

T:

APPENDING TRANSGENDER EQUAL RIGHTS TO GAY, LESBIAN AND BISEXUAL EQUAL RIGHTS

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In recent years, the identity group of transgender persons has been cohering and bringing its concerns to the attention of progressive legal thinkers as well as to organs of government. In the domain of conventional anti-discrimination coverage,¹ the result has been a number of local

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¹ The anti-discrimination legislation falls roughly into three categories. The first category of laws adds “gender identity” and/or “expression” to a list of protected classes. See CONN. GEN. STAT. ANN. § 53a-181i(2) (West 2009) (“‘Gender identity or expression’ means a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s assigned sex at birth.”); D.C. CODE § 2-1401.02 (12A) (2009) (“‘Gender identity or expression’ means a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual’s assigned sex at birth.”); HAW. REV. STAT. ANN. § 489-2 (LexisNexis 2009) (“‘Gender identity or expression’ includes a person’s actual or perceived gender, as well as a person’s gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person’s sex at birth.”); IOWA CODE ANN. § 216.2 (West 2009) (“‘Gender identity’ means a gender-related identity of a person, regardless of the person’s assigned sex at birth.”); N.J. STAT. ANN. § 10:5-5 (rr) (West 2008) (“‘Gender identity or expression’ means having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person’s assigned sex at birth.”); N.M. STAT. ANN. § 28-1-2 (Q) (LexisNexis 2009) (“‘gender identity’ means a person’s self-perception, or perception of that person by another, of the person’s identity as a male or female based upon the person’s appearance, behavior or physical characteristics that are in accord with or opposed to the person’s physical anatomy, chromosomal sex or sex at birth.”); R.I. GEN. LAWS § 28-5-6 (10) (2010) (“‘Gender identity or expression’ includes a person’s actual or perceived gender, as well as a person’s gender

ordinances,² a few state laws³ and a modest number of victories in judicial settings.⁴ In addition, advocates for transgender concerns have taken up

identity, gender-related self image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth."); VT. STAT. ANN. tit. 1, § 144 (2009) ("The term 'gender identity' means an individual's actual or perceived gender identity, or gender-related characteristics intrinsically related to an individual's gender or gender-identity, regardless of the individual's assigned sex at birth."). The second amends the definition of "sexual orientation" to include trans identities. *See* COLO. REV. STAT. ANN. § 2-4-401 (West 2009) ("'Sexual orientation' means a person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another person's perception thereof."); 775 ILL. COMP. STAT. 5/1-103 (O-1) (2009) ("'Sexual orientation' means actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth. 'Sexual orientation' does not include a physical or sexual attraction to a minor by an adult."); ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (2009) ("'Sexual orientation' means a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression."); OR. REV. STAT. ANN. § 174.100 (6) (West 2009) ("'Sexual orientation' means an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth."); WASH. REV. CODE ANN. § 49.60.040 (West 2009) ("'Sexual orientation' means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, 'gender expression or identity' means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth."). The third amends the definition of sex to include gender and trans identities. *See* CAL. PENAL CODE § 422.56 (c) (West 2009) ("'Gender' means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.").

² *See, e.g.*, NEW YORK CITY, N.Y., ADMIN. CODE § 8-107 (2009); BOSTON, MASS. MUN. CODE § 12-9.1 (2010); NORTHAMPTON, MASS. MUN. CODE § 22-104 (2005); PORTLAND, OR., CODE § 23.01.010 (2010); SEATTLE, WASH., MUN. CODE § 14.04.040 (2008).

³ *See* 2003 Cal. Legis. Serv. 164 (West); 2008 Colo. Legis. Serv. ch. 341 (West); 2005 D.C. Sess. Law Serv. 16-58 (West); 2006 Haw. Sess. Laws 76; 2004 Ill. Legis. Serv. 93 (West); 2007 Iowa Legis. Serv. ch. 191 (West); 2005 Me. Legis. Serv. ch. 10 (S.P. 413) (West); 2006 N.J. Laws 100; 2003 N.M. Laws 383; 2007 Or. Laws ch. 100; 2001 R.I. Pub. Laws 340; 2007 Vt. Acts & Resolves 41; 2006 Wash. Legis. Serv. ch. 4 (West).

⁴ *See, e.g.*, *Schroer v. Billington*, 577 F.Supp. 2d 293 (D.D.C. 2008) (holding that dismissal of a male-to-female transsexual following her disclosure of her transition process constituted sex-stereotyping discrimination and discrimination "because of sex" in violation of Title VII); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (holding that a biological male presenting in traditionally feminine attire who was denied a loan application stated a claim of sex discrimination under the Equal Credit Opportunity Act

family issues such as whether gender identity poses obstacles to child custody,⁵ access to medical services associated with gender transition⁶ and the processes for legally changing one's name⁷ and gender.⁸

The law review literature in this area has taken off like a rocket. Much of the academic thought devoted to transgender issues has focused on the problem of judicial determinations of an individual's gender,⁹ whether and how to gain coverage for gender identity under Title VII,¹⁰ the advantages and pitfalls of a disability-rights framework that medicalizes

(ECOA)); *Doe v. Bell*, 754 N.Y.S.2d 846 (Sup. Ct. 2003) (finding that female-identified foster youth diagnosed with Gender Identity Disorder suffered from a disability within the meaning of the N.Y. Human Rights Law and enjoining the Administration of Children's Services from preventing her from dressing in traditionally feminine attire).

⁵ See, e.g., *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004) (reversing trial court determination that marriage between biological female and transsexual male was valid and award of sole legal and physical custody to father and remanding for determination of custody based on invalidation of marriage).

⁶ See, e.g., *Brian L. v. Admin. for Children's Servs.*, 859 N.Y.S.2d 8 (App. Div. 2008) (holding that regulations mandating individualized medical assessments for foster youth did not require the state foster care agency to provide sex reassignment surgery for foster youth).

⁷ See, e.g., CAL. HEALTH & SAFETY CODE § 103435 (West 2009); D.C. CODE § 7-217(c) (2001); UTAH CODE ANN. § 26-2-11 (West 2009); WIS. STAT. ANN. § 69.15 (West 2003); *In re Golden*, 56 A.D.3d 1109 (N.Y. App. Div. 2008) (finding that transgender petitioner was entitled to change her name from traditionally male name to traditionally female name under New York Civil Law § 61 regardless of the potential for confusion).

⁸ See, e.g., ARIZ. REV. STAT. ANN. § 36-337(A(3)) (2009); CAL. HEALTH & SAFETY CODE § 103425 (West 2009); CONN. GEN. STAT. ANN. § 19a-42 (West 2009); D.C. CODE § 7-217(d) (2009); HAW. REV. STAT. § 338-17.7 (2009); IOWA CODE ANN. § 144.23 (West 2008); LA. REV. STAT. ANN. § 40:62 (2008); MASS. GEN. LAWS ANN. ch. 46, § 13(e) (West 2009); N.H. REV. STAT. ANN. § 5-C:87 (LexisNexis 2009); N.C. GEN. STAT. ANN. § 130A-118 (b)(4) (West 2009); S.C. CODE ANN. § 44-63-100 (2008); UTAH CODE ANN. § 26-2-11 (1995); WIS. STAT. ANN. § 69.15 (West 2003).

⁹ See, e.g., Alice Newlin, *Should a Trip From Illinois to Tennessee Change a Woman Into a Man?: A Proposal for a Uniform Interstate Sex Reassignment Recognition Act*, 17 COLUM. J. GENDER & L. 461 (2008); Stephanie Markowitz, Note, *Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection*, 14 CARDOZO J. L. & GENDER 705 (2008); Harper Jean Tobin, Note, *Against the Surgical Requirement for Legal Change of Sex*, 38 CASE W. RES. J. INT'L L. 393 (2006-2007).

¹⁰ See, e.g., Katie Koch & Richard Bales, *Transgender Employment Discrimination*, 17 UCLA WOMEN'S L.J. 243 (2008); Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561 (2007).

trans identity,¹¹ issues specific to youth (especially youth in foster care and in the juvenile justice system),¹² prisoner classification and sex-segregation¹³ and insurance coverage for gender-affirming care.¹⁴ A few critically-inclined thinkers have focused on the power that formal and discretionary bureaucratic decisions have on trans people and on the limits of formal equality, though these voices are a bit lonely.¹⁵

Because law reform in this area is still nascent, the strategic choices that reformers make now could have lasting effects on both law and identity. As anyone close to the subject matter will attest, one choice appears well on its way to being made: “T” is being appended to “GLB,”

¹¹ See, e.g., Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713 (2005); Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15 (2003); Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 260–61 (2005); Kristin Wenstrom, “*What the Birth Certificate Shows*”: *An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies*, 17 LAW & SEXUALITY 131 (2008).

¹² See, e.g., Sonja Shield, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361 (2007); Sarah E. Valentine, *Traditional Advocacy for Nontraditional Youth*, 2008 MICH. ST. L. REV. 1053 (2008).

¹³ See, e.g., Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem—A Comparative Analysis of American, Australian and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a “Universal” Recommendation to Improve Treatment*, 15 LAW & SEXUALITY 91 (2006); Christine Peek, *Breaking out of the Prisoner Hierarchy: Transgender Prisoners, Rape and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211 (2004); Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167 (2006).

¹⁴ See, e.g., Anne C. DeCleene, *The Realities of Gender Ambiguity: A Road Toward Transgender Health Care Inclusion*, 16 LAW & SEXUALITY 123 (2007); J. Denise Diskin, *Taking it to the Bank: Actualizing Health Care for San Francisco's Transgender City and County Employees*, 5 HASTINGS RACE & POVERTY L. J. 129 (2008). Some of these categories were drawn from a lecture by Dean Spade, see Dean Spade, Assistant Professor of Law at Seattle Univ., Lecture at Northeastern University School of Law: Trans Advocacy on a Neoliberal Landscape (Jan. 6, 2009).

¹⁵ See, e.g., Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731 (2008). Cf. Dan Irving, *Normalized Transgressions: Legitimizing the Transsexual Body as Productive*, [2008] 100 RADICAL HIST. REV., 38 (This is not a law review article and so does not focus specifically on law reform, but rather on how, in an effort to de-pathologize transsexuality, trans activists often have stressed the worthy contributions of trans people to the wage labor economy and have neglected to critique that economy and its gendered effects.).

indicating a similarity, but not an identity, of interests between transgender persons and gays, lesbians and bisexuals. Politically, the spot adjacent to the “GLB” sexuality constituencies seems the obvious home for the trans constituency, though—as many trans advocates have noted—it presents the danger that trans issues will be neglected or even excluded by the relatively more powerful gay-identified constituency, or at least a sector thereof.¹⁶

Moreover, the alliance is analytically complex due to the foggy interrelationship between identity and desire.¹⁷ That is, as trans advocates

¹⁶ See PAT CALIFA, *Antidote to Shame*, in PUBLIC SEX: THE CULTURE OF RADICAL SEX, 139, 140 (2d ed. 2000) (“I think the majority of gay people . . . resent sharing their movement with people they don’t particularly like, approve of, or understand. The recent controversy over support by the National Gay and Lesbian Task Force (NGLTF) for including protection for transgendered people in the Employment Non-Discrimination Act (ENDA) is evidence of this prejudice.” It should be observed, however, that the other major organizations in the LGBT movement eventually came around to support trans inclusion in ENDA. See GLAD Statement on US House Passage of Limited ENDA (Nov. 8, 2007), <http://www.glad.org/uploads/docs/advocacy/2007-11-08-ENDApostvote.pdf> (last visited June 20, 2010) (describing how over 300 LGBT organizations had come together to form an ad hoc coalition to push for a trans-inclusive version of the bill).) See also Shannon Minter, *Do Transsexuals Dream of Gay Rights?: Getting Real About Transgender Inclusion*, in TRANSGENDER RIGHTS 141, 142 (Paisley Currah, Richard M. Juang, & Shannon Price Minter eds., 2006) (“The question that calls for an explanation is not whether transgender people can justify their claims to gay rights, but rather how did a movement launched by bull daggers, drag queens, and transsexuals in 1969 end up viewing transgender people as outsiders less than thirty years later?”). On whether the gay-trans coalition is good for the trans constituency, cf. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 264 (2006) (discussing JAY PROSSER, *SECOND SKINS: THE BODY NARRATIVES OF TRANSEXUALITY* (1998) and reading that work to support the proposition that “the theory and politics of transsexuality, and perhaps whole quadrants of transgender, can thrive only if they Take a Break from feminism, gay-identity politics, and queer theory.”) But see Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 395 (2001) (arguing that women, gays and transgender persons share an interest in “confronting the system that categorizes us as male and female”).

¹⁷ See Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay*, in FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 69, 71–73 (Michael Warner ed., 1993) (observing with concern that psychoanalytic de-pathologizing of homosexuality “can be yoked to” a pathologizing of female gender identification or even effeminacy in anatomical male children and urging that while the disentanglement of gender and sexuality in gay thought represents in some respects an advance, it also comes with hazards for the figure of the effeminate male). See also Erica Schoenberg, *Psychoanalytic Theories of Lesbian Desire: A Social Constructionist Critique*, in DISORIENTING SEXUALITY: PSYCHOANALYTIC REAPPRAISALS OF SEXUAL IDENTITIES 203, 211–12, 217 (Thomas Domenici & Ronnie C. Lesser eds., 1995) (complaining, in contrast to Sedgwick, that there is insufficient conceptual room in psychoanalysis for homosexuality because same-sex desire is frequently conflated with cross-sex identification, so that, e.g., desire for a woman is marked as masculine).

struggle to individuate from the sexuality constituencies, they can sometimes be heard to protest that gender regards who they *are*, rather than whom they *want*.¹⁸ The line separating those facets of personality is a bit less pristine than such a formulation would allow, however, and the vast number of self-descriptions one encounters in the real world frustrates any such doctrines.

This Article will take up yet another concern raised by appending the *T* to the *GLB*, namely that the association between gender identity and sexual orientation seems to be contributing to an equal rights-based, identitarian strategy. As I have argued elsewhere,¹⁹ this path has had under-acknowledged costs for members of sexuality and gender-based identity groups. This Article focuses its speculation on the costs that transgender constituencies could face and urges trans advocates to consider such costs as they make their reformist choices. The Article then highlights possible opportunities for reform that are not dependent on equal rights.

I. INDETERMINACY OF RIGHTS REASONING AND THE SUMMONING OF ANTAGONISTIC RIGHTS

A recurring yet under-appreciated problem with rights argumentation, and with equality and anti-discrimination arguments in particular, is the problem of indeterminacy. This problem has been aired by legal scholars associated with Critical Legal Studies (CLS)²⁰ and it has a few features that are relevant here.

¹⁸ See, e.g., Jody Marksamer & Dylan Vade, *Trans 101*, SYLVIA RIVERA LAW PROJECT, Jan. 22, 2008, www.srlp.org/node/123 ("Gender identity is about who one is. Sexual orientation is about who one is attracted to. Some transgender people are straight, some are gay, some are bi, and some are queer.") But see Minter, *supra* note 16, at 147–50 (recounting the historical relationship between the categories as told by George Chauncy and proposing that "our modern understanding of homosexuality as based on same-sex desire rather than on gender status was a product of white middle-class gay men's embattled efforts to dissociate themselves from the dangerous visibility of working-class gay culture and to salvage the safety and status to which they felt entitled as a matter of race and class." *Id.* at 149).

¹⁹ See Libby Adler, *The Gay Agenda*, 16 MICH. J. OF GENDER & L. 147 (2009). Several of the examples appearing herein that regard the sexuality constituencies were first discussed in *The Gay Agenda*.

²⁰ See Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002) (explaining the critique of rights and its history). See also Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (1993) (discussing the critique of rights and particularly the distinction between legal, rights-oriented victories and the advancement of political goals).

One problem is epistemological. Any time a judge is charged with deciding how to “treat like cases alike,” he or she must determine what constitutes likeness. Just about any two categories of people, things or phenomena have innumerable points of comparison so there must be—explicitly or not—a determination of which points of comparison are most relevant. For example, in the gay context, when a court decides whether a state law prohibiting marriage between two persons of the same sex violates the state constitution’s equal protection clause, it must decide whether a same-sex couple is *like* a different-sex couple for purposes of marriage. If marriage simply “means” the union of one man and one woman, and if this definition is rendered the only sensible one by, say, the mechanics of procreation coupled with a natural law connection between marriage and procreation, then a same-sex couple is not similarly situated to a different-sex couple for purposes of marriage. If, however, the relevant points of comparison are love, commitment, interest in functioning in a social and economic partnership, capacity to raise (if not produce) children and so on, then the two kinds of couples *are* similarly situated. A restrictive state marriage law would then look like animus and violate equal protection.²¹ The only way to decide which points of comparison are the relevant ones is to make a political choice. There is no epistemologically superior starting place.

A similar difficulty afflicts numerous questions related to the equality of trans people. For example, in construing the term *sex* in an anti-discrimination statute such as Title VII,²² nothing foundational tells us whether that term includes trans identity. A transgender identity can be conceptualized as a protected deviation from archaic expectations of maleness or femaleness²³ or it can be conceptualized as an independent

²¹ Cf. Kennedy, *supra* note 20, at 188 (discussing how identity groups “restate the interests of the group as characteristics of all people. A gay person’s interest in the legalization of homosexual intercourse is restated as the right to sexual autonomy, say.”) The parallel contest regarding same-sex marriage is over how the right is properly framed: as a right to marry any person or as a right to marry any person of the opposite sex. A proponent of same-sex marriage would likely state the case in universalizing terms, for example, as the right to marry the person one loves.

²² Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

²³ See, e.g., *Schroer v. Billington*, 577 F.Supp. 2d 293, 305 (D.D.C. 2008) (holding the Library of Congress’s decision to terminate Schroer rested on impermissible sex-stereotypes of how “males” and “females” should present and act).

category.²⁴ Neither conceptualization is, in some politically neutral sense, the correct one.²⁵

Even in the case of an anti-discrimination law that explicitly includes gender identity as a protected category, nothing about the inclusion of the category tells us, for example, which bathroom a trans person is legally entitled to use. If a judge construing such an anti-discrimination provision starts from the baseline that a male-identified person (of any birth sex, any anatomy, any chromosomal make-up, etc.) must be treated the same as other males, then a male-identified person is entitled to use the men's bathroom and anything less would constitute discrimination. If, however, the judge begins with the idea that the correct comparison is birth sex or genitalia, then we get a different outcome: it would not be discrimination to deny an anatomical female, for example, access to the men's room, even if that person was male-identified. The judge must choose a baseline and nothing in the general prohibition against discrimination or in the general requirement of equality provides one. There simply is no escape from the politics of it.²⁶

Another feature of the indeterminacy of rights is that co-existing rights can conflict. In the gay rights context this is evident from a case such as *Romer*,²⁷ in which the equal protection rights of gay tenants vied against the associational and religious rights of landlords who wished to exclude them.²⁸ The right against discrimination prevailed in that case, but it was defeated in *Hurley*,²⁹ in which the organizers of the Boston St. Patrick's Day Parade excluded a gay group from marching. Massachusetts has a statute that protects against discrimination on the basis of sexual orientation

²⁴ See, e.g., *Ulane v. E. Airlines*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (holding that Title VII does not provide anti-discrimination coverage based on transsexuality).

²⁵ Cf. Kennedy, *supra* note 20, at 184-85, 188 (explaining how a rights-oriented claim is designed to make the claim seem to be one of reason, and therefore correct, rather than merely one of personal preference).

²⁶ Cf. *id.*, at 200 (on the difficulty of making "abstract rights . . . concrete at the level of rule choice within the legal system").

²⁷ *Romer v. Evans*, 517 U.S. 620 (1996).

²⁸ *Id.* at 635.

²⁹ *Hurley v. Irish Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

in public accommodations,³⁰ and the state's highest court found that the statute required the parade organizers to include the gay group.³¹ The United States Supreme Court reversed the state court, however, on the grounds that the parade organizers had a superior expressive right under the first amendment to organize a parade that conveyed a "pro-family" message with which a visibly gay presence was deemed inconsistent.³² The Court had to construe each competing right to choose between them and determine the outcome of the case.³³ The mere existence of a right, therefore, is not determinative where a competing right can be found.³⁴

The most perilous aspect of "conflict indeterminacy," however, and in my view the strongest reason that indeterminacy counsels against reflexively and uncritically turning to rights argumentation to advance the interests of trans people is that a right may not only lose out to some *pre-existing* competing right, but might actually *provoke* the competing right — bring it into existence. If the associational right in *Romer* and *Hurley* is not strong enough evidence of this in the gay context, then perhaps the sudden emergence of a people's "right to vote" on the definition of marriage,³⁵

³⁰ See MASS. GEN. LAWS ANN. ch. 272, § 98 (West 2009) (prohibiting discrimination in the admission to and treatment of persons within public accommodations on the basis of "sexual orientation"); MASS. GEN. LAWS ANN. ch. 272, § 92A (West 2009) (defining "public accommodation").

³¹ *Irish Am. Gay, Lesbian & Bisexual Grp. of Boston v. City of Boston*, 636 N.E.2d 1293 (Mass. 1994), *rev'd*, 515 U.S. 557 (1995).

³² *Hurley*, 515 U.S. at 578–79.

³³ Of course, if a right provided by a state statute collides with a right provided by the United States Constitution, the latter must prevail, but that does not answer the question on its own. Before reaching the point at which the Court was compelled to resolve a conflict in favor of the Constitution, it had to determine whether the parade organizers were exercising a constitutional right, including whether the St. Patrick's Day parade expresses a family values (read: "anti-gay") message. See *Hurley*, 515 U.S. 557.

³⁴ See Kennedy, *supra* note 20, at 198 ("The upshot, when both sides are well represented, is that the advocates confront the judge with two plausible but contradictory chains of rights reasoning. . . . The lesson [therefore] is that the question involved cannot be resolved without resort to policy, which in turn makes the resolution open to ideological influence.") See also *id.* at 204 (paraphrasing an observation by Herbert Weschler that "white segregationists were asserting their right of free association with just as much subjective sense of entitlement as the blacks demanding integration [and] there was no 'neutral principle' by which to decide between the two demands").

³⁵ See U.S. CONST. art. IV, § 4 (guaranteeing to each state a republican form of government). See generally MassResistance, <http://www.massresistance.org> (last visited Apr. 17, 2010) (a Massachusetts-based advocacy group calling on citizens to "take back their

which the same-sex marriage campaign seems to have conjured into being, is.

These battles are part of the culture war, which seems unlikely to be settled once and for all by a final and authoritative right that supersedes all others. The culture war is dynamic: the blues assert a right and the reds respond with their own right, each fueling the other. Once a right attains some degree of judicial recognition, I can think of only two ways to combat it. The first is a supermajoritarian act, *i.e.*, a constitutional amendment, which, as the same-sex marriage campaign has demonstrated in twenty-nine states, is another hazard of rights argumentation.³⁶ The second is the generation of a competing right or countervailing interest, forcing the prospect of foundationless judicial choosing, *i.e.*, the problem of indeterminacy.

In the trans context, this dynamic can already be discerned. In *Goins*,³⁷ a male-to-female trans employee of West Publishing wished to use the women's restroom closest to her work station. The employer instructed her not to use that restroom, ultimately resulting in her leaving her employment and filing an anti-discrimination lawsuit under Minnesota law, which she lost.³⁸ The employer stated that some of the other women employees complained that Goins's presence in the women's room created a "hostile work environment" for them.³⁹ This is a telling complaint: by

government" in the face of the growing "homosexual agenda" and focusing on the right of citizens to vote on marriage and other issues); *Schulman v. Attorney Gen.*, 850 N.E.2d 505 (Mass. 2006) (upholding citizen-initiated ballot-question on marriage rights for same-sex couples following proposed amendment by "right to vote" constituencies in the wake of *Goodridge v. Dep't of Pub. Health*, granting marriage rights to same-sex couples). *See also* Protecting Marriage, Why Proposition 8, <http://protectmarriage.com/about/why> (last visited Apr. 17, 2010) (arguing that the California Supreme Court's decision on same-sex marriage "overturn[ed] the will of California voters").

³⁶ *See* Human Rights Campaign, *Statewide Marriage Prohibitions* (2009), http://www.hrc.org/documents/marriage_prohibitions_2009.pdf (last visited June 15, 2010). *See also* Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 459–83 (2005) (discussing the backlash against pro-gay judicial rulings, especially the Massachusetts same-sex marriage decision, as evidenced by state constitutional amendments, some possible electoral consequences and the mobilization of the anti-gay right, but also suggesting that the backlash might be short-term).

³⁷ *Goins v. W. Group*, 635 N.W.2d 717 (Minn. 2001).

³⁸ *See id.* at 721.

³⁹ *See id.* *See also* *Cruzan v. Special Sch. Dist. #1*, 294 F.3d 981, 983–84 (8th Cir. 2002) (in which a teacher alleged a hostile work environment as a result of her employer-school's permitting a trans woman to use the women's restroom, but failed to demonstrate

using this language, Goins's fellow employees were tapping into the anti-discrimination/anti-harassment discourse that evolved under Title VII of the Civil Rights Act.⁴⁰ Goins's right to use the women's room provoked a competing right to exclude her, framed in feminist terms as women's right against sexual harassment.

In New Hampshire, where a piece of legislation that would have provided anti-discrimination coverage on the basis of gender identity was defeated in the Spring of 2009, opponents of the bill managed to get it referred to in public debate as the "Bathroom Bill" and argued that it would provide sexual predators with entry into women's restrooms.⁴¹ The terms of the debate invited—virtually demanded—the production of a competing women's right to bathroom safety from (arguably) male intruders. Any time a trans advocate asserts a right to access some sex-segregated facility, we ought to anticipate the generation of a competing right to exclude, framed as a right against harassment, to security, to privacy or something else.

Even outside of the bathroom context, we can probably expect this dynamic. One of the legislators opposed to the bill in New Hampshire argued that if trans people were protected against discrimination in employment, then a private school would not be able to fire a school bus driver whose gender presentation was confusing the children.⁴² His imagined scenario was not happenstance. He might have imagined a Greyhound bus driver, but he chose a school bus driver. This legislator did exactly what the proposed legislation prompted him to do. He generated a constituency defined by its vulnerability, a constituency whose "rights"⁴³

that the school's decision "affected a term, condition, or privilege of her employment" or that her workplace had become "permeated with discriminatory intimidation, ridicule and insult").

⁴⁰ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (finding that a claim of a hostile working environment due to sexual harassment gives rise to a sex discrimination claim under Title VII).

⁴¹ See Tom Fahey, 'Bathroom Bill' Goes Down the Drain, UNION LEADER, Mar. 27, 2009, at 6 [hereinafter Fahey, *Drain*]. See also 415, 2009 Gen. Ct., 161st Sess. (N.H. 2009), "An Act Adding Certain Terms Regarding Non-Discrimination to the Laws".

⁴² See Tom Fahey, *State House Dome: Transgender rights in 'bathroom bill'*, UNION LEADER, Mar. 15, 2009, at 2. Another legislator fretted that the bill could destroy the summer camp industry. See Fahey, *Drain*, *supra* note 41.

⁴³ I am not aware of any formally recognized right not to be confused by another person's gender presentation. The term "rights" appears in scare quotes here to signal that it is being used in a sense that it sometimes is used in lay, popular discourse, which is roughly synonymous with "interests." See Kennedy, *supra* note 20, at 211.

would be violated by the presence of the trans person who is vindicating his or her own anti-discrimination right. It is only our politics that tells us which right ought to prevail.

The term “indeterminacy,” drawn from the CLS literature,⁴⁴ is perhaps misleading in that it does not convey the full extent of the danger. Rights argumentation is not merely a tossing of the dice, where the judge may or may not side with your constituency and the biggest problem is that you cannot know in advance how things will turn out. Rather, rights argumentation is—or at least can be—participation in a dynamic. It can incite assertions of antagonistic rights that have the potential to harm one’s own constituency in ways beyond the immediate loss of an individual case or legislative battle. Trans advocates in New Hampshire now must contend with the potent image of a trans predator in their state’s public imagination, and progress in the legal treatment of trans people has been framed as antipodal to the interests of children.

II. THE MAKING OF THE TRANS SUBJECT

Whenever I have come across an effort to define the group “transgender persons,” the speaker or author has taken pains to be inclusive, to define the category so that it is broad enough to encompass not only those whom we might regard as “true transsexuals,” *i.e.*, people who are intent on doing whatever they can medically, legally and socially to cross completely the binary sex divide, but also more vaguely gender-deviant people, who do not feel that they fit neatly into the categories of male or female.⁴⁵ Presumably, this definitional choice is a political one, designed to maximize the size of the constituency, suggest alliances among people who

⁴⁴ See, *e.g.*, *id.*, at 218.

⁴⁵ See, *e.g.*, Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 84 n.1 (2008) (“I use the term “transgender” or “trans” throughout this article to refer to persons whose gender does not fit within mainstream understandings of binary male and female gender identities superimposed upon binary biologically-rooted sexes. “Transgender” is an umbrella term that encompasses such self-identifications as transgender, transsexual, transvestite as well as a potentially infinite range of binary-transgressive identities.”). See also Paisley Currah, *Gender Pluralisms under the Transgender Umbrella*, in TRANSGENDER RIGHTS 3, 4 (Paisley Currah, Richard M. Juang, & Shannon Price Minter eds., 2006) (discussing the history of the term and noting that “[i]t has now become almost axiomatic to define transgender . . . as an ‘umbrella’ term.”). The term “true transsexuals” appears in scare quotes above to signal provisional use of a term that came into use for medical purposes but does not necessarily reflect a naturally distinct subgroup of trans people and might not always be used the same way. See Irving, *supra* note 15, at n.1.

are not exactly alike, create a home for as many people in need as possible, and hint to onlookers that they or someone they care about might be implicated. As trans advocates in the legal domain articulate rights claims on behalf of trans people, however, this definition will (and has already begun to) taper.

Imagine a trans victory in a bathroom case.⁴⁶ What will be definitionally inscribed to support such a victory in anti-discrimination terms? Will the trans litigant succeed because she had (and could afford) genital surgery?⁴⁷ Because she committed to living full-time as a woman? What will that mean for other people who regard themselves as trans under a broader definition? What will it mean for the category itself? Imagine further that a jurisdiction provides two decisions, companion cases, on this issue in which one person seeking to use the women's room had made extensive medical, legal and social changes, while the other had not had surgery, had chosen a gender-neutral name and had asked her friends but not her parents to start referring to her as "she." If, in construing an anti-discrimination statute, a court draws the line between these two litigants so that the former gains a legal right to access the women's restroom at her workplace but the latter does not, what will be the consequences for the politics of inclusion represented by the broad definition?⁴⁸

⁴⁶ A possible victory is at hand in Maine, where a male-to-female transgender employee of Denny's recently survived a motion to dismiss in an action for discrimination prompted by the manager's refusal to allow her to use the women's restroom. The Superior Court ruled that the plaintiff had stated a claim under the state law protecting against discrimination on the basis of sexual orientation. See *Freeman v. Denny's*, No. CV-09-199 (D. Me. App. Ct. May 27, 2010) (order denying defendant's motion to dismiss), available at <http://www.glad.org/work/cases/freeman-v.-dennys/>.

⁴⁷ An early instance of precisely this comes from the marriage context. See *M.T. v. J.T.*, 140 N.J. Super. 77 (App. Div. 1976), in which surgical intervention rendering a male-to-female transsexual capable of vaginal intercourse was deemed sufficient to render her female for marital purposes. This is not to suggest that all of the case law will run in the same direction. Conflicting standards for determining sex can result in all manner of chaos and lead to a host of difficulties not discussed in this paper, but elaborately illustrated in Spade, *supra* note 15.

⁴⁸ Of course, the possibilities for the legal production of identity run in other directions, as well. If, for example, someone were faced with having to decide whether to describe oneself for purposes of a Title VII claim as a masculine woman or a female-to-male transsexual and were contending with *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (in which gender stereotyping formed the basis for an action under Title VII) on one hand and *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (holding that Title VII does not provide a cause of action on the basis of discrimination against transsexuals) on the other, that person might be less likely to self-identify as transsexual.

Trans identity is being formulated as rights claims are being articulated and rights-based victories are being achieved. In the gay context, this has been a sorely under-appreciated problem with equal rights strategies. As gay rights advocates have pushed for formal equality, especially in the same-sex marriage campaign, and have supported this push with a powerfully normalizing discourse that insists on the moral equivalency of different-sex and same-sex intimacies that are premised on an idealized (monogamous, bourgeois and de-sexed) version of both, some people living more marginalized lifestyles have found themselves deeply alienated from the gay community.⁴⁹ Moreover, their marginalization has been rationalized so that Chief Justice Marshall, the author of the Massachusetts decision granting marriage rights to same-sex couples, can write that people who do not choose to marry can justly be denied the concrete benefits that the law offers to married people.⁵⁰ In the delirium of successive same-sex marriage victories in Massachusetts,⁵¹ Connecticut,⁵² Iowa,⁵³ Vermont,⁵⁴ and New Hampshire,⁵⁵ it is easy to forget that this momentum comes at a real cost for an inclusive gay community and for

⁴⁹ See, e.g., Mattilda, a.k.a. Matt Bernstein Sycamore, *Freedom to Bury*, in I DO/I DON'T: QUEERS ON MARRIAGE 336, 337 (Greg Wharton and Ian Philips eds., 2004) ("[G]ay marriage proponents want to fundamentally redefine what it means to be queer, and erase decades of radical queer struggle in favor of a sanitized 'we're just like you' normalcy. . . . For nonmainstream queers, these are dangerous times."). See also Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 611 (2004) ("Same-sex marriage may introduce new forms of state and social regulation of sexuality into LGBT lives based on the married/unmarried distinction. LGBT individuals, particularly those in multiparty or nonmonogamous relationships, may become newly vulnerable to criminal laws that regulate marital monogamy, such as adultery and fornication laws.").

⁵⁰ *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003) ("Individuals who have the choice to marry each other and nevertheless choose not to may properly be denied the legal benefits of marriage.").

⁵¹ See generally *id.*

⁵² See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

⁵³ See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

⁵⁴ 2009 Vt. Acts & Resolves 3.

⁵⁵ 2009 N.H. Laws ch. 59 (H.B. 436) (amending marriage laws to permit marriage between couples of the same sex); 2009 N.H. Laws ch. 60 (H.B. 310) (affirming religious freedom not to solemnize marriages that do not comport with religious beliefs); 2009 N.H. Laws Ch. 61 (H.B. 73) (establishing further religious protections with regard to solemnizing marriages).

gay-identified people who are left out. Trans advocates should think through the risks and rewards before rushing into an equal rights agenda that is likely to produce new meanings for, and divisions within, trans identity.

Another feature of trans identity that could be produced, especially by equality-seeking litigation strategies, is the extent to which the trans community lacks power. The Connecticut court that awarded the same-sex marriage campaign its second major victory devoted significant attention to the question of whether gay people were sufficiently powerless to warrant heightened judicial solicitude.⁵⁶ The court dismissed the notion that an identity group is required to be entirely without political power to gain some form of heightened scrutiny under the Connecticut constitution,⁵⁷ and conceded that gays had demonstrated a modicum of political influence as evidenced by various anti-discrimination measures and a civil unions law enacted legislatively in that state.⁵⁸ The majority nonetheless justified its application of heightened scrutiny⁵⁹ in part by depicting the class as weak, frightened and despised. It recalled the long history of anti-gay discrimination, including that “gay persons were widely deemed to be mentally ill,”⁶⁰ that “the conduct that defines the class [*i.e.*, presumably, sodomy, was, and in some contexts remains] criminal,”⁶¹ that “homosexuality is contrary to the teachings of more than a few religions,”⁶² that some people experience “feelings of revulsion toward gay persons and the intimate sexual conduct with which they are associated,”⁶³ that “prejudice is reflected in the large number of hate crimes that are perpetrated against gay persons,”⁶⁴ that gay people “are ridiculed, ostracized, despised, demonized, and condemned merely for being who they are . . . perhaps even more severe[ly] than [other] groups that have been

⁵⁶ See *Kerrigan*, 957 A.2d at 439–62.

⁵⁷ See *id.* at 441.

⁵⁸ See *id.*

⁵⁹ See *id.* at 431–32.

⁶⁰ *Id.* at 444.

⁶¹ *Id.*

⁶² *Kerrigan*, 957 A.2d at 444–45.

⁶³ *Id.* at 445.

⁶⁴ *Id.*

accorded heightened judicial protection,”⁶⁵ that openly gay people are radically underrepresented in places of power, including Congress, the Cabinet, the federal appeals court and “the highest levels of business, industry, and academia”⁶⁶ (noting also that “many gay . . . officials hide their sexual orientation until they have built up considerable public trust”),⁶⁷ and that while there is a gay rights statute in Connecticut, that statute contains explicit reservations (e.g., that the law shall not be “construed . . . to mean that the state . . . condones homosexuality”) designed to make clear that “as a matter of state policy . . . same sex relationships are disfavored.”⁶⁸ The court concluded “to the extent that gay persons possess some political power, it does not disqualify them from recognition as a quasi-suspect class . . . in view of the pervasive and invidious discrimination to which they have historically been subjected.”⁶⁹

⁶⁵ *Id.* at 446 (citation omitted).

⁶⁶ *Id.* at 446–47.

⁶⁷ *Id.* at 452.

⁶⁸ *Kerrigan*, 957 A.2d at 494 n.16.

⁶⁹ *Id.* at 461. See also *Varnum v. Brien*, 763 N.W.2d 862, 893–95 (Iowa 2009). In *Varnum*, the Iowa court briefly discussed this issue, determining that “for the purpose of analyzing the Iowa Constitution, the political powerlessness factor of the level-of-scrutiny inquiry does not require a showing of absolute political powerlessness. Rather, the touchstone of the analysis should be ‘whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means.’” *Id.* at 894 (citations omitted). The court concluded that the “facts demonstrate, at the least, the political-power factor does not weigh against heightened judicial scrutiny of sexual-orientation-based legislation.” *Id.* at 895. The California same-sex marriage decision managed the issue similarly. See *In re Marriage Cases*, 43 Cal.4th 757 (2008). That court declined to consider political powerlessness to be a prerequisite for treatment as a suspect class, satisfying itself with the group’s general history of discrimination. See *id.* at 843. Following the California marriage decision, however, opposition groups were able to challenge the decision through a constitutional amendment initiated through a voter referendum, commonly known as Proposition 8. On November 4, 2008, California voters voted to overturn the State Supreme Court decision through a constitutional amendment defining marriage as between one man and one woman. Supporters of same-sex marriage challenged the constitutionality of this amendment. The California Supreme Court upheld the validity of Proposition 8 in *Strauss v. Horton*, 46 Cal. 4th 364 (2009). At the time of this writing, a federal lawsuit challenging Proposition 8 is underway. See Carol J. Williams, *New Prop. 8 court challenge brings former legal rivals together*, LA TIMES, May 27, 2009, available at <http://latimesblogs.latimes.com/lanow/2009/05/olson-boies-team-up-to-fight-prop-8-in-federal-court.html>. The Massachusetts court settled quickly on the rational basis test, so it had no cause to examine the issue. See *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 958, 961 (Mass. 2003). Vermont and New Hampshire legalized same-sex marriage legislatively, also obviating the need to discuss political powerlessness as a

All of this makes perfect sense under our system, in which the counter-majoritarian branch is there to lend a hand to those groups that, due to their history of being discriminated against and lacking in political access, are not likely to succeed in trying to advance their interests in the majoritarian arena.⁷⁰ This is the *Carolene Products* footnote 4,⁷¹ John Hart

justification for counter-majoritarian action. The Maine legislature also legalized same-sex marriage but was quickly undercut by a state-wide referendum repealing the legislation. See Abby Goodnough, *A Setback in Maine for Gay Marriage, but Medical Marijuana Law Expands*, NY TIMES, Nov. 4, 2009, available at <http://www.nytimes.com/2009/11/05/us/politics/05maine.html>.

In *Baker v. State*, 170 Vt. 194, 212, (1999), a Vermont Supreme Court decision handed down ten years prior to Vermont's marriage legislation, the court signaled a mandate to the legislature to take some step (not necessarily granting marriage) to provide equal benefits to same-sex couples. The court declined to take up the questions of whether a suspect or quasi-suspect class was implicated or what tier of scrutiny ought to be applied, finding that the Vermont constitutional tradition called for a "relatively uniform standard, reflective of [an] inclusionary principle." *Id.*

⁷⁰ This arrangement renders legislative reform something of a Scylla and Charybdis, in that as soon as a group logs in a few legislative victories, those victories could serve as obstacles to future constitutional successes. This navigational difficulty is hardly limited to sexual and gender minorities but shows up in numerous equal protection cases. *Cleburne v. Cleburne Living Center* is an example. 473 U.S. 432, 445 (1985). There, the United States Supreme Court declined to treat mentally disabled persons with heightened scrutiny in part due to the fact that legislators had already shown an interest in their concerns, notwithstanding the obvious irrational prejudice against that group that formed the heart of the case. In *Richmond v. J.A. Croson Co.*, a less precise but still pertinent example, the Court observed that five out of nine Richmond city councilors were African-American and suggested that this fact cut against the Court's deference to Richmond in reviewing its affirmative action program for city contractors. 488 U.S. 469, 495–96 (1989). The reasoning runs in the other direction, however, in *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973). In that case, legislative advances for women, including the prohibition against sex discrimination contained in Title VII and the apparent likelihood of ratifying the Equal Rights Amendment, were cited by the Court in support of an elevated level of scrutiny. The Connecticut court noticed the contradiction represented by *Cleburne* and *Frontiero* and reconciled it with the notion that some legislative successes for a group "acknowledge—rather than mark the end of—a history of purposeful discrimination." *Kerrigan*, 957 A.2d at 450–51 (citation omitted). The dissent nonetheless marshaled the achievements of the gay rights movement in Connecticut, however, to make the equally compelling argument that counter-majoritarian action was unnecessary because the trend suggested that the inequality in the state's marriage laws "would be rectified by the political process very soon." *Id.* at 492 (Borden, J., dissenting) (emphasis in original). Of the majority's attempt to reconcile *Frontiero*'s reasoning with the cases in which the justification for counter-majoritarian action bears an inverse relationship to a group's success in the majoritarian arena, the dissent wrote, "Under the majority's view, if the state *has* enacted a large body of legislation beneficial to or protective of a particular group—as this state has with respect to gay persons—that means the group lacks political power because the legislation is evidence of the group's need for protection. But if the state has *not* enacted such legislation, that also

Ely/representation-reinforcement⁷² conception, and it has a venerable history. To rely on it, however, comes with the cost of making and remaking the group as despised and powerless.

One might respond, “well, trans people are despised and powerless.” Of course, there is far too much truth to that depiction. Still, trans advocates ought to ask themselves whether they want to participate in inscribing that painful reality in law and legal argument and whether their repeated assertions that trans people are despised and powerless might contribute to the ongoing production of that reality.

When an identity group approaches the judicial system articulating an equal rights claim, it approaches as abject. If it doesn’t, then it doesn’t need the court. This is a bind that our system creates and I am not blaming anybody for that; it is not an irrational system. My point is only that it comes with costs that ought to be on the table as advocates deliberate on the best strategies for advancing the interests of trans people.

III. LEAVING NO OXYGEN

There is no doubt that gender non-conforming people are suffering and that at least some of the suffering they endure could be alleviated through law reform. Stipulation of this point, however, need not drive law reformers concerned with the interests of the trans constituency down the road to equal rights. Patient and critical observation of the obstacles faced by trans people yields more than the apparent need for anti-discrimination coverage or other equal rights-oriented reforms. A third and final cost of the dogged pursuit of equality—as the same-sex marriage campaign has made abundantly evident—is that it has the tendency to suck up all of the oxygen needed to contemplate reform possibilities that, while possibly improving the conditions faced by the relevant constituency, do not directly advance that singular goal. Put in other metaphoric terms, fixing one’s gaze on the equality ideal can render one too myopic to see other possible paths to change.

Elsewhere I have written, for example, about the many obstacles to self-support and housing that homeless young people face, including federal

undoubtedly would mean that the group lacks political power because of that lack of legislation.” *Id.* at 501. (Borden, J., dissenting).

⁷¹ *U.S. v. Carolene Products Co.*, 305 U.S. 144, 152 n.4 (1938) (articulating bases, not present in the case, that would warrant a less deferential judicial review).

⁷² JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (setting forth a similar set of justifications for a scrutinizing counter-majoritarianism).

rules requiring runaway and homeless youth shelters to report the whereabouts of youth to their custodians within seventy-two hours, limits on youth capacity to contract (e.g., for rental housing), rules against sleeping in parks, labor laws limiting the hours and conditions under which young people can work and the ineligibility of minors to serve as payees for their own child support.⁷³ Transgender youth are disproportionately likely to runaway or be kicked out of their parents' homes⁷⁴ and find themselves caught in a web of rules—none of which directly speak to gender identity or the equality of trans people—that collectively result in sustained homelessness and dire material need – conditions that produce high rates of survival sex.⁷⁵ Advocates interested in helping homeless trans youth could fixate on the need for anti-discrimination coverage and there might be some utility there.⁷⁶ A wider lens, however, might enable advocates to notice other possibilities for reform.

Some advocates⁷⁷ have observed, for example, that mandatory arrest policies, such as the one in New York,⁷⁸ designed to protect victims of domestic violence,⁷⁹ often result in the arrest of gender non-conforming youth who are in violent conflict with their parents. You can imagine the scenario: a neighbor hears fighting and calls the police, who arrive at the premises and—uncertain who the aggressor is—arrest the strangest looking person, *i.e.*, the youth in the midst of a gender transition. That young person

⁷³ See Adler *supra* note 19, at 198–99 (citations omitted).

⁷⁴ See NATIONAL CENTER FOR LESBIAN RIGHTS, LAMBDA LEGAL, AND THE NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL RECOMMENDED BEST PRACTICES FOR SERVING LGBT HOMELESS YOUTH, available at <http://www.nclrights.org/site/DocServer/national-recommended-best-practices-for-lgbt-homeless-yo.pdf?docID=5821>.

⁷⁵ See *id.*

⁷⁶ It would be great, for example, if advocates could affect rules governing various types of shelters to combat discrimination. Those changes would have to account for the complexities of placement for gender non-conforming people to be genuinely helpful, which runs into some of the difficulties discussed in part II *infra*.

⁷⁷ In this paragraph especially I am indebted to the experience and insight of Chase Strangio.

⁷⁸ N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 2004) (“a police officer *shall* arrest a person, and shall not attempt to reconcile the parties or mediate,” where it is reasonable to believe that certain family-related offenses have occurred) (emphasis added). See also N.Y. CRIM. PROC. LAW § 530.11(1) (McKinney 2004) (defining “members of the same household” for purposes of the mandatory arrest law).

⁷⁹ See Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 12 (2006).

then acquires an arrest record, which could inhibit his or her future efforts to obtain a name change on the grounds that a person who has a history with law enforcement might be trying to acquire aliases for no-good purposes.⁸⁰ Not being able to obtain this change could send effects down a causal chain. For example, a masculine name could inhibit a public assistance agency from using an “F” signifier in its record for someone transitioning from male to female. If that person is hoping to obtain Medicaid coverage for estrogen therapy, an “M” signifier with the agency might then serve to block coverage.⁸¹ This, in turn, could result in increased desperation for funds, sex work, an arrest, and eventually, the brutalities of the prison system (bad for anybody, but especially acute for gender non-conforming persons).⁸²

This is not an improbable trajectory for a poor, young, homeless and otherwise disenfranchised transgender person. Some forms of equal rights and anti-discrimination coverage might help in limited ways, but many of the problems in the pattern, while legal in nature, elude a narrow,

⁸⁰ Under Article 6 of the Civil Rights Law, “If the court to which the petition is presented is satisfied thereby, or by the affidavit and certificate presented therewith, that the petition is true, and that there is no reasonable objection to the change of name proposed . . . the court shall make an order authorizing the petitioner to assume the name proposed.” N.Y. CIV. RIGHTS LAW § 63 (McKinney 2004). In theory, Article 6 codified the common law right to change one’s name. See *In re Halligan*, 46 A.D.2d 170, 171 (N.Y. App. Div. 1974) (affirming the broad common law right to change one’s name absent fraud, misrepresentation, or interference with the rights of others); *Smith v. United States Casualty Co.*, 90 N.E. 947, 950 (N.Y. 1910) (“[The name change statute] does not repeal the common law by implication or otherwise, but gives an additional method of effecting a change of name.”). In practice, however, the judicial procedure vests significant discretion in judges to limit access to name changes and Civil Court Judges frequently deny name petitions of petitioner’s with criminal histories (or sometimes even for trans people without criminal histories). In Massachusetts, there is a more explicit statutory basis for denying a name change based on criminal history. MASS. GEN. LAWS ANN. ch. 210, §§ 12–13 (West 2009) (requiring, respectively, that a name change be consistent with the public interest and that, prior to ordering a name change, a court consult with the probation department).

⁸¹ See N.Y. COMP. CODES R. & REGS. tit. 18, § 505.2(l) (2009) (“Payment is not available for care, services, drugs, or supplies rendered for the purpose of gender reassignment (also known as transsexual surgery) or any care, services, drugs, or supplies intended to promote such treatment.”). Antecedent to the insurance coverage issue is the question of youth capacity to consent to gender affirming care. See Maureen Carroll, *Transgender Youth, Adolescent Decisionmaking, and Roper v. Simmons*, 56 UCLA L. REV. 725 (2009).

⁸² See SYLVIA RIVERA LAW PROJECT, “IT’S WAR IN HERE”: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS (2007), <http://srllp.org/files/warinhere.pdf>.

equal rights-focused mentality. Uncritically setting a course in pursuit of anti-discrimination coverage and other equal rights-oriented reforms could blind advocates to many of the important legal issues that have a regular and powerful effect on the quality of life for many transgender people. Legal advocates who can tear their gaze from equal rights might discover potential targets for law reform beyond what is imagined here, and I hope they do.⁸³

IV. CONCLUSION

Sometimes a reader of critical work (including a critique of rights or a critique that discusses the production of identity) reacts with the sentiment, “Sure, it’s easy to be a critic, but what do you propose to do instead?” The reaction is defensive, but not altogether unreasonable for lawyers interested in reform for the benefit of a vulnerable population, so I hope it will be noticed that this Article offers an answer. The answer is not that equal rights should be replaced with some other golden apple, such as a right to dignity or self-determination or gender expression. The alternative proposed in this Article is instead a turn to multiple, dispersed, and concrete law reform tasks. A refocus on low-profile legal conditions such as those discussed in part III *is* my answer.

Such a re-deployment would come with the challenge of not always knowing precisely what victory will look like. Instead of the term “gender identity” being added to a pre-existing list of statutes or annotations, success might appear more like a mounting array of small discoveries—discoveries of the effects of legal conditions that have gone under-recognized by law reformers, followed by the reformist work that leads to their eradication, amendment or circumvention. This process might not bring with it that same sense of culture war triumph that the same-sex marriage cases have brought in some quarters of the gay community, but it also might not carry the same costs.

⁸³ Some already have. *See, e.g.*, Spade, *supra* note 15 (This article discusses conflicting formal and discretionary standards for establishing one’s gender for purposes of a range of bureaucratic entities and the resulting dangers that occur for gender non-conforming people. Spade’s elaborate and rigorous analysis has important implications for the so-called “bathroom issue,” but he does not resort to an equal rights or anti-discrimination model to address it.). *See also* Valentine, *supra* note 12 (on the failure of many attorneys for youth to advocate zealously for their clients’ interests due to homophobic and transphobic biases and the need for an ethical rule mandating traditional representation rather than “best interests” representation to address such failures).

