

SEARCHING FOR JUSTICE: MOVING TOWARDS A TRANS INCLUSIVE MODEL OF ACCESS TO JUSTICE IN CANADA

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I. INTRODUCTION

Access to justice (A2J) in Canada has reached a point of “crisis.”¹ Research indicates that nearly half of the population in Canada will experience some kind of justiciable problem within any given three-year period.² When this time period is extended to a lifetime, almost everyone will experience some kind of justiciable problem.³ Currie notes that “while the law may be pervasive in Canadian society, access to the law or more broadly to justice for those experiencing law-related problems seems to be limited.”⁴ Financial and institutional inaccessibility and gross inequalities, both inside and outside of the judicial process, continue to create barriers that prevent people from accessing justice. For vulnerable populations, these barriers are exacerbated due to systemic oppression and discrimination, economic disenfranchisement, and social marginalization. A2J literature encompasses a wide range of initiatives and approaches to reducing barriers to justice that everyday people (i.e., non-legal actors) face. However, it has largely failed to critically examine how gender identity and gender expression can function as additional barriers to justice for trans.⁵ This paper seeks to address this gap in A2J literature by providing an overview of key barriers to justice that trans and gender nonconforming persons face within the Canadian legal

¹ Trevor Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall LJ 957 at 962; Olivia Stefanovich, “We’re in trouble”: Advocates urge Ottawa to help close the access-to-justice gap” (18 April 2021), online: *CBC News* <<https://www.cbc.ca/news/politics/access-to-justice-federal-budget-2021-requests-1.5989872>>.

² Farrow, *supra* note 1 at 963; Ab Currie, *A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patters* (Ottawa: Justice Canada, 2005) at 5.

³ Farrow, *supra* note 1 at 963.

⁴ Currie, *supra* note 2 at 5.

⁵ *Trans* is an umbrella term that encompasses a spectrum of gender identities and embodiments of those whose gender identity does not match their assigned sex at birth including Two-Spirit and other culturally specific identities to the extent people with these identities view themselves as part of the trans community.

system and by offering pathways towards a trans inclusive framework of A2J that seeks to address these barriers.

While trans people in Canada face many of the same legal problems as cisgender⁶ people, as a vulnerable population they are more likely to experience legal problems.⁷ The *TRANSforming JUSTICE* Trans Legal Needs Assessment found that trans people living in Ontario have significantly higher legal needs than the general Canadian population, with 71% of respondents reporting that they have experienced at least one legal problem in the last three years.⁸ This is in part due to the fact that trans people are susceptible to significant discrimination and harassment in all areas of life, including the legal system, and experience social marginalization and economic disenfranchisement.⁹ As “one sort of problem is often compounded by another type of legal problem,” this can lead to criminalization and other legal problems.¹⁰ Furthermore, trans people face additional barriers to justice to their cisgender counterparts including exclusion from and

⁶ *Cisgender* refers to persons whose gender identity corresponds with the sex/gender they were assigned at birth.

⁷ Julie James et al, *Legal Problems Facing Trans People in Ontario*, TRANSforming JUSTICE Summary Report 1 (Toronto: HIV & AIDS Legal Clinic Ontario, 2018); Kylar W Broadus, “The Justice system and Trans People” (2009) 18:2 Temp Pol & Civ Rts L Rev 561; Center for American Progress & Movement Advancement Project, *Unjust: How the Broken Justice system Fails Transgender People* (Center for American Progress & Movement Advancement Project, 2016) at 10, online: <http://www.lgbtmap.org/file/lgbt-criminal-justice-trans.pdf> [CAP & MAP]; Jaime M Grant et al, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011), online: http://www.academia.edu/download/31122982/NTDS_Report.pdf; Sandy E James et al, *The Report of the 2015 U.S. Transgender Survey* (Washington, DC: National Center for Transgender Equality, 2016), online: <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>; Alexis Forbes, “Criminalization of Transgender People,” in Kevin L Nadal, ed, *The SAGE Encyclopedia of Psychology and Gender* (Thousand Oaks, CA: SAGE, 2017) 395.

⁸ James et al, 2018, *supra* note 7. See also, Samuel Singer, “Trans Rights Are Not Just Human Rights: Legal Strategies for Trans Justice” (2020) 35:2 CJLS 293 at 302-03.

⁹ Broadus, *supra* note 7 at 561; Grant et al, *supra* note 7; James et al, 2016, *supra* note 7; CAP & MAP, *supra* note 7; Forbes, *supra* note 7; James et al, 2018, *supra* note 7; Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law*, 2nd ed (Durham, NC: Duke University Press, 2015); Julia C Oparah, “Feminist and the (Trans)gender Entrapment of Gender Nonconforming Prisoners” (2012) 18:2 UCLA Women’s LJ 239; Chassitty N Whitman, “Transgender Criminal Justice: Ethical and Constitutional Perspectives” (2017) 27:6 Ethics & Behavior 445.

¹⁰ Farrow, *supra* note 1 at 963.

underrepresentation within the legal system,¹¹ the legal regulation and enforcement of the sex/gender¹² binary (i.e., bigenderism¹³), and structural transphobia and cissexism.¹⁴

This article synthesizes the A2J barriers encountered by trans people in Canada and argues for a trans inclusive approach to A2J that seeks to reduce and remedy barriers to justice that trans people face. It is organized into five sections with this introduction serving as section one. Section two consists of an overview of A2J models and the conceptualization of a trans inclusive approach to A2J. Traditional A2J models, which focus on alleviating procedural and economic barriers to accessing the legal system, are insufficient as they do not attend to the plethora of systemic barriers to justice that trans people face. Therefore, we argue that a more holistic understanding of ‘access’ and ‘justice.’ We then outline three primary aspects of A2J: procedural, substantive, and symbolic justice. Section three provides an overview of barriers to justice that trans people face in relation to the three aspects of A2J outlined in section two. These include socio-economic barriers that are in excess of the legal system as well as institutional barriers directly caused by the legal system (e.g., cost, procedure, sex/gender certification). The fourth section offers pathways towards increasing A2J for trans persons and outlines what a trans inclusive approach to A2J could look like. This section serves as a starting point for scholars, and legal and community actors to begin

¹¹ We use legal system rather than justice system to reflect the fact that people refer to systems of law when using the expression “justice system” rather than actual systems capable of producing justice, particularly considering that law is often a significant source of injustices.

¹² We use the term *sex/gender* to signal the theoretical, social, and legal entanglement of ‘sex’ and ‘gender,’ and because the terms are often used interchangeably. For example, while the term ‘gender marker’ is commonly used in everyday parlance, most Canadian identification documents (e.g., birth certificates, passports, driver’s licenses, etc.) use the term ‘sex’ rather than ‘gender.’

¹³ *Bigenderism* is the belief that there are only two genders, man and woman, which correspond with the two sexes, male and female, respectively: Miqqi Alicia Gilbert, “Defeating Bigenderism: Changing Gender Assumptions in the Twenty-First Century” (2009) 24:3 *Hypatia* 93. Bigenderism does not account for non-binary gender identities and many culturally specific gender identities (e.g., Two-Spirit or Bakla).

¹⁴ *Cissexism* is based on the belief that one’s assigned sex at birth determines their gender and privileges cisgender identities as natural and normal while casting trans identities as unnatural and deviant: Julia Serano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (Berkeley: Seal Press, 2007) at 12-3.

the discussions and work necessary to attain the goal of securing A2J for trans people. The final section offers our concluding thoughts.

II. A TRANS INCLUSIVE APPROACH TO ACCESS TO JUSTICE

The term *access to justice* is by no means straightforward. It is best understood as a “moving frontier,” which has and continues to shift over time as the concepts ‘access’ and ‘justice’ are reinterpreted and redefined.¹⁵ The A2J literature tends to discuss its eponymous concept either as a very practical matter (e.g., what prevents an individual from accessing judicial remedies) or in a philosophical way (e.g., what are the meanings of ‘access’ and ‘justice’). As Hughes observes, rarely do studies present a more holistic analysis of A2J, one that encompasses both practice and theory.¹⁶ This lacuna has led to the formulation of generic solutions—usually based on the costs of legal procedures or the complexity of the legal system—that are often ill adapted to the needs of marginalized groups such as trans people.¹⁷ To avoid falling into this ‘trap’ and to ensure that we do ‘justice’ to the trans community, we develop an A2J approach that attempts to encompass the plural elements of A2J as a distinct concept.

The concept of A2J emerged in the postwar era. Initially, it focused on securing access for low-income and impoverished communities to the legal system, specifically access to lawyers and the courts.¹⁸ Judicial processes were seen as inaccessible to communities who did not have the financial means or specialized knowledge required to access and navigate the legal system. Early A2J initiatives sought to address issues related to cost, delay, and complexity. Those issues,

¹⁵ Marc Galanter, “Access to Justice as a Moving Frontier,” in Julia Bass, W A Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 147.

¹⁶ Patricia Hughes, “Advancing Access to Justice Through Generic Solutions: The Risk of Perpetuating Exclusion” (2013) 31:1 Windsor YB Access Just 1 at 2.

¹⁷ *Ibid* at 6-7.

¹⁸ Roderick A Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Bass, Bogart & Zemans, *supra* note 15, 19 at 20.

however, are not the only barriers to accessing justice and, consequently, the concept was expanded in the 1970s to cover “the ability to avail oneself of the various institutions, governmental and non-governmental, judicial and non-judicial, in which a claimant might find justice.”¹⁹ It became a site of justice *seeking*.²⁰ Despite this expanding understanding, A2J solutions remain centered on measures linked to legal comprehension, time and financial barriers, and to the formal judicial system. In other words, we are stuck in a paradigm where A2J typically means *access to legal institutions*, or justice through law/courts.²¹ This model is inherently flawed since we speak of access to *justice*, not *law*, and both law and justice, while often linked, are not synonymous.

If we are to move towards a conceptualization of A2J as *justice seeking* and move away from the *access to the legal system* model, then the term ‘justice’ requires further attention. Galanter offers a simple yet effective definition: “justice is the negation or correction of injustice.”²² The issue is that injustices are not a zero-sum game with a pre-determined amount of injustices that we can progressively chip away. As society advances and develops, new injustices appear based on new areas of injustices that previously did not exist (e.g., unequal access to the internet) and on new populations that were once invisible or not considered legitimate (e.g., injustices against trans people).²³ Galanter sees the frontiers of A2J as ever moving. This resonates with Derrida’s understanding of justice as something that is infinite, that cannot be captured, and that offers an unlimited responsiveness to the other.²⁴ Another way to put it is that justice relates

¹⁹ Galanter, *supra* note 15 at 147.

²⁰ *Ibid* at 147-48.

²¹ Roger Cotterrell, “Access to Justice, Moral Distance and Changing Demands on Law” (2019) 36 Windsor YB Access Just 193 at 194. See also Macdonald, *supra* note 18 at 23-34.

²² Galanter, *supra* note 15 at 154.

²³ *Ibid* at 154-55.

²⁴ Jacques Derrida, “Force of Law: The Mystical Foundation of Authority” in Drucilla Cornell, Michel Rosenfeld & David G Carlson, eds, *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 3.

to the kind of life and community people find desirable.²⁵ Justice is an aspiration, and ‘access’ is the never-ending race towards it. This leads to an understanding that any attempt to reach justice will always come short and that A2J will always be imperfect. A2J is more of a virtue in sense of virtue ethics; success should be measured by our continuous attempts to improve A2J. It is more of a means obligation rather than a result obligation.

Moving towards more practical aspects, A2J must first and foremost center on the needs and lived realities of justice claimants and place emphasis on the characteristics and experiences that impede A2J or that prevent the redress of injustices through existing channels.²⁶ As Singer notes, “[a] pragmatic, intersectional, and flexible approach to trans justice is grounded in the daily realities of trans lives.”²⁷ Focusing on needs serves as a way to bridge, in Cotterrell’s words, the “moral distancing” of legal institutions;²⁸ that is, the lack of responsiveness of law or the absence of justice. This responsiveness (or justice) also relates to solidarity and a sense of community. Solidarity ensures that the legal institutions have meaningful contact or relations with the populations subject to them, in whole and in part, and ensures a level of comfort and trust between justice claimants and the system built, at least in theory, to respond to their claims.²⁹ To reflect this or attempt to achieve it, a comprehensive A2J strategy must be multi-dimensional and encompass society as a whole.³⁰

²⁵ Farrow, *supra* note 1 at 983.

²⁶ Matthew Dylag, “Informal Justice: An Examination of Why Ontarians Do Not Seek Legal Advice” (2018) 35 Windsor YB Access Just 363 at 365; Singer, *supra* note 8 at 315; Farrow, *supra* note 1 at 961, 983; Hughes, *supra* note 15 at 7-8.

²⁷ Singer, *ibid* at 314.

²⁸ Cotterrell, *supra* note 21 at 198-203.

²⁹ *Ibid* at 204-08; Peter Fitzpatrick, “Access as Justice” (2005) 23:1 Windsor YB Access Just 3.

³⁰ Macdonald, for example, identifies four dimensions for such a strategy: geography, socio-demography, conception of justice, and perception (*supra* note 18 at 24-26).

In order to be responsive to multiple dimensions, a more holistic approach to A2J must aim to do more than just tinker at the margins or offer other generic solutions or reforms.³¹ The intersection and impact of the legal system with the lives of individuals is quite broad and exceeds the bound of what current positive law regulates. This is amplified for communities that have traditionally been excluded from the system or are systemically disadvantaged by it (e.g., trans people).³² As such, A2J must recognize its political aspect: we are not simply in the realm of legal technicalities or of objective corrective justice measures; we are in the realm of distributive justice and political priorities.³³ Including issues of redistribution in A2J is crucial for ensuring enfranchisement, empowerment, and solidarity, which will ultimately strengthen the justice system and diminish moral distancing both from the state and from the justice claimants' ends.³⁴ Systemic and structural changes within the legal system and within society in general are thus needed in order to address every A2J dimension. As Singer puts it,

“[Trans justice] goes beyond legal recognition through explicit human rights grounds and turns to the substantive work of helping marginalized trans people survive—by increasing access to low-cost housing and social benefits, decriminalizing sex work and drug use, fighting against racial profiling, supporting trans parents and trans youth, and through other projects that increase trans people's life chances.”³⁵

Measures to address these issues will take time and resources. While the status quo should not be tolerated, we must remain pragmatic in that such dramatic changes will likely not happen overnight. Nonetheless, A2J demands that we *aim* for such changes in order to *seek* justice.

To operationalize this approach, we consider three key aspects of A2J that trans communities face. The first aspect, procedural justice, deals with the fairness in which justice

³¹ *Ibid* at 29; Hughes, *supra* note 15 at 8.

³² Constance Backhouse, “What Is Access to Justice?” in Bass, Bogart & Zemans, *supra* note 15, 113.

³³ Galanter, *supra* note 15 at 157.

³⁴ Cotterrell, *supra* note 21 at 199; Macdonald, *supra* note 18 at 101.

³⁵ Singer, *supra* note 8 at 315.

claims are dealt with from the perspective of a trans claimant. It also includes the accessibility—in terms of comprehensibility and navigability—of the system. The second aspect, substantive justice, refers to the fairness of the outcome of a justice claim considering the social context of trans claimants. Can a trans claimant with a valid justice claim obtain a result from the system that resolves the issues underlying the claim? With this aspect, we are concerned with the content and meaning of law (or lack thereof). The final aspect, symbolic justice, touches upon the disenfranchisement of the trans community from the legal system, the state, and society writ large. Issues related to confidence and trust regarding the justice system, the recognition and respect of trans identities within the system, and the overall ability of the system to adapt and welcome justice claims by trans people are part of this aspect. When considering these aspects of A2J, it is important to be mindful of intra-group power dynamics and intersectional forms of oppression and discrimination. Not all trans persons suffer injustices the same way or with the same intensity given the increased marginalization produced by intersecting identities (e.g., race, disability, femininity, poverty, immigration status, etc.).³⁶ The uneven distribution of life chances means that some trans persons experience heightened marginalization and are more likely to be criminalized. This is not simply a question of recognizing the different social identities of trans claimants and their material impacts on their lived experiences, but one that necessitates the understanding that transphobia, transmisogyny³⁷, cissexism, and bigenderism form part of other systems of oppression and that the issue of gender identity and Indigeneity/settler colonialism, for example,

³⁶ See Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) 139 U Chicago Legal F 139; Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43:6 Stan L Rev 1241; Hajer Al-Faham, Angelique M Davis & Rose Ernst, “Intersectionality: From Theory to Practice” (2019) 15 Annual Rev of L & Social Science 247; Hughes, *supra* note 15 at 9-10.

³⁷ The term *transmisogyny* speaks to the intersections of misogyny, sexism, and transphobia, which trans women face: Serano, *supra* note 14 at 12.

cannot be disentangled for a trans or Two-Spirit Indigenous person.³⁸ In other words, the injustices faced by trans people and other marginalized people are the result of intersecting systems of oppression. This situation is not an unfortunate consequence of the system, but rather is one of its core parts (i.e., the system is built, consciously or not, to achieve this result). Therefore, A2J for trans people cannot be achieved independently of A2J for all. Any inclusive A2J approach based on responsiveness simply must take intersectionality seriously.

III. BARRIERS TO JUSTICE FOR TRANS PERSONS

Increasing A2J for trans people requires attending to the numerous barriers that trans people face when seeking justice. Given the multiplicity of factors that influences trans people's experiences of justice, it is impossible to give an exhaustive portrait of all the elements that produce, alone or in conjunction, barriers to justice for trans people in Canada. Nonetheless, we endeavor to provide an overview of those barriers based on the current literature.³⁹ To achieve this, we focus on four key barriers that trans people face when seeking A2J: socio-economic inequalities; exclusion from the legal system; sex/gender certification; and transphobia and cissexism within the legal system. We explicitly connect these barriers to procedural, substantive, and symbolic aspects of A2J at the end of each of the four subsections. When Canadian data is unavailable,⁴⁰ we cautiously use data from the United States to supplement this section given the commonalities among the two states,

³⁸ See Richard M Juang, "Transgendering the Politics of Recognition" in Paisley Currah, Richard M Juang & Shannon Price Minter, eds, *Transgender Rights* (Minneapolis: University of Minnesota Press, 2006) 242; Lori Saffin, "Identities Under Siege: Violence against Transpersons of Color" in Eric A Stanley & Nat Smith, eds, *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Oakland: AK Press, 2015) 161.

³⁹ This synthesis included relevant literature up to May 2022.

⁴⁰ There is still a considerable lack of data on trans people in Canada. While some studies have started to fill this gap, like the Trans PULSE Project, we have far from having a complete socio-economic portrait of trans people. It should be noted that this forms a particular type of injustice, epistemic injustice; see Alexandre Baril, H el ene Bigras-Dutrisac & David Guignon, "Gender Identity Trouble: An Analysis of the Underrepresentation of Trans* Professors in Canadian Universities" (2019) 5 *Chiasma* 90.

the cultural influence the U.S. has in Canada, and the porous discursive boundaries within the Anglosphere. We recognize that the legal apparatuses and political climates of the two states differ, and that this data is not fully reflective of trans people's experiences in Canada.⁴¹

A. Socio-economic Inequalities

There are multiple factors that contribute to the marginalization of trans people in Canadian society and impact their ability to access justice, including procedural, substantive, and symbolic aspects of A2J. Chief among these factors is systemic discrimination, represented by transphobia, transmisogyny, and cissexism. Systemic discrimination structures the marginalization of trans people by influencing and/or causing many, if not all, of the issues that lead to their social marginalization. In Ontario, the Trans PULSE Project found that 98% of respondents reported experiencing some form of transphobia in their lives, making the experience nearly universal among trans Ontarians.⁴² National data paints a similarly grim picture with 84% of trans people having avoided some public spaces for fear of harassment or outing, and a high proportion having suffered various forms of violence: 68% for verbal harassment, 37% for physical intimidation or threats, 16% for physical violence, 42% for sexual harassment, and 36% for sexual assault.⁴³ Another study found that 82% of gender-diverse people had experienced violence and harassment, 73% had experienced sexual harassment and violence, and 35% had experienced online

⁴¹ This is particularly evident considering the recent legislation across U.S. states that limit trans rights and criminalize gender-affirming care for trans youth. See Kendall Ciesemier & Chase Strangio, "Why and How Trans Hate is Spreading" (27 April 2023) online: *American Civil Liberties Association* <<https://www.aclu.org/podcast/why-and-how-trans-hate-is-spreading>>.

⁴² Marcellin R Longman et al, "Experiences of Transphobia among Trans Ontarians" (7 March 2013) Trans PULSE e-bulletin, online: <<http://transpulseproject.ca/research/experiences-of-transphobia-among-trans-ontarians/>>.

⁴³ The Trans PULSE Canada Team, "Health and Health Care Access for Trans & Non-binary People in Canada: National, Provincial, and Territorial Results" (10 March 2020) report 1 of 10 at 7.

harassment in the workplace.⁴⁴ Given these numbers, it is unsurprising that trans people suffer high levels of discrimination in housing, shelters, employment, social services, education, prisons, and healthcare.⁴⁵ This leads to disproportionately high unemployment rates among the trans population, approximately three times that of the general population,⁴⁶ despite having disproportionately higher levels of education than the cisgender population.⁴⁷ Trans people also suffer from a high rate of housing insecurity (10%) and food insecurity (15%), and have a high rate of unmet health care needs (45%).⁴⁸ Trans people of colour and Indigenous Two-Spirit and trans people have greater health issues than the general trans population.⁴⁹ The COVID-19

⁴⁴ Berlingieri et al, *Harassment and violence in Canadian workplaces: It's [not] part of the job* (London, ON: Western University, 2022) at 7.

⁴⁵ *Ibid*; Trans PULSE Canada Team, *supra* note 42 at 7; Masen Davis & Kristina Wertz, "When Laws Are Not Enough: A Study of the Economic Health of Transgender People and the Need for a Multidisciplinary Approach to Economic Justice" (2010) 8:2 *Seattle J for Soc Justice* 467 at 476; Grant et al, *supra* note 7; James et al, 2016, *supra* note 7; Evan Vipond, "From Surviving to Thriving": A Needs Assessment of Trans and Non-binary People in Toronto Based on the Social Determinants of Health, *Toronto Trans Coalition Project* (2019), online: <https://www.researchgate.net/publication/338922113_From_Surviving_to_Thriving_A_Needs_Assessment_of_Trans_and_Non-binary_People_in_Toronto_Based_on_the_Social_Determinants_of_Health>; Greta R Bauer et al, "We've Got Work to Do: Workplace Discrimination and Employment Challenges for Trans People in Ontario" (30 May 2011) 2.1 *Trans PULSE e-bulletin*, online: <<http://transpulseproject.ca/wp-content/uploads/2011/05/E3English.pdf>>; Greta R Bauer et al, "Who are Trans People in Ontario?" (26 July 2010) 1.1 *Trans PULSE e-bulletin*, online: <<http://transpulseproject.ca/wp-content/uploads/2010/07/E1English.pdf>>; Dan Irving, "Performance anxieties" (2015) 30:83 *Australian Feminist Studies* 50; Sean Waite, "Should I stay or should I go? Employment discrimination and workplace harassment against transgender and other minority employees in Canada's federal public service" (2021) 68:11 *Journal of Homosexuality* 1833; William Hébert, "Trans Rights as Risks: On the Ambivalent Implementation of Canada's Groundbreaking Trans Prison Reform," (2020) 35:2 *CJLS* 221; Kenna McDowell, "LGBTQ2 vulnerability in the Canadian housing sector" (2021) *Community Housing Canada Report No 2*, <https://doi.org/10.7939/r3-bac5-2503>; Tara Lyons, "Experiences of Trans Women and Two-Spirit Persons Accessing Women-Specific Health and Housing Services in a Downtown Neighborhood of Vancouver, Canada" (2016) 3:5 *LGBT Health* 373; Leon Laidlaw, "Trans University Students' Access to Facilities: The Limits of Accommodation" (2020) 35:2 *CJLS* 269; Jake Pyne, "Unsuitable bodies: Trans people and cisnormativity in shelter services" (2011) 28:1 *Canadian Social Work Review* 129.

⁴⁶ James et al, 2016, *supra* note 7 at 140; Vipond, *supra* note 45 at 13.

⁴⁷ Davis & Wertz, *supra* note 45 at 476; Grant et al, *supra* note 7 at 23; Vipond, *supra* note 45 at 44; Bauer et al, 2011, *supra* note 45.

⁴⁸ Trans PULSE Canada Team, *supra* note 42 at 6-7.

⁴⁹ Caiden Chih et al, "Health and well-being among racialized trans and non-binary people: Violence, discrimination, and mistrust in police" (November 2020) 2:2 *Trans PULSE Canada Team*.

pandemic exacerbated trans people's access to healthcare and diminished their access to transition-related care.⁵⁰

Social marginalization often leads to economic disenfranchisement, further limiting trans people's life chances and ability to participate in society.⁵¹ Due to un(der)employment, trans people experience a great deal of financial insecurity and are more likely to live in poverty than cisgender people.⁵² The Trans PULSE Canada project found that 48% of respondents aged 25 or older reported earning less than \$30,000 annually, while 24% reported earning less than \$15,000.⁵³ The COVID-19 pandemic worsened the economic precarity of trans people with 53% of trans individuals unable to meet their financial obligations or pay for essential needs.⁵⁴ According to a study from British Columbia, half of the Two-Spirit, trans, and non-binary people living in that province received income support, with 83% of them being on disability support.⁵⁵ This lack of financial security greatly diminishes trans people's ability to thrive and contributes to high rates of homelessness and housing insecurity amongst the trans population.⁵⁶ Moreover, social marginalization and economic disenfranchisement make it difficult for many trans persons to access healthcare, especially transition-related care that is not or inadequately covered by public

⁵⁰ Trans PULSE Canada COVID Cohort Working Group, *Impact of COVID-19 on health care access for transgender and non-binary people in Canada*, 8 December 2020, online: *Trans PULSE Canada* <www.transpulsecanada.ca/research-type/reports>.

⁵¹ Chris Hale, "Economic Marginalization, Social Exclusion, and Crime," in Chris Hale, Keith Hayward, Azrini Wahidin & Emma Wincup, eds, *Criminology*, 3rd ed (Oxford: Oxford University Press, 2013) 289; Government of the United Kingdom, Department for International Development, *Reducing Poverty by Tackling Social Exclusion* (Glasgow: UK Department for International Development, 2005) at 5, online: <https://www2.ohchr.org/english/issues/development/docs/social_exclusion.pdf>.

⁵² James et al, 2016, *supra* note 7 at 140; Vipond, *supra* note 45 at 29; Bauer et al, 2010 *supra* note 45.

⁵³ Trans PULSE Canada Team, *supra* note 42 at 4.

⁵⁴ Trans PULSE Canada COVID Cohort Working Group, *Social and economic impacts of COVID-19 on transgender and non-binary people in Canada*, 8 December 2020, online: *Trans PULSE Canada* <www.transpulsecanada.ca/research-type/reports>.

⁵⁵ Aaron Devor & Kingsley Strudwick, Poverty reduction in trans, non-binary & two-spirit communities: A summary report for the British Columbia ministry of social development and poverty reduction (Victoria: British Columbia Ministry of Social Development and Poverty Reduction, 2020).

⁵⁶ See Vipond, *supra* note 45 at 33; Trans PULSE Canada Team, *supra* note 42 at 7; James et al, 2016, *supra* note 7 at 176; McDowell, *supra* note 45.

healthcare.⁵⁷ A 2011 US survey found that 48% of trans respondents living in the US postponed medical care simply because they could not afford it.⁵⁸ Attempts to challenge the lack of public funding for all transition-related care on human rights grounds have proven inadequate for system wide change, with some limited success for some individuals.⁵⁹ Being unable to access transition-related care can be detrimental to trans peoples' mental health and contributes to disproportionately high rates of depression and suicidality among trans persons.⁶⁰

Marginalized populations, specifically poor and un(der)housed persons,⁶¹ people of colour,⁶² and trans people,⁶³ are more likely to be criminalized, which increases their chances of interacting with the police and the judicial system. Among these populations, some people are more susceptible to criminalization than others. Black and Indigenous people, specifically, are

⁵⁷ Grant et al, *supra* note 7; James et al, 2016, *supra* note 7; Vipond, *supra* note 45.

⁵⁸ Grant et al, *supra* note 7 at 72.

⁵⁹ Brodeur v Ontario (Health and Long-Term Care), 2013 HRTO 1229; Hogan v Ontario (Health and Long-Term Care), 2006 HRTO 32; May v Ontario (Health and Long Term Care), 2012 HRTO 733; Waters v BC Medical Services Plan, 2003 BCHRT 13.

⁶⁰ Greta R Bauer & Ayden I Scheim, *Transgender People in Ontario, Canada: Statistics to Inform Human Rights Policy* (London: Trans PULSE, 2015) at 6; Kyle Scanlon et al, "Ontario's Trans Communities and Suicide: Transphobia is Bad for our Health" (12 November 2010) 1:2 Trans PULSE e-bulletin, online:

<<http://transpulseproject.ca/research/ontarios-trans-communities-and-suicide/>>; Greta R Bauer et al, "Suicidality Among Trans People in Ontario: Implications for Social Work and Social Justice," (2013) 59:1 *Service Social* 35.

⁶¹ Diane Crocker & Val Marie Johnson, *Poverty, Regulation and Social Justice: Readings on the Criminalization of Poverty* (Halifax: Fernwood Publishing, 2010); Kaaryn Gustafson, "The Criminalization of Poverty" (2009) 99:3 *J Crim L & Criminology* 643; Bridget McCormack, "Economic Incarceration" (2007) 25:2 *Windsor YB Access Just* 223; Dean Spade, "Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy" in Currah, Juang & Minter, *supra* note 37, 217.

⁶² Andrea J Ritchie, "Law Enforcement Violence Against Women of Color," in INCITE! Women of Color Against Violence, ed, *Color of Violence: The INCITE! Anthology* (Durham, NC: Duke University Press: 2016); Canadian Civil Liberties Association, "A Recent History of Racial Profiling and Policing" (18 May 2015), online: *CCLA* <<https://ccla.org/a-recent-history-of-racial-profiling-and-policing>>; Ontario Human Rights Commission, "Paying the Price: The Human Cost of Racial Profiling" (October 2013), online: *OHRC*

<http://www.ohrc.on.ca/sites/default/files/attachments/Paying_the_price%3A_The_human_cost_of_racial_profiling.pdf>; David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006); Angela Y Davis, *Abolition Democracy: Beyond Empire, Prisons, and Torture* (New York: Seven Stories Press, 2005); Hall et al, *supra* note 58.

⁶³ Grant et al, *supra* note 7 at 158; CAP & MAP, *supra* note 7; Forbes, *supra* note 7; Spade, *supra* note 9; Spade, *supra* note 58; Eric A Stanley & Nat Smith, eds, *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Oakland, CA: AK Press, 2015); Tara Lyons et al, "Negotiating Violence in the Context of Transphobia and Criminalization: The Experience of Trans Sex Workers in Vancouver, Canada" (2017) 27:2 *Qualitative Health Research* 182; Elijah A Edelman, "'Walking While Transgender': Necropolitical Regulations of Trans Feminine Bodies of Colour in the US Nation's Capital" in Jin Haritaworn, Adi Kuntsman & Silvia Posocco, eds, *Queer Necropolitics* (Abingdon: Routledge, 2014) 172.

more likely to be racially profiled and criminalized than other racialized groups.⁶⁴ Similarly, among trans people, trans women experience heightened scrutiny and are often profiled by police as sex workers – a phenomenon known as “walking while transgender.”⁶⁵ For trans women of colour, particularly Indigenous and Black trans women, the intersections of transphobia, transmisogyny, and racism result in even higher rates of criminalization and violence.⁶⁶ A national survey in the US found that 40% of trans people have interacted with police, and 2% had been arrested, within a year.⁶⁷ The economic precarity of trans people can also lead to criminalization due to a reliance on the underground economy (e.g., sex work), to gain income or resources, to meet basic and transition-related needs.⁶⁸ The Toronto Trans Coalition Project reported that 12% of trans respondents living in Toronto have relied on the black market or underground economy to obtain their prescription drugs and/or hormone therapy.⁶⁹ One of the most common ways that trans people become criminalized is through sex work.⁷⁰ According to a TransPULSE Canada study, approximately 4.8% of trans people in Canada were sex workers.⁷¹ The Ontarian version of the

⁶⁴ Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax: Fernwood Publishing, 2017); Ontario Human Rights Commission “Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario” (April 2017) at 20, online: *OHRC* <http://www.ohrc.on.ca/sites/default/files/Under%20suspicion_research%20and%20consultation%20report%20on%20racial%20profiling%20in%20Ontario_2017.pdf>; Angela Y Davis, “Race and Criminalization: Black Americans and the Punishment Industry” in Eugene McLaughlin & John Muncie, eds, *Criminological Perspectives*, 3rd ed (London: SAGE, 2013) 301; Hall et al, *supra* note 58.

⁶⁵ Walking while transgender refers to the police practice of profiling trans women as sex workers, often resulting in arrest for solicitation without cause: Grant et al, *supra* note 7 at 158.

⁶⁶ Grant et al, *supra* note 7; James et al, 2016, *supra* note 7; Stanley & Smith, *supra* note 60.

⁶⁷ James et al, 2016, *supra* note 7.

⁶⁸ Dean Spade, “Documenting Gender” (2008) 59 *Hastings LJ* 731 at 758.

⁶⁹ Vipond, *supra* note 45 at 51.

⁷⁰ Viviane Namaste, *Sex Change, Social Change: Reflections on Identity, Institutions, and Imperialism* (Toronto: Women’s Press, 2005); Nora Butler Burke, “Double punishment: Immigration penalty and migrant trans women who sell sex” in Elya M Durisin, Emily van der Meulen & Chris Bruckert, eds, *Red light labour: Sex work regulation, agency, and resistance* (Vancouver: UBC Press, 2018) 109; Leon Laidlaw, “Challenging dominant portrayals of the trans sex worker: On gender, violence, and protection” (2018) 41:4 *Manitoba LJ* 351.

⁷¹ Frédéric SE Arps et al, Health and well-being among trans and non-binary people doing sex work, *Trans PULSE Canada*, 30 March 2021.

survey found that 14% of trans Ontarian had engaged in sex work while 3% were sex workers at the time of the survey.⁷²

The wide-spread social exclusion of trans people in Canada impacts A2J negatively because it results in trans people having to face a high degree of injustices, some with legal remedies (e.g., being fired after transitioning) and some without (e.g., homelessness due to being kicked out of the family home). In terms of legal issues, the TRANSforming Justice project found that trans people in Ontario faced a high degree of justiciable legal problems compared to the general population: discrimination (43% vs. 5.3%), medical treatment (22% vs. 3%), police action (16% vs. 2%), personal injury/victim of crime (19% vs. 3%), housing (22% vs. 3%), neighbours/property (19% vs. 10%), disability benefits (16% vs. 2%), employment (22% vs. 16%), and family law (17% vs. 6%).⁷³ The economic disenfranchisement that results from social marginalisation further increases inequality by leading to high levels of criminalization, especially among Indigenous and Black trans people. Criminalization is often simply the result of trans people trying to survive in an unjust world. The legal system is thus made into a source of injustices rather than a pathway to justice.

The socio-economic conditions of and the level of injustices and legal issues faced by trans people point to significant issues regarding substantive justice – i.e., the legal system seems incapable of addressing the legal issues faced by trans people to the same level it does for cisgender people. Economic disenfranchisement also limits trans peoples' A2J by making legal remedies difficult to obtain due to the high cost of legal services and lack of access to legal aid.⁷⁴ Even

⁷² Greta Bauer et al, "High heterogeneity of HIV-related sexual risk among transgender people in Ontario, Canada: A province-wide respondent-driven sampling survey" (2012) 12 *BioMed Central Public Health* 292.

⁷³ James et al, 2016, *supra* note 7.

⁷⁴ Trevor C W Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016).

available legal solutions to trans injustices are rendered inaccessible by the patterns of systemic discrimination that leave trans people disproportionately impoverished. This points to lower procedural justice due to a lack of financial accessibility. Finally, these considerable barriers to justice do not create a favourable environment for trans people's confidence in the legal system. This is exemplified by trans people's – especially racialized trans people, trans migrants, and trans sex workers – distrust of police and expectation of unfair treatment by the legal system.⁷⁵ This suggests a low level of symbolic justice.

B. Exclusion from the Legal System

Exclusion from the legal system – in terms of lack of representation and of considerations of their needs – creates procedural, substantive, and symbolic barriers to justice for trans communities. Marginalized populations in general often experience legal disenfranchisement, making it difficult to access justice within an exclusionary system. Backhouse contends Canadian law, and the nation itself, was founded upon white supremacy, racism, patriarchy, heterosexism (and cissexism), homophobia, and ableism.⁷⁶ She reminds us that “[t]he historical record is replete with evidence of discriminatory practices and laws that operated to create privileges for white, able-bodied, heterosexual [cisgender] males.”⁷⁷ The *Indian Act*, residential schools, Chinese head tax, Japanese internment camps, the criminalization of cross-dressing and homosexuality, and withholding the rights of women and racial minorities to vote provide only a few examples of Canada's oppressive and discriminatory legal history. While most of the examples listed above have been repealed, aside from the *Indian Act*, these legacies remain within our institutions and social consciousness.

⁷⁵ Chih et al, *supra* note 46; Jose Navarro et al, “Health and well-being among trans and non-binary immigrants & newcomers”, 23 March 2021, online: *TransPULSE Canada* <transpulsecanada.ca>.

⁷⁶ Backhouse, *supra* note 31.

⁷⁷ *Ibid* at 118.

In fact, discrimination within the law often simply takes more subtle and pernicious forms. For example, while gay sex was ‘legalized’ in 1969 (by exempting consensual private sexual activities between two adults 21 years of age and above from the offences of buggery and gross indecency), the criminalization of queer sexuality simply continued on in different forms: criminalizing public sex and the non-disclosure of HIV status.⁷⁸

While the Canadian legal system may guarantee, in theory, the right to equality, the situation on the ground tells a different story. Tanovich argues that the *Canadian Charter of Rights and Freedoms* “has, to date, had very little impact on racial injustice in Canada.”⁷⁹ Charter rights are better understood as *white* rights — that is, rights that are afforded to white persons but not racialized persons. Tanovich does not attribute these shortcomings to the Charter itself but to “those who apply and interpret it.”⁸⁰ The overrepresentation of white, nondisabled, heterosexual, and financially privileged cisgender men as legal actors in the justice system contributes to the further disenfranchisement of marginalized communities because rulings are often made “at the discretion of white heterosexual males who preside over the legal system.”⁸¹ Backhouse further explains, “[p]oliticians, lawyers and judges whose lives contain little personal experience of racism, sexism, disability, poverty or homophobia [or transphobia] are at risk of failing to understand the realities of those who face such problems day in and day out.”⁸²

Trans persons are grossly underrepresented within the legal system.⁸³ The first openly transgender judge in Canada, Kael McKenzie, who is also Métis, was appointed in December

⁷⁸ Kyle Kirkup, “The gross indecency of criminalizing HIV non-disclosure” (2020) 70:3 UTLJ 263.

⁷⁹ David M Tanovich, “The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Justice System” (2008) 40:2 SCLR 655 at 656.

⁸⁰ *Ibid* at 657.

⁸¹ Saffin, *supra* note 37 at 175.

⁸² Backhouse, *supra* note 31 at 121.

⁸³ See Florence Ashley, “L’In/visibilité constitutive du sujet trans : l’exemple du droit québécois” (2020) 35:2 CJLS 317.

2015.⁸⁴ The absence of trans persons working within legal professions and the justice system exacerbates power imbalances between cisgender legal professionals, who hold both institutional power and socio-economic privilege, and ordinary trans persons. Without adequate representation within the legal system, trans people's voices are likely to not be adequately heard and understood given the specific social context and needs of this population (e.g., not viewing transition related care as necessary healthcare or not understanding the importance of gender affirming parents in a family dispute).⁸⁵ The subject of the law is overwhelmingly cisgender, under the guise of neutrality, reflecting by default the realities of cisgender people and only including trans experiences in specific 'trans' provisions (what Ashley refers to as the minority model).⁸⁶ Trans people of colour face even greater institutional erasure than white trans people. The underrepresentation of racialized people – particularly Black and Indigenous people – within the justice system is further exacerbated by the purportedly neutral concept of colourblindness, or the refusal to fully acknowledge racial difference under the law.⁸⁷ Eng argues that the erasure of race under the law “willfully refuses to acknowledge the increasing socio-economic disparities that mark our society.”⁸⁸ Essentially, in denying racial difference under the law, racism and racial inequalities are eclipsed under the rhetoric of legal equality. However, as critical race scholars and women of colour feminists argue, colourblindness further perpetuates racial inequalities and injustices through their disavowal of racial difference.⁸⁹ A colourblind

⁸⁴ “Manitoba Appoints First Transgender Judge Kael McKenzie” (18 December 2015), online: *CBC News* <<http://www.cbc.ca/news/canada/manitoba/transgender-judge-manitoba-appointment-1.3372983>>.

⁸⁵ See Samuel Singer, “Trans Competent Lawyering” in Joanna Radbord, ed, *LGBTQ2 + Law: Practice Issues and Analysis* (Toronto: Emond Publishing, 2019) 159.

⁸⁶ Ashley, *supra* note 83.

⁸⁷ Devon W Carbado & Daria Roithmayr, “Critical Race Theory Meets Social Science” (2014) 10 *Annual Rev of L & Social Science* 149 at 155.

⁸⁸ David Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham, NC: Duke University Press, 2010) at 5.

⁸⁹ *Ibid*; Spade, *supra* note 9; Davis, *supra* note 59.

approach to the law obscures systemic racism and thus fails to consider how trans people of colour, particularly trans women of colour, are more susceptible to violence and criminalization than their white counterparts.⁹⁰

As symbolic justice is premised on trust and representativeness, the general exclusion of trans people, particularly those who are racialized, from the legal system points to a high degree of symbolic injustice. In other words, it is hard to believe that justice is being done when you do not see yourself in those responsible for the system and in the so called ‘neutral’ standpoint of the law. This exclusion also results in issues with procedural and substantive justice. Without adequate trans competent legal actors, trans people face additional hurdles in accessing adequate legal representation and navigating legal procedures. There is a significant risk that cisgender lawyers and other court actors would not know or understand enough about the legal needs of trans individuals to help them navigate their legal issues. In the same vein, the lack of trans voices within the legal system heightens the risk of substantive injustices as improperly represented or understood trans claimants will increase the likelihood of a substantively unfair result.

C. Sex/Gender Certification and Bigenderism within the Legal System

Another way the legal system is inaccessible to trans people is through its perpetuation, regulation, and enforcement of the sex/gender binary, resulting in procedural, substantive, and symbolic barriers to justice. The sex/gender binary is legally regulated and enforced through the ‘certification’ of sex/gender on official documents, especially birth certificates which are typically used to establish legal (state sanctioned) sex/gender on all other government documents such as driver’s licenses, health cards, and passports. This regulation starts at birth by assigning one of two

⁹⁰ Broadus, *supra* note 7; Spade, *supra* note 9; Chih et al, *supra* note 46.

sex/gender categories (male or female) to newborns despite the fact that they have yet to develop a gender identity.⁹¹ For trans people, this often leads to the desire or need to change one's sex/gender marker on official documents. However, the strict and continually shifting requirements for legally changing one's sex/gender designation prevent many trans persons from obtaining documents that consistently reflect their gender identity.⁹² Due to jurisdictional differences, these regulations vary from one province or territory to another, which means trans persons are often unable to secure uniformity across documents.⁹³ For example, passports and Indian Status fall under federal jurisdiction, whereas driver's licenses, health cards, and birth certificates fall under provincial and territorial jurisdiction, and it is not uncommon for these documents to all have separate rules and procedures for changing the displayed sex/gender marker. Moreover, within a single jurisdiction, the criteria required to change one's sex/gender designation can vary document to document. Trans persons who do not have consistency across identification documents or are seen to have a 'discrepancy' between their sex/gender marker and gender expression may lead to a denial of services, harm (due to outing) or other legal problems, such as accusations of fraud.⁹⁴ Furthermore, the regulation of sex/gender through the enforcement of bigenderism excludes non-binary, Two-Spirit and other gender identities that do not fit within the binary. While the number of jurisdictions recognizing a third option (marked as 'X' or simply

⁹¹ Ashley, *supra* note 83 at 322-23.

⁹² Spade, *supra* note 9; Spade, *supra* note 58; Toby Beauchamp, "Artful Concealment and Strategic Visibility: Transgender Bodies and U.S. State Surveillance After 9/11" (2009) 6:4 *Surveillance & Society* 356; Abigail W Lloyd, "Defining the Human: Are Transgender People Strangers to the Law?" (2005) 20 *Berkeley J Gender L & Just* 150 at 169-70.

⁹³ For Canadian provincial regulations, see Canadian Civil Liberties Association, *supra* note 59.

⁹⁴ Mia Fischer, "Under the Ban-Optic Gaze: Chelsea Manning and the State's Surveillance of Transgender Bodies" in Emily van der Meulen & Robert Heynen, eds, *Expanding the Gaze: Gender and the Politics of Surveillance* (Toronto: University of Toronto Press, 2016): 185 at 195; Katherine Starks, "Gender markers on government-issued identification in Saskatchewan: Rights, reform, and jurisdiction in a shifting legal landscape" (2018) 81:2 *Sask L Rev* 213 at 219, 239.

unspecified) is growing,⁹⁵ some jurisdictions still do not provide an option outside of the sex/gender binary. According to a recent decision of the Québec Superior Court, not providing a non-binary option violates trans people's right to dignity and equality.⁹⁶ While this precedent is good news, relying on lengthy and complex constitutional and human rights litigation to have your gender identity recognized is not an adequate solution to the enforcement of bigenderism through law.

The state regulation of the sex/gender binary is deeply entwined with the medicalization of trans people. Historically, medical and psychiatric institutions have functioned as gatekeepers, determining who can medically transition based on one's ability to conform to normative conceptions of what it means to be trans.⁹⁷ Generally, in order to be approved to undergo gender confirmation surgery (GCS), trans individuals typically must receive a diagnosis of gender dysphoria. Until recently, trans individuals had to undergo gender reassignment (i.e., GCS) to change one's sex/gender marker on government identification documents, which meant that trans individuals who did not wish to or were unable to undergo GCS were prohibited from changing their legal sex/gender.⁹⁸ While most of the medical requirements no longer exist, many jurisdictions in Canada still require a physician note in order to legally change one's sex/gender designation. This creates an additional and unnecessary hurdle, especially since medical transition is no longer necessary, to obtaining documentation that reflects one's gender identity.

⁹⁵ As of May 2022, these include Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Ontario, Prince Edward Island, Québec, Saskatchewan, and Yukon. Various federal documents, such as immigration documents, Indian Status cards, and passports, also allow for the 'X' gender-marker.

⁹⁶ Centre for Gender Advocacy c Attorney General of Quebec, 2021 QCCS 191. See also *TA v Manitoba (Justice)*, 2019 MBHR 12.

⁹⁷ See Evan Vipond, "Resisting Transnormativity: Challenging the Medicalization and Regulation of Trans Bodies" (2015) 8:2 *Theory in Action* 21.

⁹⁸ This requirement was found discriminatory by the Human Rights Tribunal of Ontario (*XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726) and the Court of Queen's Bench of Alberta (*CF v Alberta (Vital Statistics)*, 2014 ABQB 237). See also Vipond, *supra* note 97.

The notion of “compliance” in the justice system is another method of regulating and enforcing the sex/gender binary.⁹⁹ Compliance is based in gendered stereotypes that can range from attire to personal grooming, to behaviour, to personal expression.¹⁰⁰ Trans and gender nonconforming individuals’ gender expressions may appear to be ‘at odds’ with their legal sex/gender by legal actors or correctional officers and thus deemed to be “out of compliance.”¹⁰¹ In particular, trans people who are feminine, poor and/or un(der)housed, racialized, or belonging to religious minorities, must not only contend with gendered expectations of what appropriate attire consists of, but also sexist, racist, and classist expectations with which they must comply or risk punishment.¹⁰²

The use of gender-segregated¹⁰³ facilities within the justice system – including jails and prisons, rehabilitation centres, transitional housing, and even public washrooms in legal institutions – further enforces bigenderism. In the context of the courthouse, for example, the absence of a gender-neutral or all-gender accessible washroom may expose trans people to harassment, and physical and sexual violence.¹⁰⁴ In Ontario, 57% of trans respondents to a Trans PULSE study indicated that they avoid public washrooms due to fear.¹⁰⁵ Moreover, trans persons

⁹⁹ Spade, *supra* note 58; Lori Girshick, “Out of Compliance: Masculine-Identified People in Women’s Prisons” in Eric A Stanley & Nat Smith, eds, *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Oakland, CA: AK Press, 2015) 215 at 222. Hébert, *supra* note 45 at 237.

¹⁰⁰ Spade, *supra* note 58 at 227.

¹⁰¹ *Ibid*; Girshick, *supra* note 97; Charlotte Knight & Kath Wilson, *Lesbian, Gay, Bisexual and Trans People (LGBT) and the Criminal Justice System* (London: Palgrave Macmillan, 2016) at 241.

¹⁰² See, for e.g., Continuing Legal Education Society of BC, “But I Was Wearing A Suit” (23 November 2017) online: *YouTube* <<https://www.youtube.com/watch?v=HTG7fi-5c3U>>.

¹⁰³ The terms *gender-segregated* and *sex-segregated* are often used synonymously. ‘Gender-segregated’ refers to facilities or spaces that are segregated based on gender identity whereas ‘sex-segregated’ refers to spaces that segregated based on one’s genitals. In recent years, ‘sex-segregated’ has been distinguished from ‘gender-segregation’ in efforts to exclude trans women from ‘women-only’ spaces by distinguishing biological sex from gender identity. See Evan Vipond, “Trans Rights Will Not Protect Us: The Limits of Equal Rights Discourse, Antidiscrimination Laws, and Hate Crime Legislation” (2015) 6:3 *Western JL Studies* 1 at 8-14.

¹⁰⁴ Jenifer K McGuire, Sloan Okrey Anderson & Cari Michaels, “‘I don’t think you belong in here:’ The impact of gender segregated bathrooms on the safety, health, and equality of transgender people” (2022) 34:1 *Journal of Gay & Lesbian Social Services* 40.

¹⁰⁵ Ayden Scheim, Greta Bauer & Jake Pyne, “Avoidance of Public Spaces by Trans Ontarians: The Impact of Transphobia on Daily Life” (2014) 4:1 *Trans PULSE E-Bulletin*.

may feel invalidated if they are forced to use a washroom that does not align with their gender identity. Incarceration, which already poses several issues for any incarcerated individuals,¹⁰⁶ is particularly fraught for trans people due to the possibility of being incarcerated in a gender-segregated facility that does not reflect their gender identity.¹⁰⁷ In the US, a study found 19.3% of trans women and 41.6% of trans women of colour had been incarcerated in their lifetime.¹⁰⁸ While incarceration rates are higher in the US, we can reasonably assume that trans individuals, especially those who are racialized, are disproportionately incarcerated in Canada as well. Although Correctional Service Canada (CSC) introduced Interim Policy Bulletin 584 – Bill C-16 (Gender Identity or Expression) in 2017,¹⁰⁹ which mandates that prisoners are to be segregated based on self-identification (rather than genitals),¹¹⁰ CSC continues to enforce bigenderism through the use of binary gender-segregated facilities.¹¹¹ As noted by Hébert, despite the rights centered approach adopted by the government of Canada and the CSC, and the promise of trans inclusion, correctional facilities continue to exclude trans prisoners on the basis of risk to cisgender women and escape risk.¹¹² Furthermore, trans prisoners, particularly trans women of colour, experience disproportionately high rates of physical and sexual assault and harassment at the hands of other

¹⁰⁶ See Canada, Parliament, Senate, Standing Committee on Human Rights, *Report on The Human Rights of Federally-Sentenced Persons*, 43rd Parl, 2nd Sess (16 June 2021).

¹⁰⁷ Hébert, *supra* note 45 at 235; Vipond, *supra* note 103 at 16; Denio Lourenco, “Documents show a pattern of human rights abuses against gender diverse prisoners”, 16 May 2022, online: *CTV News* <<https://www.ctvnews.ca/canada/documents-show-a-pattern-of-human-rights-abuses-against-gender-diverse-prisoners-1.5905364>>.

¹⁰⁸ Sari L Reisner, Zinzi Bailey & Jae Sevelius, “Racial/ethnic disparities in history of incarceration, experiences of victimization, and associated health indicators among transgender women in the U.S.” (2014) 54:8 *Women Health* 750.

¹⁰⁹ The interim policy was replaced by the permanent “Commissioner’s Directive 100 – Gender Diverse Offenders” (9 May 2022), online: *CSC* <<https://www.csc-scc.gc.ca/politiques-et-lois/005006-100-cd-en.shtml>>. Much of the original interim policy was retained: “Policy Bulletin 685”, online: *CSC* <<https://www.csc-scc.gc.ca/politiques-et-lois/685-pb-cd-100-en.shtml>>.

¹¹⁰ “Interim Policy Bulletin 584 – Bill C-16 (Gender Identity or Expression)” (27 December 2017), online: *CSC* <<https://www.csc-scc.gc.ca/policy-and-legislation/584-pb-en.shtml>>.

¹¹¹ We do not advocate for an expansion of CSC through the addition of non-binary jails and prisons. Rather, we are critical of the justice system’s ongoing regulation of the sex/gender binary and argue that this regulation continues to harm and disenfranchise trans people.

¹¹² Hébert, *supra* note 45.

inmates and correctional officers.¹¹³ This leads to trans prisoners frequently being held in solitary confinement, often viewed as an inhumane treatment,¹¹⁴ for their own ‘protection.’ Finally, shelters also perpetuate bigenderism. Given the high rate of housing insecurity and of violence within the trans population, we can assume that shelters are an important resource for trans people. Some explicitly exclude trans people and benefit from exemptions from the application of anti-discrimination provisions.¹¹⁵ Even shelters that have adopted inclusionary approaches are not necessarily safe spaces for trans people, especially trans women.¹¹⁶ Accessibility to gender-segregated facilities for people who do not identify with the sex/gender binary is an issue across the board, even in jurisdictions where a third gender category is recognized.

The regulation of sex/gender results in significant A2J barriers. The fact that sex/gender is regulated at all is a significant violation of substantive justice, particularly for Two-Spirit, non-binary and other gender diverse people who do not fit within ‘male’ or ‘females’ spaces. The fact that the state imposes a particular view of sex/gender, in this case a white patriarchal settler view, and lends its resources to its continued legitimization without proper justification other than to assert power and control is a significant form of injustice to all gender diverse people, including those who identify within the binary but express themselves in a non-normative way.¹¹⁷ This in

¹¹³ Grant et al, *supra* note 7; Spade, *supra* note 9 at 25; National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2014* (New York: NCAVP, 2015) [NCAVP]. A 2006 study revealed that transgender inmates in the California prison system were thirteen times more likely to be sexually assaulted than cisgender inmates: Broadus, *supra* note 7 at 570.

¹¹⁴ Adams v Nova Institution, 2021 NSSC 313; Canadian Civil Liberties Association v Canada, 2019 ONCA 243; British Columbia Civil Liberties Association v Canada (Attorney General), 2019 BCCA 228.

¹¹⁵ See *Nixon v Vancouver Rape Relief Society*, 2002 BCHRT 1, overturned, based on a provision excluding certain organizations from the BC Human Rights Code, by *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601.

¹¹⁶ Lyons et al, *supra* note 60; Pyne, *supra* note 45; Stephanie Begun & Shanna K Kattari, “Conforming for survival: Associations between transgender visual conformity/passing and homelessness experiences” (2016) 28:1 Journal of Gay & Lesbian Social Services 54.

¹¹⁷ See Kim TallBear, “Identity is a poor substitute for relating: Genetic ancestry, critical polyamory, property, and relations” in Brendan Hokowhitu et al, eds, *Routledge Handbook of Critical Indigenous Studies* (New York: Routledge, 2021) 467; Scott Lauria Morgensen, *Spaces Between Us: Queer Settler Colonialism and Indigenous Decolonization* (Minneapolis: University of Minnesota Press, 2011); Scott Lauria Morgensen, “Settler homonationalism: Theorizing settler colonialism within queer modernities” (2010) 16:1-2 GLQ 105.

turn creates a climate that is ripe for violence, harassment and discrimination in gender-segregated spaces. Moreover, the continuous policing of sex/gender by the state makes the appearance of fairness evaporate for most trans people who do not see themselves in the system or in fact see themselves at odds with the system. This creates significant issues of symbolic justice. If one's existence is barely or not recognised at all by the justice apparatus, how can one trust that the system will deliver justice? Finally, the regulation of sex/gender also acts as a barrier to procedural justice in making spaces where one could pursue justice (e.g., courthouses, government buildings, etc.) inaccessible to many trans people due to fear related to the use of gender-segregated facilities and the need to demonstrate one's identity to access services which nearly always inevitably includes sex/gender.¹¹⁸

D. Other Issues of Transphobia and Cissexism within the Legal System

The legal system, “like many other top-down social institutions, has been used to segregate and disenfranchise the less fortunate of our citizens.”¹¹⁹ Broadus notes that transphobia among police officers, judges, prosecutors, public defenders, and the private bar “are barriers to fair treatment that must be encountered along the way.”¹²⁰ As transphobia, transmisogyny, and cissexism permeate society and the legal system, there are many more barriers to justice than the numerous ones listed above. Here, we attempt to highlight some of the additional issues we have noted that relate to procedural, substantive, and symbolic aspects of A2J without claiming to be exhaustive: police, family law, and refugee and immigration law.

¹¹⁸ While some courthouses have adopted rules to respect trans people's gender identities and many offices, public and private, have policies related to gender identity and expression, the adoption of policies and rules is far from guaranteeing that these spaces will be accessible to trans people, especially non-binary people.

¹¹⁹ Broadus, *supra* note 7 at 561.

¹²⁰ *Ibid.*

Due to the prevalence of transphobia among police officers, trans persons who experience harassment or assault may face further victimization if they report an incident to the police. A 2014 U.S.-based study determined that trans persons are 6.2 times more likely to experience physical violence at the hands of police than those who are cisgender.¹²¹ Furthermore, the study found that 22% of trans persons who reported interacting with the police experienced some form of harassment and 20% said they were denied equal services.¹²² The dehumanizing myth that trans persons are ‘deceptive’ (i.e., that they are lying about their gender and therefore lying about who they are) and are not ‘real’ (i.e., that trans persons are pathological), “allow law enforcement and the prison system to act as if trans people do not exist. If someone does not exist, then they do not deserve to be treated with humanity.”¹²³ Furthermore, the mistreatment of trans persons by police (or correctional officers) rarely results in a formal investigation.¹²⁴ It is not surprising to find that trans persons are losing faith in the police and the legal system.¹²⁵ According to a 2015 U.S.-based survey, as many as 57% of trans persons have reported being “either somewhat or very uncomfortable” seeking police help.¹²⁶ Studies in Canada have found a similar degree of distrust regarding police.¹²⁷

The family context is another area where the law and its application can have negative impacts on trans people. As Singer notes, family law decisions are based on the particulars of each case and involve some level of discretionary power.¹²⁸ This can leave spaces for transphobia to transpire, especially in the absence of trans competent legal actors. For example, in 2004, the court

¹²¹ NCAVP, *supra* note 108 at 56.

¹²² Grant et al, *supra* note 7 at 158.

¹²³ Broadus, *supra* note 7 at 570.

¹²⁴ *Ibid* at 566.

¹²⁵ Grant et al, *supra* note 7 at 158.

¹²⁶ James et al, *supra* note 8 at 185.

¹²⁷ Chih et al, *supra* note 46; Navarro et al, *supra* note 73.

¹²⁸ Singer, *supra* note 8 at 306.

refused to change the designation of a transgender parent on their child's birth certificate from "mother" to "father" despite evidence that it would be in the best interest of the child (a paramount principle of family law) and that not changing it was causing harm to the parent because the birth parent will always be the "mother" according to the law.¹²⁹ In 2015, sole custody of a child was given to the cisgender parent despite an expert's recommendation that joint custody be awarded, preferring instead the expert opinion that highlighted "traditional family environment".¹³⁰

Another context where decision-makers have a high degree of discretion is immigration and refugee law. Immigration and refugee cases are often very fact dependent, but outside of cases where the situation is obvious (e.g., a state that openly oppresses trans people), Immigration Officers and the Immigration and Refugee Board have considerable latitude in interpreting the facts. The general lack of trans competence within our system, highlighted above, can lead to decisions with severe negative consequences for trans claimants. For example, several refugee claims from Mexico were rejected based on the legal protection of sexual and gender minorities offered by the State despite the general transphobic attitude of Mexican society, particularly of law enforcements.¹³¹ The adoption of *Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics* may have alleviated this issue,¹³² but limited publication of refugee decisions makes evaluating the Guideline's impact difficult. Furthermore, the mix of different cultural perceptions and conceptions of gender identity,

¹²⁹ *J M, Re*, 2004 CanLII 20754 (QC CS), [2004] RJQ 2491. The adoption of Bill 2 by the National Assembly of Québec in June 2022 will alleviate this issue, but this case remains an example of how judges can enact transphobia through law despite ample evidence that would allow them to decide otherwise.

¹³⁰ Johanne Clouet, "Commentaire de jurisprudence : transsexualité et droit de garde" (2015) 117:1 *Revue du Notariat* 217; *Droit de la famille — 133870*, 2013 QCCS 6825; *Droit de la famille — 151902*, 2015 QCCS 3615.

¹³¹ *X (Re)*, 2010 CanLII 96290 (CA IRB); *X (Re)*, 2010 CanLII 96744 (CA IRB). See also *Go v Canada (Citizenship and Immigration)*, 2016 FC 1021. The decision in *X (Re)*, 2011 CanLII 67655 (CA IRB) offers a counter view, showing how a different reading of similar facts can lead to a different conclusion.

¹³² Immigration and Refugee Board, *Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics*, 1 May 2017, revised 17 December 2021, online: IRB <<https://irb.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx>>.

the often non-linear path of gender identity and transition, and the stigma associated with being openly trans can lead to rejection of claims due to claims not meeting the expectations of decision-makers.¹³³

The high degree of discretion and even impunity in some cases within the law and its enforcement negatively affects symbolic justice. When the system highlights how different you are because of your gender identity, it is hard to see justice being done, even if the result of a decision is not negative per se; the fact that extra steps were needed because of one's gender identity is enough to highlight the non-normative aspect of one's personhood. The evidentiary burden created by the need to prove facts or correct issues related to gender identity in a cisgender system (sometimes referred to a "cistem") adds barriers to procedural justice that cisgender individuals do not have to face. The violence, in its various forms, that results from this legal cistem because of police abuse and wrongly decided family or refugee cases create significant substantive injustices. As the police is viewed as the main branch of law enforcement, the negative impacts create by the violence it perpetrates against trans people go beyond substantive justice as it acts as a procedural barrier since trans victims may feel disinclined to report the crime they suffered to the police. It also paints a picture that the police and the state it protects are transphobic, which erodes symbolic justice.

IV. ELEMENTS OF TRANS INCLUSIVE A2J

A trans inclusive approach to A2J must attend to the barriers that trans people face when seeking justice. The A2J barriers we identified are numerous and interconnected, but there are more of

¹³³ *Enam v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1117; *X (Re)*, 2019 CanLII 120788 (CA IRB); *Held v Canada (Citizenship and Immigration)*, 2015 CanLII 111447 (CA IRB).

them. For example, Singer notes further issues that impact trans people’s ability to access justice, including the need for trans youth with a transphobic parent to rely on courts to access gender affirming care, and the difficulties of obtaining social benefits and appealing negative decisions.¹³⁴ Additionally, there are likely further barriers for which there is currently no or too little data. Overall, social and structural barriers to justice for trans people paint a dismal picture. If it is trite to mention that there is an A2J crisis to Canada, discussions of the crisis seldom focus on the particulars of those most affected by it, including, and one might say especially, trans people.¹³⁵ Consequently, most solutions offered to alleviate the crisis – i.e., those focusing on the cost and complexity of legal procedures – are too generic to be of significant use to trans people or simply irrelevant to their lived experiences.¹³⁶ This does not mean they are pointless, as, for example, reducing cost and complexity will benefit trans people. Nonetheless, cheaper legal representation does not alleviate the trust issue that exists; that is, the fact many trans people, often the most marginalized, simply do not view lawyers as part of the justice equation. Most generic solutions – Hughes notes “increased availability of unbundled and *pro bono* legal services, more self-help materials, greater reliance on technology, more consensual settlement processes at or in connection with the courthouse and greater opportunity for early resolution of disputes” as common recommendations¹³⁷ – fall short of addressing the complex and systemic issues that plague trans

¹³⁴ Singer, *supra* note 8.

¹³⁵ Hughes, *supra* note 15 at 2.

¹³⁶ *Ibid* at 6-7.

¹³⁷ *Ibid* at 1.

people's A2J. To palliate this significant lacuna in the A2J literature, we propose a plan or sketch of what trans inclusive A2J looks like based on the approach developed in the second section and the A2J barriers discussed in the third section. While this vision of trans A2J is undoubtedly incomplete both in its scope and depth, this section is meant as a starting point for serious discussions and inquiries into improving A2J for trans people.

Anti-discrimination provisions have long been sought out as a means of protection for marginalized populations. Trans people have been protected under the grounds of civil status in Québec since 1982,¹³⁸ and of sex and/or disability in all of Canada since the late 1990s.¹³⁹ In the last decade, 'gender identity' and/or 'gender expression' were added to all the human rights legislation in Canada. There is no doubt that human rights law has served and continues to serve an important role in trans people's quest for justice. Adding grounds of discrimination that are largely specific to trans people was an important move towards improving symbolic justice.¹⁴⁰ Nevertheless, the liberal and individualist foundation of anti-discrimination provisions render them of little use to address the systemic and collective issues that afflict trans A2J.¹⁴¹ These provisions do not prevent the criminalization of more vulnerable trans people, including sex workers and those un(der)employed and/or un(der)housed. The inadequacies of human rights law do not mean it cannot be part of a broader approach to A2J.¹⁴² In fact, it can play a strategic role

¹³⁸ Québec (Commission des droits de la personne) c Anglsberger, [1982] 3 CHRR D/892.

¹³⁹ Commission des droits de la personne et des droits de la jeunesse (ML) c Maison des jeunes, 1998 CanLII 28, [1998] RJQ 2549; Sheridan v Sanctuary Investments Ltd, 1999 BCHRT 4, 33 CHRR D/467; Kavanagh v Canada (Attorney General), 2001 CanLII 8496, 41 CHRR 119; Forrester v Peel (Regional Municipality) Police Services Board, 2006 HRTO 13; XY, *supra* note 95.

¹⁴⁰ Singer, *supra* note 8 at 298.

¹⁴¹ See Vipond, *supra* note 103; Florence Ashley, "Don't Be So Hateful: The Insufficiency of anti-discrimination and Hate Crime Laws in Improving Trans Well-being" (2018) UTJL 68:1; Spade, *supra* note 9.

¹⁴² See Singer, *supra* note 8 at 300-302.

in challenging certain transphobic laws and practices if efforts are made to increase the accessibility of the human rights system through reduced costs, expedited remedies, simplified procedures, and widespread trans specific public education on the system and how to use it. After all, the system only has use to the extent that trans persons know their rights and feel empowered to use the system.¹⁴³

Similarly, the inclusion of ‘gender identity’ and ‘gender expression’ within hate crime provisions in the *Criminal Code* is unlikely to effectively deal with the systemic violence affecting trans people.¹⁴⁴ First, the hate crime regime suffers from the same flaws as the human rights system – i.e., individualist, and liberal.¹⁴⁵ There is little evidence that the increased sentencing that characterizes hate crime provisions – only hate propaganda is a distinct crime – result in less hate, a social rather than individual issue. Second, the prosecution of hate crimes remains uncommon, and it appears that none have involved trans people as victims.¹⁴⁶ Finally, and potentially explaining the last point, hate provisions require proof that the criminal act was motivated by bias, prejudice or hate towards a protected group. Proving such a subjective element is difficult as the true motivation behind someone’s violent behavior is not always evident and/or investigated.¹⁴⁷ For hate propaganda, the speech act must reach the high threshold of ‘hate’ in order for prosecution to be possible.¹⁴⁸ Many speech acts that could be characterized by trans people as an aggression

¹⁴³ Davis & Wertz, *supra* note 45 at 478.

¹⁴⁴ Vipond, *supra* note 103.

¹⁴⁵ See Ashley, *supra* note 83; Spade, *supra* note 9; Vipond, *supra* note 103.

¹⁴⁶ Based on a search on the CanLii database using the search terms “trans OR transgender OR transsexual” for each relevant offence, up to date as of May 2022; see also Abbee Corb, “Hate and hate crime in Canada” in Nathan Hall et al, eds, *The Routledge International Handbook on Hate Crime* (Oxford: Routledge, 2015) 163 at 169-70.

¹⁴⁷ Julian Roberts, *Disproportionate Harm: Hate Crime in Canada — An Analysis of Recent Statistics* (Ottawa: Justice Canada, 1995) at 13-14, 36. Successful hate crime prosecution often involved crimes where the hateful motivation of the offender is obvious and central to the offence: see *R v Woodward*, 2011 BCCA 251. See also Vipond, *supra* note 103.

¹⁴⁸ See *R v Keegstra*, [1990] 3 SCR 697. “To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies”: *R v Andrews*, (1988) 65 OR (2d) 161 (ON CA) at 179.

would likely not meet that threshold. Unlike anti-discrimination provisions, it is hard to see the strategic value of hate crimes for improving trans A2J aside for the symbolic justice provided by their very existence. Furthermore, emphasizing criminal law solutions to the A2J crisis is incompatible with the harm criminalization and imprisonment cause to people in general, but especially trans people, and members of racialized groups, particularly Indigenous and Black communities. These issues are explored further below.

Being able to easily change one's sex/gender and name on official documents is an easy step – as in no systemic change is needed and it can be done fast by changing rules – to increase trans people's A2J. Having documentations that reflect one's gender identity is crucial for many trans people's safety, wellbeing, and ability to access services. Procedures and requirements for sex/gender and name changes should be reduced to an absolute minimum, unified (i.e., one application to change all documents per jurisdiction) and standardized. In other words, one should be able to file one form at the federal level and one at the provincial/territorial level and have every document changed to the correct sex/gender and name without any need for medical documentation (i.e., based on self-determination).¹⁴⁹ These changes should also be available to anyone capable of making-such decisions, meaning that parental consent should not be a criterion for youth who otherwise are deemed capable of making serious decisions.¹⁵⁰ Furthermore, changing one's sex/gender designation, as it is a result of state cissexism in its insistence to assign a sex/gender to a newborn, should be free and changing one's name to match one's gender identity should also be free.¹⁵¹ Services, such as legal clinics, should be provided without charge to assist

¹⁴⁹ This would be difficult to implement due to jurisdictional differences, demonstrating that the very framework of the Canadian legal and justice systems themselves create barriers to accessing justice.

¹⁵⁰ See *AB v CD*, 2020 BCCA 11 (minor access to hormone therapy).

¹⁵¹ See, for e.g., Québec's fees schedule, which exempts first application for a change of sex designation from fees: Directeur de l'état civil, "Fees and processing time" (2022) online: *Government of Québec* <<https://www.etatcivil.gouv.qc.ca/en/certificate-copy/processing-time.html>>.

trans individuals in navigating the name and sex/gender marker changes.¹⁵² To maximize the efficacy of these services, trans competency training must also be provided.

Ultimately, the legal certification and regulation of the sex/gender binary must be reconsidered in its entirety.¹⁵³ At a very minimum, sex/gender marker options beyond the binary, as many jurisdictions already have,¹⁵⁴ should be available, as well as the option to not have any sex/gender designation at all. However, general third options, like ‘X’, have limits as they form a catch all and unspecified category of non-binary gender, which obscure and devalue specific non-binary identities like agender, genderqueer, genderfluid and nonbinary, and non-Western identities like Two Spirit, Mashoga and Bakla.¹⁵⁵ Recognizing additional gender identities (whether the typical ‘X’ option or even more expensive options) can also create serious issues, such as forcibly outing people as trans as, unlike ‘male’ or ‘female’, non-binary options are clearly trans identities, or creating problem when visiting states without non-binary sex/gender options or with acute transphobic attitudes.¹⁵⁶ Instead of providing a third option, and going further in the deregulation of sex/gender, the Gender-Free ID Coalition in Canada seeks to “end state-assigned gender” altogether by “remov[ing] all gender/sex designations from identity documents.”¹⁵⁷ The “decertification” of sex/gender under the law could “remov[e] official state processes that standardize, fix, and allocate sex/gender categories” and thus reduce many of the barriers that trans

¹⁵² E.g., the 519 Trans ID Clinic in Ontario (<https://www.the519.org/programs/virtual-trans-id-clinic>), and QMUNITY’s Trans ID Clinic in British Columbia (<https://qmunity.ca/trans-id-clinic/>).

¹⁵³ Notably, some trans people are against decertification on the basis that sex/gender markers on identity documents are integral for accessing services and safety. However, as discussed above, many trans people are unable to acquire identity documents that reflect their lived gender and thus sex/gender certification remains a significant barrier to access for many trans people.

¹⁵⁴ See *supra* note 92.

¹⁵⁵ Florence Ashley, “‘X’ Why? Gender Markers and Non-binary Transgender People” in Isabel C Jaramillo & Laura Carlson, eds, *Trans Rights and Wrongs: A Comparative Study of Legal Reform Concerning Trans Persons* (Cham, CH: Springer, 2021) 33 at 38-39.

¹⁵⁶ Starks, *supra* note 92 at 239-40.

¹⁵⁷ See Gender-Free ID Coalition, “Vision” (2016), online: <<http://gender-freeidcoalition.ca>>.

people face within the legal system, as well as their everyday lives.¹⁵⁸ Decertification does not mean sex/gender would cease to exist or that gender oppression would be eradicated and, in fact, it could result in other forms of sex/gender regulation and marginalization. At the same time, “decertification may weaken the naturalisation of gender-based distinctions and inequalities, which arise from treating humans, *from the start*, as legally sexed and gendered subjects” and would privilege self-identification over state regulation.¹⁵⁹ The Future of Legal Gender Project in the United Kingdom offers a roadmap towards decertification that could easily be adapted to the Canadian context.¹⁶⁰ Decertification is also an important step towards decolonizing sex/gender within Canadian law, as it would end the state regulation of Indigenous people’s sex/gender identification and allow Indigenous nations and communities to affirm gender and regulate issues related to it in accordance with their own legal system and culture.¹⁶¹ Decertification could loosen the state’s authority over sex/gender identification and enable us to move towards a self-determinist model.¹⁶²

Continuing on the particularity of Two-Spirit and Indigenous trans people, it is clear that decolonizing gender – that is, healing and repairing the damage caused by the colonial imposition of binary and patriarchal western gender concepts and ensuring the self-determination of

¹⁵⁸ Davina Cooper & Robyn Emerton, “Pulling the thread of decertification: What challenges are raised by the proposal to reform legal gender status?” (2020) 10:2 *feminists@law* 1 at 13. See also, Davina Cooper & Flora Renz, “If the State Decertified Gender, What Might Happen to its Meaning and Value?” (2016) 43:4 *JL & Soc’y* 483.

¹⁵⁹ Cooper & Emerton, *supra* note 150 at 8. See also Ashley, *supra* note 147 at 40-41.

¹⁶⁰ Davina Cooper et al, *Abolishing legal sex status: The challenge and consequences of gender related law reform*, final report (London: Future of Legal Gender Project, 2022).

¹⁶¹ See Val Napoleon, “Raven’s Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues” (2002) 17 *CJLS* 149; Bonita Lawrence, “Regulating Native Identity by Gender” in Margaret Helen Hobbs & Carla Rice, eds, *Gender and Women’s Studies in Canada: Critical Terrain* (Toronto: Women’s Press, 2013) 285; Saylesh Wesley, “Twin-Spirited Woman” (2014) 1:3 *Transgender Studies Quarterly* 338; Scott Lauria Morgensen, “Theorising Gender, Sexuality and Settler Colonialism: An Introduction” (2012) 2:2 *Settler Colonial Studies* 2.

¹⁶² Cooper and Renz explain that “decertification could mean the state’s withdrawal from assigning gender while still *recognizing* self-determined gender identities”: *supra* note 158 at 484.

Indigenous Peoples – is a crucial and substantial component of ensuring A2J for trans people.¹⁶³ The 2SLGBTQQIA+ Sub-Working Group of the National Inquiry on Missing and Murdered Indigenous Women and Girls has created an action plan and its recommendations are highly relevant to improving A2J for Indigenous trans people and Two-Spirit people specifically, and trans people generally. We highlight a few of these recommendations here: undertake a review of federal/provincial/territorial legislation that discriminates against 2SLGBTQQIA+; prepare and advocate for the passing of federal and national Indigenous legislation on distinct 2SLGBTQQIA+ holistic rights/needs; increased specific 2SLGBTQQIA+ services and funding; dedicated 2SLGBTQQIA+ gender and sexually diverse language revitalization funding for First Nations/Métis/Inuit names for the 2SLGBTQQIA+ spectrum of identities and orientations; develop a 2SLGBTQQIA+ harassment-free National Healing Strategy and legislation at all levels of governments for 2SLGBTQQIA+ health services; amendment of legislation and policies to ensure land access for healing, health, cultural renewal is established; access to social security services that take into consideration the effects that discrimination have on earning potential of 2SLGBTQQIA+; commit to upholding Indigenous transformative models and actualizing alternative justice models; design, deliver and evaluate relevant 2SLGBTQQIA+ training programs for all levels of the justice system; and create a national 2SLGBTQQIA+ courtworker network to help 2SLGBTQQIA+ people navigate the justice system.¹⁶⁴

Raising awareness of trans persons' needs through education initiatives (e.g., trans competency training) for those working within the legal profession and legal system, including lawyers, judges, police officers, and correctional officers, is integral to facilitating social and

¹⁶³ *Ibid*; Lezard et al, *MMIWG2SLGBTQQIA+ National Action Plan*, 2SLGBTQQIA+ Sub-Working Group Final Report (April 2021), online: *MMIWG2S+ National Action Plan* <<https://mmiwg2splus-nationalactionplan.ca/wp-content/uploads/2021/06/2SLGBTQQIA-Report-Final.pdf>>.

¹⁶⁴ Lezard et al, *ibid*, at 36-51.

structural change. As noted by Singer, “[f]or trans people frequently stigmatized and excluded by systems and service providers, lawyers’ efforts to be respectful and responsive to a trans client’s legal needs can carry great importance.”¹⁶⁵ These initiatives must extend beyond the formal legal system and should include educators, social service providers, government employees, and medical professionals to reduce anti-trans discrimination in essential services and combat the social and economic marginalization of trans persons, which exacerbates legal problems and leads to criminalization. Adopting policies and rules to that effect is certainly a first step, but ensuring their proper implementation is key.¹⁶⁶ Physical spaces must also be welcoming to trans people, both in terms of accessibility related to disability and in terms of degendering or at least ensuring equal non-binary options for gender-segregated facilities like washrooms.

More than awareness, trans people need to be included in any decision-making that affect the trans community. Token representation (e.g., appointing a trans person to a position without power or meaningful input), soft measures (e.g., adopting vague policy around inclusivity), and inclusion without offering adequate support and ensuring that the space they integrate is welcoming are insufficient measures.¹⁶⁷ Concrete measures must be taken to ensure meaningful consultation on trans issues and to ensure a channel for those issues to be clearly communicated to decision-makers. A potential measure to ensure the trans inclusivity of law could be to create a trans law reform commission, or a similar trans-led body within an existing institution, who would systematically identify the shortcoming of existing laws and how to palliate them. While difficult to implement, this would ensure that governments are proactive and would limit the burden that

¹⁶⁵ Singer, *supra* note 83 at 179.

¹⁶⁶ See Kyle Kirkup et al, “The Aftermath of Human Rights Protections: Gender Identity, Gender Expression, and the Socio-Legal Regulation of School Boards” (2020) 35:2 CJLS 245, in the context of secular English school boards in Ontario.

¹⁶⁷ See Sara Ahmed, *On Being Included: Racism and Diversity in Institutional Life* (Durham, NC: Duke University Press, 2012); Frances Henry et al, *The Equity Myth: Racialization and Indigeneity at Canadian Universities* (Vancouver: UBC Press, 2017).

currently lies on the trans community regarding ad hoc and often reactive litigation and law reform advocacy. Participation of trans individuals in justice processes should be encouraged at all levels of the legal system. This could include scholarships or financial assistance for trans students admitted to law schools, financial and logistic assistance for trans law school graduates at the articling stage, funding legal aid programs, legal clinics and public interest law initiatives geared towards and led by trans people, appointing trans amicus curiae or advocate in court or administrative proceedings involving trans individuals to ensure a certain understanding of their needs regardless of the adequacy of legal representation, prioritizing the appointment of trans judges and administrative adjudicators, and funding legal scholarship on trans legal issues and trans professorships in law. These inclusion measures will not, overnight, result in the systemic changes that are needed to remove all barriers to A2J for trans people.¹⁶⁸ They are also far from holistic, as it is beyond the scope of this article to craft such measures in detail and for all situations involving justice. Nevertheless, they can serve as a starting point to improve trans people's opportunities to advocate for their justice needs.

In terms of police and prison, some urgent actions are needed. At the very least the adoption and rigorous implementation of policies on educating and directing prison and police staff on proper use of pronouns, the need for appropriate dress, proper medical care, proper placement, and other best practices when dealing with trans people.¹⁶⁹ It is also clear that any mistreatment of trans persons at the hands of police and correctional officers must be taken seriously, adequately investigated, and properly remedied to ensure trans persons are being treated fairly and humanely within the justice system. However, given the inherently violent nature of prison and police systems and its considerable impact on trans individuals, especially those who are racialized, and

¹⁶⁸ See Spade, *supra* note 9.

¹⁶⁹ See Broadus, *supra* note 7 at 269; Hébert, *supra* note 45.

the critique of reform attempts of these systems, effective A2J will require rethinking completely these systems in line with the calls to defund and abolish police and prisons.¹⁷⁰ Along the same lines, Namaste, noting the historical and contemporary prevalence of sex work among the trans population, argues that legalizing sex work would actually do more than anti-discrimination provisions to improve the lives and safety of the most marginalized members of the trans community, particularly Two Spirit and Indigenous trans women and other trans women of colour.¹⁷¹ Furthermore, the legalization of sex work is also one of the recommendations of the 2SLGBTQIA+ Sub-Working Group, along with adopting legislation and programs to support sex workers and help them leave the industry if they so desire.¹⁷² To put it simply, while acknowledging the complexity of the task, the criminal law and the state apparatus that supports it must be thoroughly reconstituted into a new system aimed at preventing and repairing harm rather than causing it.

Finally, the socio-economic situation of trans people must be significantly improved to ensure better A2J for this community. There is no miracle solution to this issue, but there are, at minimum, some steps that can be taken to improve the everyday lives of trans people. With high un(der)employment, above average level of higher education and below average income, it is clear that measures must be taken to increase employment and decrease discrimination in this sector. Some of these measures could include creating partial funding to encourage the hiring of trans people, creating hiring quotas in certain contexts (e.g., in the public service), mandating trans specific training in the workplace and trans specific policy (e.g., covering name/gender changes, washrooms, insurance, etc.), creating special mechanisms to investigate and remedy

¹⁷⁰ Davis, *supra* note 59; Robyn Maynard, “Police Abolition/Black Revolt” (2020) 41 TOPIA: Canadian Journal of Cultural Studies 70; Spade, *supra* note 9; Stanley & Smith, *supra* note 60.

¹⁷¹ Namaste, *supra* note 68.

¹⁷² Lezard et al, *supra* note 155 at 51.

discrimination in the workplaces to simplify and fast track these cases, increasing and simplifying employment insurance and other forms of social security benefits (e.g., the Ontario Work program and Québec’s Social Assistance program), especially in cases where discrimination is a suspected cause of unemployment, and increasing public funding of trans organizations and other civil society organizations that hire and serve trans people (accomplishing a double purpose as increasing services dedicated to trans people will also further A2J). Additionally, given that trans people (at least in Ontario) had legal issues related to disability benefits at a rate 10 times higher than the general Canadian population,¹⁷³ which is likely related to the health impact that systemic injustices have on trans people,¹⁷⁴ increasing accessibility and the amount of disability benefits is also of capital importance.¹⁷⁵ Along similar lines, public healthcare should be extended to cover all transition related care as such care is crucial to the health and wellbeing of trans people and often remains inaccessible throughout Canada.¹⁷⁶

Reforms in general and law reforms specifically have their limits and do not always lead where we hoped they would.¹⁷⁷ Thus, before we conclude, we want to highlight the important role that mutual aid and solidarity movements provide in the quest for A2J. As Spade states,

Mutual aid work is mostly invisibilized and undervalued in mainstream and left narratives about social movement resistance, despite its significance as a tool for opposing systems of domination. The marginalization of care work as uncompensated feminized labor, the mystification of law and policy reform, and

¹⁷³ James et al, 2018, *supra* note 7 at 15.

¹⁷⁴ Singer, *supra* note 8 at 313.

¹⁷⁵ Disability advocates have long highlighted how disability benefits amount to “legislated poverty”: see disability without poverty <<https://www.disabilitywithoutpoverty.ca/>>.

¹⁷⁶ Kinnon MacKinnon et al, “‘I don’t think they thought I was ready’: How pre-transition assessments create care inequities for trans people with complex mental health in Canada” (2020) 49:1 *International Journal of Mental Health* 56; Kinnon MacKinnon et al, “Preventing transition ‘regret’: An institutional ethnography of gender-affirming medical care assessment practices in Canada” (2021) 291 *Social Science and Medicine* 1. The one exception appears to be Yukon: Fae Johnstone, “Yukon trans health-care coverage now the most comprehensive in Canada” (30 March 2021), online: *Xtra* <<https://xtramagazine.com/health/yukon-trans-health-197706#:~:text=Through%20their%20new%20insurance%20policy,insurance%20policy%20in%20Canadian%20hi story>>.

¹⁷⁷ Singer, *supra* note 8 at 313-14; Dean Spade, “Solidarity Not Charity: Mutual Aid for Mobilization and Survival” (2020) 38:1 *Social Text* 131 at 132-34.

the demobilizing liberal mythology of moving hearts and minds that keeps people busy expressing themselves online all impede a focus on mutual aid. However, mutual aid projects are central to effective social movements, and as conditions worsen, mutual aid projects are becoming an even more essential strategy for supporting survival, building new infrastructure, and mobilizing large numbers of people to work and fight for a new world.¹⁷⁸

Mutual aid work favours the self-determination of our communities and ensures that justice can be achieved to some extent without the state. This type of work, the advocacy of the trans community vis-à-vis the state (through lobbying, litigation, etc.), and the concrete measures government, civil society and the corporate world can take now are all part of the same strategy to ensure trans A2J. The sketch we offer is a starting point to seeking justice; that is, ensuring that society does its best to improve its responsiveness to trans needs. This benefits trans people, of course, but also society as whole by ensuring better social cohesion between the marginalized group and the rest of society through measures that promote intersectional procedural, substantive, and symbolic justice.¹⁷⁹

V. CONCLUSION

A2J initiatives have largely failed to critically examine and seek to address how gender identity and gender expression can function as additional barriers to justice for trans people in Canada. As a marginalized population, trans people are more likely to experience legal problems and face barriers to justice than cisgender people. This is in part due to the fact that trans people are susceptible to significant discrimination and harassment in all areas of life, which can further lead to criminalization and other legal problems. Traditional A2J solutions – i.e., those focusing on the cost and complexity of legal procedures – often fall short of addressing the complex and systemic

¹⁷⁸ Spade, *ibid* at 147.

¹⁷⁹ Cotterrell, *supra* note 21 at 204-08.

barriers to justice that trans people face within and beyond the justice system, particularly those who are racialized, undocumented, un(der)employed, un(der)housed, disabled, sex workers, or otherwise marginalized. Therefore, we argue a more holistic understanding of ‘access’ and ‘justice’ is needed.

This article offers a starting point for what a trans inclusive approach to A2J that seeks to address the myriad barriers to justice that trans people face could look like. A trans inclusive framework for improving A2J must be intersectional and recognize that not all trans people experience discrimination and marginalization in the same way or to the same extent as individuals who may occupy multiple marginalized social positions in society and may experience multiple and intersecting forms of discrimination. Such an approach must center the needs and lived realities of trans justice claimants and place emphasis on the characteristics and experiences that impede A2J or that prevent the redress of injustices through existing channels. Additionally, a trans inclusive approach to A2J must attend to the multiplicity of barriers to justice that trans and gender nonconforming people face, including systemic transphobia, cissexism, and bigenderism, as well as racism, xenophobia, ableism, classism, homophobia, sexism, and colonialism.

The distrust of the trans community vis-à-vis the legal system and legal professionals renders most of the mainstream A2J measures – centered on access to legal professionals or the courts, and on simplifying legal procedures – ineffective. Furthermore, these measures do not address the deep inequalities imposed on the trans community that affect trans A2J at all levels. Anti-discrimination law and hate crime provisions, while certainly of use in certain contexts, have not and cannot eliminate the barriers identified in this article. To address the systemic issues that limits trans people’s ability to live a just life, one worth living, A2J initiatives need to expand beyond the limited scope they typically adopt.

In the context of trans people and the barriers to accessing justice they face, measures to improve A2J can be divided between measures feasible in the short term, and those that require more time and deeper social changes. Short term measures include standardizing and simplifying name and sex/gender marker changes based on self-determination; trans competency training for justice actors and other relevant policy and education measures favouring trans inclusion; encouraging trans employment through quotas, financial measures, and other programming; and increasing social support for trans individuals and reducing the administrative burden related to social programs. Longer and more complex measures include decertifying sex/gender and eradicating bigenderism; decriminalizing sex work; recognizing Indigenous sovereignty accompanied with proper reparation measures; and working towards prison and police abolition. Across these measures, financially and logistically supporting community-based measures that support trans people is also of great importance to ensure better social responsiveness to trans people's justice needs.

These are only a few of the many possible initiatives that could be implemented to reduce the barriers that trans people face when seeking justice and ensure that trans people are afforded equal A2J. Additional strategies such as mutual-aid, solidarity movements, and economic redistribution are also integral to improving A2J for trans people and should be pursued. Further research in the Canadian context on such measures should be undertaken to ensure that these options are taken seriously and developed appropriately with the needs of the community in mind. Ultimately, a trans inclusive approach to justice will not only increase A2J for trans people but strengthen the legal system overall and improve social inclusion of various marginalized groups. The ability of a society to respond to the needs of those among its most vulnerable members is a society that can aspire to be just, that can truly claim it is ensuring that justice is accessible for all.