through survival as oppressed people.²²⁴ It is this commitment to creative community building, intersectional analysis, and love-in-action that is at odds with the appropriation of his rhetoric for the purposes of limiting movement, marginalizing, and regulating trans bodies.²²⁵ Furthermore, what is interesting here, is that King found the three systematic "evils" monstrous²²⁶ not people of color, poor people, and victims of American imperial violence. Though it ultimately made him susceptible to state archival and

²¹⁷ *Id.*

²¹⁸ *Id.* at 84.

²¹⁹ *Id.* at 86.

²²⁰ Guth, *supra* note 214, at 83.

²²¹ *Id.* at 84-85.

²²² *Id.* at 88.

²²³ *See generally id.*

²²⁴ *Id.* at 84-85.

²²⁵ *See* Koritha Mitchell, *Love in Action: Noting Similarities Between Lynching Then and Anti-LGBT Violence Now*, 36 CALLALOO 689, 690-92 (2013).

²²⁶ *See* Martin Luther King Jr. *Saw Three Evils in the World: Racism Was Only the First*, THE ATLANTIC, <https://www.theatlantic.com/magazine/archive/2018/02/martin-luther-king-hungry-club-forum/552533/> (last visited Apr. 26, 2019). The article is an excerpt of a speech originally titled "America's Chief Moral Dilemma" from 1967. *Id.*

appropriation for disparate and seemingly dichotomous causes of justice and equality, this shows King's theology was oriented radically different than hegemonic Christianity and the state even as he employed their gender and sexual logics for normalizing effects. As a result, designating womanist theology as a way of reading or shading King reveals the intersections of race, gender, sexuality, and nation as the elements of social relations in which theology, knowledge and memory are formed.

B. An Action

We are able to re-conceptualize the semiotics of King in a queer womanist tradition due to a form of prophetic performative witnessing. In March of 2016, Micky Bradford, a black transwoman, tired from peacefully protesting outside of the then governor of North Carolina, Pat McCrory's, mansion all day had a change of tactic.²²⁷ Bradford was protesting House Bill 2, more officially short-titled the Public Facilities Privacy and Security Act, which stated that transgender people have no legal right to use any public bathroom that does not coincide with the gender recorded on their birth certificate.²²⁸ The bill, which defines biological sex as the physical condition of being male or female, also took away the rights previously held by individual cities in North Carolina to enforce their own standards and caused them to overturn any city-wide anti-discrimination policies that conflicted with House Bill 2.²²⁹ In May of 2016, former Governor Pat McCrory was sued by the United States Department of Justice, citing that House Bill 2 violates Title VII of the Civil Rights Act and the Violence Against Women Act.²³⁰ A year later, in March of 2017, the section of the bill pertaining to bathroom usage in publicly owned buildings was repealed and replaced with House Bill 142.²³¹

²²⁷ Jorge Rivas, *A Beautiful Act of Resistance in the Face of a Terrible Law in North Carolina*, SPLINTER NEWS (Mar. 25, 2016, 9:33 PM), <https://splinternews.com/a-beautiful-act-of-resistance-in-the-face-of-a-terrible-1793855827>.

²²⁸ H.B. 2, 2016 Leg., 2d Extra Sess. (N.C. 2016); Tal Kopan & Eugene Scott, *North Carolina Governor Signs Controversial Transgender Bill*, CNN (Mar. 24, 2016, 11:12 AM), <https://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/index.html>.

²²⁹ Kopan & Scott, *supra* note 228.

²³⁰ David A. Graham, 'State-Sponsored Discrimination': *Loretta Lynch Takes on North Carolina's Bathroom Bill*, THE ATLANTIC (May 9, 2016), <https://www.theatlantic.com/politics/archive/2016/05/state-sponsored-discrimination-loretta-lynch-takes-on-north-carolinas-hb2/481986/>.

²³¹ H.B. 142, 2017 Leg., Reg. Sess. (N.C. 2017). See Elliott C. McLaughlin, *North Carolina's HB142: Repeal? Compromise? What Does It All Mean?*, CNN (Mar. 30, 2017, 2:38 PM), <https://www.cnn.com/2017/03/30/us/north-carolina-hb2-repeal-hb142-explainer/index.html>.

Although House Bill 142 replaces some of the most egregious elements of House Bill 2, it is by no means designed as a protection against discrimination, leaving many LGBT activists still entrenched in the battle for basic protections and rights as any other protected class would be under state and federal law.²³² Fighting against discrimination is what brought many activists to participate in actions, such as the one Micky Bradford engaged in that day in 2016.²³³ Stationed outside of the governor's mansion, Bradford and other activists collected in opposition of newly passed H.B.2.²³⁴ In an interview later that week, Bradford was quoted as saying, "I was tired. The most I could do was dance away my anger, frustration, and sadness."²³⁵ A video posted to social media, and later shared in an online article on Splinter News, depicts the moment of exhaustion turned protest dance.²³⁶

The video was taken at the end of the day and it is dark out, but the street lamps are on operating as stage lights.²³⁷ Bradford is flanked by uniformed police at both sides while several more are behind her and line the collective.²³⁸ The police are a somber and discordant contrast to the exuberance of the dance.²³⁹ The chanting and cheering of the crowd doxologize Bradford while dissociating from and un-recognizing the police.²⁴⁰ Bradford stated, "it's important to see a black transwoman be unafraid of police and policing."²⁴¹ Bradford is seen wearing a mini dress and boots, her brown skin gleaming under the street lights, and she is dancing, although not just dancing.²⁴² To be specific, Bradford is voguing, or what Marlon Bailey might call new way voguing with its mix of traditional African diasporic dance with house, hip-hop, and vocal chants.²⁴³ Voguing was created by queer people from predominately black and brown working-class communities and is performed at specialized balls.²⁴⁴

²³² McLaughlin, *supra* note 231.

²³³ Rivas, *supra* note 227.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Rivas, *supra* note 227.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ BAILEY, *supra* note 182, at 174–75.

²⁴⁴ Amy Herzog & Joe Rollins, *Editors' Note: House Style*, 41 *WOMEN'S STUD.* Q. 9, 9–13 (2012).

Ball culture includes voguing, fashion -made, salvaged or otherwise obtained - performing with a focus on self-presentation, and belonging to a ball house.²⁴⁵ For those, who for reasons of hetero/cissexism, racism and poverty who may have lost all or partial of their homes and communities, ball culture provides other-homes, other-mothers, and other ways of belonging.²⁴⁶ House ball culture participates in the performance of collective and individual sexual, gendered, and racialized identity amidst social and economic marginalization.²⁴⁷ All the while, participating in material culture which has long been a means of forming notions around citizenship -who belongs where and to whom do they belong.²⁴⁸ When Bradford began to vogue, she was doing more than just dancing after a long day of protesting. To vogue is to signify to home and to citizenship; it is a way to claim belonging through the use of coded language and performative significations.²⁴⁹ What might look like just dance to the police who are standing around is yet understood to those who can *read* this particular code as a form of claiming space and place, participating in an act of self-performance and identity display, and ultimately experiencing rejuvenating joy while throwing shade.²⁵⁰

Micky Bradford is participating in what Johnson would identify as a “quare” performance-in-resistance.²⁵¹ E. Patrick Johnson, utilizing the definitional style and formula created by Alice Walker in *In Search of Our Mother’s Gardens* in 1983, defines what it means to be quare, a black vernacular expression of queer.²⁵² It is to be both black and queer.²⁵³ Quare is an LGBT black person who does not identify with the relationship between queer and whiteness as already assumed and naturalized.²⁵⁴ It is an intersectional reality that is always both queer and black, black and queer, and never just one or the other.²⁵⁵ “Quare,”

²⁴⁵ *Id.* at 10.

²⁴⁶ *Id.* at 9–10.

²⁴⁷ BAILEY, *supra* note 182, at 4–5.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 89–91 (discussing how ballroom members “undertake a labor of kin to create an alternative social and community sphere through a reformulation of kinship”).

²⁵⁰ *Id.* at 180.

²⁵¹ Johnson, *supra* note 191, at 125.

²⁵² *Id.*

²⁵³ *Id.* (“[Quare] denotes excess incapable of being contained within conventional categories of *being*. [...] one who *thinks* and *feels* and *acts*, [and sometimes “acts up”]; committed to struggle against all forms of oppression – racial, sexual, gender, class, religious, etc.”).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

Johnson writes, “is to queer, as reading is to throwing shade.”²⁵⁶ Instead of the image of black transwomen as victim or predator, we see her dancing. The queering and coding of space is a transformational act as it is expressed through the body. Space is created through a series of actions by subjects; the queering of space through a performance-in-resistance by a marginalized “other”, offers a new, complex, and multi-dimensional interpretation of space. In a performance-in-resistance, the body is being used to queer the space on its own terms. This is what we mean by a prophetic performative witnessing; the body is used as a discursive method of re-remembering that is able to transport the spectator to a different space and time.²⁵⁷ Specifically, recalling and reconciling the paradoxical experience of the black queer subject in the black church, this performance, as Muñoz discovered, works within our own internal narratives of self-formation.²⁵⁸ It is an act of public reflexivity that can be both personally restorative and socially transformative.

C. *Theory in the Flesh*

A theory in the flesh “means one where the physical realities of our lives – our skin, color, the land or concrete we grew up on, our sexual longings – all fuse to create a politic born out of necessity.”²⁵⁹ E. Patrick Johnson advances a theory in the flesh and emphasizes its ability to call out diversity within and among race, gender and sexuality while simultaneously accounting for how racism and classism affect how we experience and theorize the world.²⁶⁰ Theory is a “way of seeing that allows us to apprehend our world in different and potentially productive ways.”²⁶¹ Theories in the flesh adjoin theory and practice through an embodied politic of resistance: this politic of resistance is manifest in vernacular traditions such as performance and verbal art.²⁶² Movement – being able to move, literally in the body, despite, in resistance to, and through oppression – is a form of resistance. Embodied theory resists

²⁵⁶ *Id.*

²⁵⁷ Johnson, *supra* note 191, at 141.

²⁵⁸ MUÑOZ, *supra* note 157, at 1–5.

²⁵⁹ THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 19 (Cherríe Moraga & Gloria Anzaldúa eds., 4th ed. 2015).

²⁶⁰ Johnson, *supra* note 191, at 127.

²⁶¹ Phillip Brian Harper, *The Evidence of Felt Intuition: Minority Experience, Everyday Life, and Critical Speculative Knowledge*, in BLACK QUEER STUDIES: A CRITICAL ANTHOLOGY 106, 120 (E. Patrick Johnson & Mae G. Henderson eds., 2005).

²⁶² Johnson, *supra* note 191, at 127.

restraints that are designed to control and limit the movement of subjugated bodies.²⁶³

It is through embodiment, a fundamental criterion of a theory in the flesh, that liberatory practices can be grounded. King's use of non-violence in the form of embodied action was an expression of agency which had transformative capabilities. Likewise, a performance as an act of protest and as an expression of justice has the transformative power of creating and coding space. Controlling images of the marginalized through state semantic maneuvers and through stirring up of collective re-memory of the civil rights era can only go on as long as it is not disrupted and confronted by the actual body.

We can, then, read Micky Bradford's performance-in-resistance as a disidentification with the contemporary memory of queer politics. Bradford's defiant vogue in the face of state violence and surveillance harkens back to the roots of the radical queer politics of the 1960s and 1970s, what Spade calls the "bottle-throwing resistance to police brutality and the claiming of queer sexual public space"²⁶⁴ that originated with Compton's cafeteria and New York's Stonewall riots and with groups like Street Transvestite Action Revolutionaries (STAR).²⁶⁵ This type of radical queer politics, rooted in anti -imperial, -racist, -capitalist and -patriarchal politics, stands in deep contrast to the lesbian and gay politics of today, whose primary focus is a conservative quest for inclusion and recognition in United States institutions through nonprofit professionalization (not street organizing).

Further, Bradford's performance-in-resistance signifies a "quaring" of the black charismatic patriarchal messianic leader trope produced through hegemonic historical imagery associated with the African American civil rights struggle.²⁶⁶ Erica Edwards insists these tropes inform contemporary performative iterations of black leadership that:

²⁶³ See Stephanie M.H. Camp, *The Pleasures of Resistance: Enslaved Women and Body Politics in the Plantation South, 1830-1861*, 68 *J. S. HISTORY* 533, 541–42 (2002) (discussing how women have used their body in resistance).

²⁶⁴ SPADE, *NORMAL LIFE*, *supra* note 27, at 30.

²⁶⁵ *Street Transvestite Action Revolutionaries Found STAR House*, NSW, <https://www.nswp.org/timeline/event/street-transvestite-action-revolutionaries-found-star-house> (last visited Apr. 26, 2019); Leslie Feinberg, *Street Transvestite Action Revolutionaries*, *WORKERS WORLD* (Sept. 24, 2006, 11:53 PM), <https://www.workers.org/2006/us/lavender-red-73/>.

²⁶⁶ ERICA R. EDWARDS, *CHARISMA AND THE FICTIONS OF BLACK LEADERSHIP* 6 (2012).

normalizes a charismatic aesthetic, a specific organization of symbolic elements that fabricate and produce political authority that includes elements as banal as the podium; the positioning of the leader in front...or above the collective; the deployment of music to create a collective ethos of resistance and change; calling upon or silencing women to authorize masculine power; the habits of black sermonizing; and the call-and-response format of black improvisatory speech.²⁶⁷

Bradford's performance simultaneously invests in and challenges this trope by centering her black queer feminine body in a staging that typically leaves her absent.²⁶⁸ Though Bradford is the sole front-person, in a political context where black trans women are disproportionately subjected to violence, "the act of performing . . . in public takes on ever multiplying significance."²⁶⁹ Instead of a rhetorical sermon behind a podium or pulpit, she takes to the street to sermonize through provisional dance, with a call-and-response that ties the black church house to the black queer ball house.²⁷⁰ Undoubtedly, Bradford's performance disidentifies the King figure emblematic of the black charismatic scenario, signifying a more grounded, democratic and gendered diverse historicity.

Bradford's performance subverts the normative power structure conceptualized by the center and margins. If the body is the site of the trauma, the body must also be a site of ontological/epistemological power.²⁷¹ Embodied critical praxis creates agency and is an act of protest which has the transformative power of creating forced audiences which subverts the typical and directional power of gaze – the direction in which one will be seen or not be seen. Queering public spaces into stages creates something capable of being and becoming diasporic, as in, able to expand and change, but consisting of a central core - a home and citizenship. When a performance by the marginalized creates an audience out of those who typically control the gaze, it borrows the power of gaze. It makes the powerful temporary observers of the societal disempowered. The marginalized are no longer gazed upon against their wishes but reclaim their own images. It creates an ontological Being – being seen as a form of radical square aesthetics. It brings the ball to the

²⁶⁷ *Id.* at 19.

²⁶⁸ Rivas, *supra* note 227.

²⁶⁹ MUÑOZ, *supra* note 157, at 1.

²⁷⁰ Rivas, *supra* note 227. *See supra* Part III.B.

²⁷¹ Johnson, *supra* note 191, at 129.

battlefield and places the ball within the same lineage as other performed resistance practices, such as the gospels and the blues.

Creative quare and theological imagination through performative acts can resurrect and reclaim the body using stratagems of joy. Bodies that are rendered blurred, or less intelligible, can be made into focus through new representations that combat the negative images created by the authors of anti-trans policies. Black feminism birthed much of quare notions of praxis, which “At the heart of [B]lack feminist praxis is a push to make the lives of disappeared [B]lack women matter.”²⁷² Performance as praxis is capable of enacting the Black womanist theological practice of “going back to get” what we have lost. Thus, Bradford’s performance constitutes a counter-performative collective that restages our collective racial justice memory, and thus, undermines the state anti-transgender racial discourse and its fate-linking framework. The charismatic scenario illustrates how historical knowledge can be configured in the body—channeling the old to make sense of the new.²⁷³ This quare embodied performance, through this citational practice, reconstitutes the power and logics of these hegemonic narratives—displacing demarcations between the recognized and unrecognized. By conjuring up and recasting the radical queer politics and the black charismatic politics of the past, Bradford’s performance constructs a performative collective that employs the black queer body to create a continuity between movements that are often recalled in isolated fashion to propagate assemblies predicated on the erasure of queer people of color. Put differently, Bradford’s performance reveals the fragility of the assemblies produced around state discursive claims of popular will while assembling and signifying black trans bodies, “we are not disposable.”²⁷⁴

CONCLUSION

Although King has been distorted and rendered into extra-historical intelligibility to make it appear that both sides of the debate are suffering a civil rights injustice; it can easily be made obvious who really suffers from anti-transgender policy formation and conservative discourses that create profane others/monsters out of trans persons. Micky Bradford stated, “the biggest hurdle to being a fully integrated

²⁷² Kai M. Green, *Troubling the Waters: Mobilizing a Trans* Analytic*, in *NO TEA, NO SHADE: NEW WRITINGS IN BLACK QUEER STUDIES* 65, 80 (E. Patrick Johnson ed., 2016).

²⁷³ EDWARDS, *supra* note 266.

²⁷⁴ BUTLER, *PERFORMATIVE THEORY OF ASSEMBLY*, *supra* note 4, at 18.

member of society for trans folks is simply just to not die young. I'm 26 and I fight everyday to one day live to see 35 which is the average age for a black transwoman in the south."²⁷⁵ During the writing of the conclusion of this article, 3 black trans women were brutally killed in Shreveport, Chicago and Philadelphia; that means, for 2018, as of now, there have been 19 trans lives forcefully ended; 13 of which have been black trans people.²⁷⁶

Continued acts of resistance are necessary even after anti-transgender bathroom bills fail. The bills themselves are dangerous, but even when they are not passed or sustained, ideological damage is done.²⁷⁷ This impacts policy as these harmful ideological forms construct and define the conceptual category of gender, as well as maintain false dichotomies between what is considered just or unjust politically; as well as what is moral or immoral ideologically; and profane or sacred theologically.²⁷⁸ The racial and religious framing of cissexist policies pit oppressions against one another, erasing the queer people of color central to liberation work before, during, and long after the civil rights movement.²⁷⁹

Understanding Micky Bradford's performance-in-resistance as not only a political act, but a theological act is a hermeneutical-counter to the discursive maneuvers of conservative multi-racial coalitions that erase black trans persons from black theological memory.²⁸⁰ This re-reading allows for the body of black transwomen to be seen as possessing spiritual agency, demarcating them from the illegitimate *monster* or profane other and claiming them as part of the sacred legitimate. The discourse surrounding these bills inform our collective memory of the theological and political past; how we remember what we remember informs policy as it substantiates the way we frame political aims and agendas. Micky's *quare* performance, thus, gives new meaning to Sessions' closing remarks to the ADF and his claims at "the people," *truly* "every American has a right to believe, worship, and exercise their faith

²⁷⁵ Emanuella Grinberg & Dani Stewart, *3 Myths That Shape the Transgender Bathroom Debate*, CNN (March 7, 2017), www.cnn.com/2017/03/07/health/transgender-bathroom-law-facts-myths/index.html.

²⁷⁶ Tonja Renée Stidhum, *Three Young, Transgender Women Were Killed in the Past Week*, BLAVITY, <https://blavity.com/two-young-transgender-women-were-killed-within-hours-of-one-another> (last visited Apr. 26, 2019).

²⁷⁷ See *supra* Part II.

²⁷⁸ *Id.*

²⁷⁹ See *supra* Part II-C.

²⁸⁰ See *supra* Part II-B.

in the public square.”²⁸¹ Black trans people, as part of “every American,” have always had political and theological agency; the problem with the distorting nature of anti-trans rhetoric is not a problem with the trans being, it is a problem of *sight* and perception. A black transwoman dancing is a black transwoman alive to dance, to be seen in motion, to move, or perhaps to be moved, by, of, or in the spirit.

²⁸¹ Michaels, *supra* note 1.