

Spring 2017

Transgender Rights without a Theory of Gender?

Paisley Currah

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Paisley Currah, *Transgender Rights without a Theory of Gender?*, 52 Tulsa L. Rev. 441 (2017).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol52/iss3/10>

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

TRANSGENDER RIGHTS WITHOUT A THEORY OF GENDER?

Paisley Currah

KIMBERLY A. YURACKO, *GENDER NONCONFORMITY & THE LAW* (YALE UNIVERSITY PRESS 2016). PP. 256. HARDCOVER \$85.00

JAMI K. TAYLOR & DONALD P. HAIDER-MARKEL EDS., *TRANSGENDER POLITICS: GROUPS, ISSUE FRAMING, & POLICY ADOPTION*. (UNIVERSITY OF MICHIGAN PRESS 2014). PP. 304. HARDCOVER \$80.00. PAPERBACK \$34.95

In a 1994 essay, Jack Halberstam famously declared that “We are all transsexuals . . . and there are no transsexuals.”¹ Transsexual (“Trans”) people might make the shakiness of gender particularly visible, but gender uncertainty is visited upon us all. Gender is not so much a status but a lifelong project for everyone—living up to it, convincing others that we are doing it right, rejecting it, changing it, fixing it. We need, Halberstam said, “to rewrite the cultural fiction that divides sex from a transex, a gender from a transgender.”² That statement was enunciated around the time that “transsexual” (soon to be absorbed by “transgender”) appeared as a tiny figure on the horizon of mainstream political legibility and captured a tension that has hovered over the transgender rights movement ever since. Are we referring to transgender as a particular type of person, collectively only a tiny proportion of the population, desperately in need of rights and respect? Or are we talking about the rights of everyone to live in and express their gender as they see fit? Who are transgender rights for? Who needs transgender rights?

Halberstam’s statement reflected the intellectual ferment that surrounded queer theory in the 1990s. Eve Sedgwick’s *Epistemology of the Closet*, Judith Butler’s *Gender Trouble*, and Michael Warner’s *Fear of a Queer Planet* collection, among others, were received as celebrating fluidity over stasis, acts over identity, a queer anti-normative politics over the assimilationist tendencies of the gay and lesbian rights movement.³

1. J. Halberstam, *F2M: The Masking of Female Masculinity*, in *THE LESBIAN POSTMODERN* 226 (Laura Doan ed., 1994).

2. *Id.*

3. EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990); JUDITH BUTLER, *GENDER TROUBLE* (1990); JUDITH BUTLER, *BODIES THAT MATTER* (1993); *FEAR OF A QUEER PLANET: QUEER POLITICS AND*

Queer theory wanted to free sexuality from heteronormativity, intimacy from monogamy, and sex from private property.⁴ Guided by poststructuralist theory and its critique of essentialism, a radical queer politics would supersede the identity politics then (and now) powering the gay and lesbian rights movement.

One particular thread from the queer theoretical revolution turned out to matter a great deal in contemporary debates about transgender rights. Sedgwick had identified two different ways of thinking about the relation between homosexuality and heterosexuality in western culture. The “minoritizing view holds that there are a distinct number of people who ‘really are’ gay.” The second “universalizing” approach positions sexuality as “an issue of continuing, determinative importance in the lives of people across the spectrum of sexualities.”⁵ In *The History of Sexuality*, Michel Foucault described the emergence of homosexual identity in the late nineteenth century—“The sodomite had been a temporary aberration; the homosexual was now a species.”⁶ Homosexuality, defining a specific type of person, an identity, is minoritizing; sexuality understood as constituted by acts and desires is universalizing. Even as Foucault and those who followed him emphasized the historical contingency of the category of homosexuality (and heterosexuality), Sedgwick, writing in the late 1980s, was concerned that gay historians saw the identity-based model as “supervening” the act-based model. In fact, she stressed chapter after chapter, both notions co-existed throughout the twentieth century.⁷

She need not have worried. The next generation of queer theorists (generation as in reproducing PhDs, not as in new human adults) largely dismissed gay and lesbian identity politics and instead turned their gazes toward the expansive approach. Queer readings of literature, television, and social policy—from Shakespeare (“Shakesqueer”) to “The Jack Benny Show” to the Personal Responsibility and Welfare Reform Act of 1996—demonstrated how, even absent a discussion of homosexuality or a visible homosexual character, sexuality functions as “an especially dense transfer point for relations of power.”⁸ By the beginning of this century, the pendulum had most definitely swung back to the universalizing side.⁹

Halberstam’s statement transposes Sedgwick’s observation about the different constructions of homo/sexual definition onto the question of transgender/gender. But it does more than that. It also exports queer theory’s tendency to privilege the universalizing approach over the apparent limits of an identitarian approach. The

SOCIETY THEORY (Michael Warner ed., 1993).

4. Lauren Berlant and Michael Warner define heteronormativity as “the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent—that is, organized as a sexuality—but also privileged.” Laura Berlant & Michael Warner, *Sex in Public*, 24 *CRITICAL INQUIRY* 547, 548 (1998).

5. SEDGWICK, *supra* note 3, at 1.

6. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME I* 43, (Robert Hurley trans., Vintage Books 1990).

7. SEDGWICK, *supra* note 3, at 47.

8. FOUCAULT, *supra* note 6, at 103.

9. *See, e.g.*, SHAKESQUEER: A QUEER COMPANION TO THE COMPLETE WORKS OF SHAKESPEARE (Madhavi Menon ed., 2011); ALEX DOTY, *MAKING THINGS PERFECTLY QUEER: INTERPRETING MASS CULTURE* (1993); EDELMAN LEE, *NO FUTURE: QUEER THEORY AND THE DEATH DRIVE* (2004); ANNA MARIE SMITH, *WELFARE REFORM AND SEXUAL REGULATION* (2007).

conflict between queer theory and LGB advocacy has never been resolved, though one could say there has been an armistice. LGB advocates have largely ceded the humanistic academic terrain to queer studies, and instead rely on social scientists to produce evidence supporting identity-based LGB rights claims—for example, that same-sex parents do not harm children, that same-sex marriage will not bring an end to the institution of marriage. Similarly, beyond a few manifestos, queer theorists have largely given up on the possibility of making universalizing arguments intelligible to policymakers and judges because those positions do not usually reflect settled common sense and do require conceptual sophistication to apprehend them.¹⁰

Unlike the LBG/sexuality question, however, the transgender/gender debate has not been shunted off to the sidelines and limited to humanistic academic inquiry. The question is of crucial importance to anyone who has had their gender censured by an employer, a school, a court, a social service agency, or the police. Most people have experienced this policing at some time and to some degree: a high school boy who is told his shirt is “too gay,” a woman chastised for wearing business attire that is not feminine enough, a transgender woman barred from the women’s bathroom because of the sex she was assigned at birth. People in the transgender rights movement—from impact litigation attorneys framing equality arguments, to advocates working quietly with officials on administrative policies, to local activists pushing non-discrimination bills in their city or state—think long and hard about the kinds of people and conduct that will benefit from the particular change they are trying to bring about.

In the area of transgender rights, disagreements over whether to follow a particular or a universal approach have often quickly turned into disagreements about what gender really is.¹¹ Is gender identity fixed, or might it change more than once throughout the life course? Are transsexual people born in the wrong body, or is the wrong body narrative imposed by a medical establishment and legal architecture intent on maintaining the rigid border between male and female, even as they develop diagnoses and criteria that would allow one to move morphologically and/or legally from one gender to another? Is gender identity *expressed* through one’s clothes, voice, demeanor, or is it retroactively inscribed on a person through performing it? Is gender a property of the brain or an effect of the social, of the psyche, of discourse, of language?

Painting with a broad brush, these contests over gender pit the medical and psychiatric establishment against the third wave feminist theory, which denaturalized gender. That both positions circulate inside the transgender rights movement reflects the protean nature of “transgender.” It stands for “any and all kinds of variation from gender norms and expectations,”¹² and for people who have a gender identity not

10. One notable exception is the historian’s brief to the Supreme Court in *Lawrence v. Texas*, which pointed out that laws against sodomy were part of the regulation of what we now call heterosexuality. See Brief of Professors of History George Chauncey et al. as Amici Curiae in Support of Petitioners; *Lawrence v. Texas*, 539 U.S. 558 (2002) (No. 02-102) (2003 WL 152350).

11. Here I am not addressing the arguments of opponents of transgender rights, who attempt to make what they imagine biological sex to be the arbiter of one’s classification as male or female.

12. SUSAN STRYKER, *TRANSGENDER HISTORY* 19 (2008).

traditionally associated with the sex assigned at birth—that is, for a particular type of person. By this point, it is pretty much axiomatic that the minoritizing approach reflects gender essentialism while the universalizing way of understanding gender norms and deviations from them is constructionist. But what if we separate, at least provisionally, the question of “Who needs trans rights?” from the question of “What is gender?” That this seems deeply counterintuitive (even to me) reveals the hold that the essentialism-constructionism debate of the 1990s still has on the limits of our political imagination. It so deeply structures our thinking that distinguishing questions about trans politics from questions about trans identity/subjectivity seems just wrong. (Of course, that association is not limited to the present topic. In political theory, in my field, undergraduates learn on day one that a thinker’s conception of justice is deeply bound up with their views about human nature.)

In this thought experiment, however, instead of doing the usual thing and collapsing the minoritizing-universalizing problematic into a disagreement about gender, I am going to disaggregate these questions and focus only on the former. Reviewing these two books provides a perfect opportunity to do so. Identity politics thoroughly suffuses the approach taken by the contributors to Jami K. Taylor and Donald P. Haider-Markel’s edited collection, *Transgender Rights and Politics: Groups, Issue Framing, & Policy Adoption*. Conversely, Kimberly A. Yuracko’s monograph, *Gender Nonconformity and the Law*, spells out the tension and ultimately argues in favor of the universalist approach.

The lodestar for Yuracko’s argument, which focusses solely on workplace non-discrimination law, is the case of Darlene Jespersen. Jespersen had worked as a bartender at Harrah’s Casino in Reno, Nevada, for twenty years before her employer started enforcing a “Beverage Department Image Transformation” policy which mandated its female employees wear “[m]ake up (face powder, blush and mascara) . . . applied neatly in complimentary colors” along with lip color and femininely styled hair.¹³ Male employees, however, would be in violation of the policy if they *did* wear make-up or style their hair. Jespersen refused and was fired. She argued that the policy “forced her to be feminine” and to become “dolloed up” like a sexual object,” and ultimately “interfered with her ability to do her job.”¹⁴ Because only women were forced to wear make-up and style their hair, Jespersen’s Title VII claim asserted that Harrah’s policy amounted to disparate treatment based on sex. She lost in district court, again in the Ninth Circuit, and finally in a 2006 Ninth Circuit *en banc* decision. While Title VII generally prohibits sex stereotyping, the first Ninth Circuit panel held that the existence of different grooming standards for men and women did not constitute sex stereotyping. The *en banc* decision was even more counter-intuitive: although sex-based appearance standards violate Title VII, there was no evidence to suggest that the policy “was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear.”¹⁵

Yuracko contrasts these dress code and grooming cases with two other types

13. As cited in *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1107 (9th Cir. 2006).

14. KIMBERLY A. YURACKO, *GENDER NONCONFORMITY AND THE LAW* 24 (2016).

15. *Id.* at 23.

of cases involving gender nonconforming people: those of transgender people transitioning in the workplace and those of individuals (generally men) harassed because they are seen as too feminine or because they are perceived as gay. In the last decade, the latter two types of sex discrimination claims have been increasingly successful.¹⁶ As Jennifer Levi, a law professor and director of the Transgender Rights Project at GLBTQ Legal Advocates & Defenders who has written widely on this issue and also litigated it, observed out in 2008, the “pervasive attitude of judicial laissez-faire toward sex-based dress codes is increasingly anomalous in the wider context of sex discrimination case law, yet it shows no signs of abating.”¹⁷ The central question that runs through Yuracko’s book is this: “Why are transsexuals winning their challenges to sex-based gender conformity demands while garden-variety gender benders are not?”¹⁸ Yuracko thinks it through chapter by chapter as she examines different doctrines on sex discrimination law: formal gender neutrality which suggests that disparate treatment of any sort is untenable; anti-subordination doctrine, which suggests that courts should consider the history of a particular group, in this case women, in adjudicating sex discrimination cases when the action in question has a disparate impact; doctrines differentiating status from conduct; approaches that depend on freedom of expression. The penultimate chapter compares the expansions of protection based on gender identity and the lack of such protection for expressions of racial identity.

After careful and nuanced readings detailing how these doctrines fare in the case law, Yuracko concludes that no particular doctrinal approach can explain the growing gap between cases litigated based on gender identity and those involving only nonconforming gender expression. Instead, she argues, “it has resulted from a set of values, commitments, and beliefs that are significantly more controversial. In particular, recent protection for transsexuals . . . has flowed most directly from a reinforced and newly medicalized commitment to binary gender categories.”¹⁹ What accounts for the success of the gender identity cases, then, is the emphasis on status, on immutability, and on the medical establishment’s verification of gender through

16. The EEOC has ruled in two cases, *Macy v. Holder*, EEOC DOC 0120120821 (Apr. 20, 2012) (2012 WL 1435995), and *Lusardi v. McHugh*, EEOC DOC 0120133395, (April 1, 2015) (2015 WL 1607756) that discrimination against transgender people constitutes discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964. Both cases involved women transitioning in the workplace. See also U.S. EEOC, WHAT YOU SHOULD KNOW ABOUT EEOC AND THE ENFORCEMENT PROTECTIONS FOR LGBT WORKERS, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

17. Jennifer L. Levi, *Missapplying Equality Theories: Dress Codes at Work*, 19 YALE J. L. & FEMINISM 353, 389 (2008).

18. YURACKO, *supra* note 14, at 2. Yuracko is not the first to address this issue. One major failing of the book is that Yuracko does not address the key scholarship on her question. For example, Jennifer Levi has written much about sex-differentiated grooming policies in general, and the Jespersen case in particular. Yet only some of Levi’s work is listed in endnotes, and Yuracko does not address Levi’s ideas about the relationship between the successful discrimination claims based on transgender identity and the lack of movement in jurisprudence on grooming standards and dress codes. See, e.g., Levi, *supra* note 17, at 354-390; Jennifer L. Levi, *Clothes Don’t Make the Man (or Woman) But Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 90-113 (2006). Indeed, Yuracko’s general citational practice seems to be to name check well known individuals not particularly associated with transgender scholarship and advocacy (e.g., Mary Anne Case, Andrew Koppelman, Martha Nussbaum) in the text, and generally relegate those working in the area of discrimination against transgender and gender nonconforming people to the footnotes (Levi) or not include them at all (Jillian Weiss).

19. YURACKO, *supra* note 14, at 172.

science. These dress code and grooming cases reinforce the gender binary, Yuracko suggests, and thus “come at the expense of greater rigidity of gender roles and expectations for all workers.”²⁰ In her view, the minoritizing “transsexual” cases impair the possibility of the universalizing “garden-variety gender benders,” like Darlene Jespersen, to be protected against sex stereotyping in the workplace.

Yuracko’s analysis of these doctrines and their use, and misuse, in these two strands of stereotyping law is thorough and penetrating. But she fails to make the case that the successful “transsexual” employment litigation is responsible for the lack of progress for “garden variety gender benders”—she just assumes it must be so. And that assumption is made possible by her conceptual apparatus. The terms “transsexual” and “garden-variety gender benders” are repeated throughout the book. Her use of them comes off as somewhat out of touch with the communities she is writing about or the scholarship that dispels the stereotypes about transgender people.²¹ “Transsexual” carries the whiff of the pathologizing discourses from whence it emerged, and has largely been replaced by “transgender” by advocates and plaintiffs in these cases—increasingly even judges. It is also much more common now for both terms to be used as adjectives, (e.g. transsexual woman, transgender people) rather than as nouns, which reduces a person to a single characteristic. But it is not just a matter of politically incorrect language. The real problem with this usage is more fundamental. Basing the crux of her analysis on a distinction between “garden-variety gender benders” and “transsexuals” reinforces the idea that there is something particularly strange or exotic about people who transition.²² The organizing binary of Yuracko’s book effectively re-naturalizes cissexual normativity as universal (garden-variety), relegates transsexuality to an exotic identity politics position, and imagines that it is the latter that trucks in gender essentialism.²³

There is another explanation for first part of the central question that Yuracko poses in her book—Why are courts deciding that transgender people cannot be forced wear the clothes traditionally associated with the sex assigned to them at birth? Perhaps it is simply because the transgender women in these cases are women, the transgender men are men, and judges are increasingly recognizing this. Forcing a transgender woman to wear men’s clothes in the workplace constitutes a type of sex discrimination against an individual. There is no especial transsexual politics of gender in these cases. Just as transgender people are not necessarily the harbingers of

20. YURACKO, *supra* note 14, at 174.

21. See, e.g., A. Finn Enke, *The Education of Little Cis: Cisgender and the Disciplining of Opposite Bodies*, in *TRANSFEMINIST PERSPECTIVES* 60–77 (Anne Enke ed., 2012); Susan Stryker, *Transgender Studies: Queer Theory’s Evil Twin*, 10 *GLQ: A J. OF LESBIAN AND GAY STUD.* 212, 212–15 (2004); JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES* (2004); Cristan Williams, *Transgender*, 1 *TSQ: TRANSGENDER STUD. Q.* 232, 232–34 (2014).

22. The opposition also implies that “transsexuals” cannot be gender non-conformers in their own right. In fact, it’s entirely possible that people whose gender identity is not associated with the sex assigned to them at birth do not follow gender stereotypes, even post-transition.

23. Cissexual refers to individuals who are not transsexual. See JULIA SERANO, *WHIPPING GIRL: A TRANSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY* 12 (2007).

gender revolution, they are not necessarily the select guardians of the traditional gender regime.²⁴ They just are—like everyone else. Their gender identity is no more or no less fixed than that of their cis doppelgangers. (“We are all transsexuals . . . there are no transsexuals.”²⁵) The expert testimony presented to judges in these cases does not, as Yuracko suggests, “newly medicalize” gender—gender has been medicalized in one way or another since the start of the scientific revolution in early modern Europe, and that medicalization has not been limited to, or even until recently directed at, the transsexual body.²⁶ To make the gender of transgender men and women legible to judges, advocates present the most recent version of gender’s medicalization in the hope that this evidence will resonate with what judges already know about gender. On the matter of policies that require men and women to conform to gender norms in the workplace, these cases are neither here nor there. That this explanation is not the first to come to mind may be an effect of the belief that trans people’s equality claims are always really about litigating the meaning of gender and resolving the essentialist-constructionist debate.

As to second part of the question—why courts continue to find these sex-differentiated dress and grooming policies are not violations of Title VII—Yuracko provides the answer that many others have: norms and values.²⁷ For employers and judges, hegemonic gender norms appear as common sense and as such are not all that pervious to rational doctrinal analysis. As a result, courts come up with contorted readings of neutrality and anti-subordination doctrines to keep the deep-seated gender norms in place, as in the decisions in the Jespersen case. Changing the norms will require much more than simply making the right doctrinal arguments.

One would be hard pressed to find a better representative of the minoritizing approach to trans politics than Taylor and Haider-Merkel’s collection.²⁸ The contributors unabashedly occupy that end of the political spectrum. It is significant that, other than two pages in the introduction subtitled “The Concept of Transgender”—in which the editors politely note that “different academic disciplines have different understandings of the term” and leave it at that²⁹—there is not a speck of gender trouble in the entire collection. Here transgender rights are articulated simply as an identity politics, with little handwringing about the meaning of gender and its relation to transgender. Instead, the purpose of the collection is to add scholarship on the

24. The widely held assumption in queer and trans studies that transgender rights claims should undermine gender norms seems to be another import from queer theory. Robyn Wiegman and Elizabeth A. Wilson argue that normativity itself has become “queer’s axiomatic foe.” Robyn Wiegman & Elizabeth A. Wilson, *Introduction: Antinormativity’s Queer Conventions*, 26 DIFFERENCES: A J. OF FEMINIST CULTURAL STUD. 1, 1-2 (2015); see also, Robyn Wiegman, *Eve’s Triangles, or Queer Studies beside Itself*, 26 DIFFERENCES: A J. OF FEMINIST CULTURAL STUD. 48, 48-73 (2015).

25. Judith Halberstam, *F2M: The Masking of Female Masculinity*, in *THE LESBIAN POSTMODERN*, 210, 225–26 (Laura I. Doan ed., 1994).

26. See, e.g., THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* (1990).

27. Levi suggests that gender norms operate in the law as “collective hunches.” Jennifer L. Levi, *Clothes Don’t Make the Man (or Woman) But Gender Identity Might*, 15 COLUM. J. OF GENDER AND L. 90, 92–94 (2006).

28. *TRANSGENDER POLITICS: GROUPS, ISSUE FRAMING, & POLICY ADOPTION* (Jami K. Taylor & Donald P. Haider-Markel, eds., 2014).

29. *Id.* at 7.

transgender rights movement to the political science literature on new social movements, issue framing, policy implementation, coalition and electoral politics. As the editors point out in their introduction, there has been a great deal of work on transgender rights outside of political science, but most of that has been from the perspectives of normative, queer, and deconstructive theory or doctrinally driven legal studies.³⁰ Within political science, transgender has generally been treated as an afterthought on LGBT empirical work of this kind. *Transgender Rights and Politics* presents an overall coherence generally lacking in edited collections. That is no doubt partly a result of all the collaborative work that went into creating it: the editors and many of the contributors are co-authors of more than one chapter.

These essays do much more than inventory the wins and losses of the movement thus far. They also subject those political fortunes to the sort of granular forensic analysis that only the tools of positivist social inquiry can deliver. Anthony J. Nownes uses the theory of density dependency to understand why the number of nationally active transgender rights groups grew from five in 1995 to nineteen in 2004 and why it has since declined. In an exploration of state-level politics, Taylor and Daniel C. Lewis identify possible explanations for why there are twenty-one state nondiscrimination laws that prohibit sexual orientation discrimination in the workplace but only seventeen of them include gender identity. Turning to city nondiscrimination ordinances, Taylor, Tadlock, Sarah J. Poggione and Brian DiSarro employ the quantitative method of event history analysis and the qualitative method of case study to understand why some municipalities adopt transgender-inclusive nondiscrimination laws and why others do not. In another study of state nondiscrimination laws, Lewis, Taylor, DiSarro and Matthew J. Jacobsmeier find that there are differences between policy adoption based on sexual orientation and gender identity. In the current political climate, access to restrooms is one especially salient difference. Mitchell D. Sellers asks if partisanship plays a role in the decisions of governors to issue or rescind executive orders prohibiting discrimination based on gender identity. Based on research conducted in the United Kingdom, Ryan Combs compares the needs of transgender patients with the health services they are actually getting. In the collection's final substantive article, "Birth Certificate Amendment Laws and Morality Politics," Taylor, Tadlock and Poggione unpack an apparently counterintuitive fact: the states that do not have transgender-inclusive nondiscrimination laws in place are as likely as the presumably more liberal states that have such laws to allow transgender individuals to change the sex on their birth certificate. Their conclusion: While nondiscrimination laws involve majoritarian political contests, policymaking on birth certificates is much more likely to be driven by federal professionalized bureaucrats, who draw on expert knowledge and diffuse model policies vertically to state-level bureaucrats.

The only essay to address the assumed tension between identity politics and the universalizing approach is the contribution by Barry L. Tadlock, "Issue Framing and Transgender Politics." He notes that the scholarly critique of transgender identity

30. *Id.* at 5.

politics tends to devolve into a critique of rights-based politics in general. Moving from the theoretical to the empirical, Tadlock finds that the successful framing strategies are the “vehicle” through which the rights-based strategy emerges.³¹ That is, it is the necessity of making the issues faced by gender nonconforming people intelligible that requires these issues to be packaged in ways that will resonate to the public and policymakers, and the language of rights achieves this. Tadlock identifies the frames used in elite transgender advocacy as equality, education, safety/security, and empowerment; those used by groups opposed to transgender rights tend to message the issue as majoritarianism, freedom, safety/security, and pathology.³² Because policymakers and the public are less familiar with transgender issues, and because those issues are more complex (e.g., identity documents, access to facilities, in addition to discrimination) transgender advocacy needs more frames than is required by LGB advocacy. The latter focuses primarily on equality, and their opponents, which rely on morality frames. Similarly, in their study of the legal right to name changes in Latin America, Jacob R. Longaker and Heider-Markel find that transgender advocates use a number of frames, including a legal frame that speaks to the need for policy reform, a frame focused on discrimination that uses individuals’ stories, and the more abstract equality frame that uses the language of rights, justice, equality.³³

Adding to Tadlock’s cogent analysis, I suggest that the paramount frame is that of identity politics. It is the notion that transgender people constitute a group that makes it possible for so many different forms of gender nonconformity to be wrangled into a coherent political force. As I suggest in my book, the category brings together, at times uneasily, both ascribed and performative notions of identity/subjectivity: people who understand themselves as having been born in the wrong body find themselves working alongside people who reject most gender norms as nothing but a mechanism of power and alongside people who identify as non-binary. A cacophonous crowd, to be sure, yet one that is still imagined as moving forward together under the protective carapace of the transgender umbrella. Through identity politics, the transgender community is not just seen; it becomes visible against the backdrop of the civil rights tradition in the United States. Without the “transgender” nomenclature, the jumble of uneven advances in a wide variety of settings (different agencies, different branches of government, different jurisdictions) addressing very different legal areas (identity documents, discrimination, family law, incarceration, immigration, etc.) and involving different sorts of gender non-conformity (hewing to or rejecting the gender binary, for example) would not be hypostasized into a larger phenomenon. But with the term, these successes can be written into a new chapter

31. Barry L. Tadlock, *Issue Framing and Transgender Politics: An Examination of Interest Group Websites and Media Coverage*, in *TRANSGENDER POLITICS: GROUPS, ISSUE FRAMING, & POLICY ADOPTION* 25, 30 (Jami K. Taylor & Donald P. Haider-Markel, eds., 2014).

32. As an example of the majoritarian frame, Tadlock quotes the Massachusetts Family Institute’s pronouncement that “our laws should not be changed to encourage a disorder at the expense of 99.05% of the population.” *Id.* at 33.

33. Jacob R. Longaker & Donald P. Haider-Markel, *Transgender Policy in Latin American Countries: An Overview and Comparative Perspective on Framing*, in *TRANSGENDER POLITICS: GROUPS, ISSUE FRAMING, & POLICY ADOPTION* 49, 63 (Jami K. Taylor & Donald P. Haider-Markel, eds., 2014).

in the story of progress that underwrites the liberal world view in the United States: a previously disdained social group's slow but inevitable (from hindsight) triumph over an oppression enforced by the state and made possible by widespread social animus.³⁴ For example, earlier this year U.S. Attorney General Loretta Lynch situated the rights of trans people firmly within the civil rights tradition when she announced a federal civil rights lawsuit challenging a North Carolina law that restricted bathroom access in schools and public buildings to the sex classification on one's birth certificate:

This is not the first time that we have seen discriminatory responses to historic moments of progress for our nation. We saw it in the Jim Crow laws that followed the Emancipation Proclamation. We saw it in fierce and widespread resistance to *Brown v. Board of Education*. And we saw it in the proliferation of state bans on same-sex unions intended to stifle any hope that gay and lesbian Americans might one day be afforded the right to marry . . . This country was founded on a promise of equal rights for all, and we have always managed to move closer to that promise, little by little, one day at a time.³⁵

As the essays in the collection show, the political legibility that identity politics provides matters. It has been crucially effective in allowing all sorts of gender non-conforming people to be represented as a group in the policymaking arena.

From the universalizing perspective, however, the concern is that the minoritizing politics represented in Taylor and Haider-Merkel's book will only produce gains for the people who, if we borrow Sedgwick's description, "really are" transgender, leaving the "garden variety-gender benders" behind. That concern assumes that the political horizon of identity-based groups is limited to their own parochial interests. But, as Sellers and Rodrick Colvin explain in their essay, the actual language in "transgender-inclusive" nondiscrimination legislation is expansive rather than narrowly constructed.³⁶ Shannon Minter and I wrote in 2000 that,

[d]espite the fears of some, the emergence of a transgender rights movement has not resulted in laws that protect only a narrowly defined class. . . . Instead, transgender advocates and legislators have attempted to fashion statutory language that respects both the diversity among transgender people and the commonality between transgender people and others. . . . Moreover, the broad definitions used in most of

34. PAISLEY CURRAH, *NOT THE UNITED STATES OF SEX: REGULATING TRANSGENDER IDENTITY* (forthcoming). My book ultimately argues, however, that while transgender identity politics has been successful, its rights-based agenda dovetails too neatly with neoliberalism's celebration of diversity and does not advance the needs of trans people, who are economically precarious, incarcerated, or made vulnerable by a regime of racial terror.

35. U.S. Department of Justice, *Attorney General Loretta E. Lynch Delivers Remarks at Press Conference Announcing Complaint Against the State of North Carolina*, (May 9, 2016), accessed May 24, 2016, <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint>.

36. The language used in New York City's Human Rights Law, which I helped draft and which passed in 2002, is typical of the expansive approach. It includes both gender identity and gender expression, and covers those who conform to gender norms and those who do not: "The term 'gender' shall include actual or perceived sex and shall also include a person's 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 legal sex assigned to that person at birth."

these statutes also include people who do not identify as transgender, but whose gender identity or expression is at odds with stereotypical norms about gender in some way.³⁷

To be sure, in some jurisdictions, legislators exempted grooming and dress codes from the protections these laws offer, mirroring the courts' reluctance to see them as barriers to gender equality. But culpability for the courts' and legislatures' defense of hegemonic gender norms cannot be assigned to transgender rights movement. These norms do not regulate only transgender people, they are not minoritizing—and neither should be the politics that seeks to transform them. The thought experiment of this review essay was to sever the analysis of particular political strategies from various assumptions about what gender really is. Agreement on the origin of gender is not required to challenge the ability of employers and judges to force people to adhere to gender norms. What is required is a shared commitment to the political value of gender equality.

In *Epistemology of the Closet*, Sedgwick reminds her readers several times that the impasse between minoritizing and universalizing views is not a contradiction to be resolved. She urges her readers not to foreclose either definitional approach, but to explore the gaps between them, to understand what each made possible, what each made invisible, and to think through the very terms of their incommensurability. Writing in a time when the Republican Party's culture wars were in the ascendancy, when the Supreme Court had just ruled that criminalizing consensual same-sex sex was perfectly consonant with the Constitution, when William F. Buckley Jr. proposed tattooing people living with HIV, when the "scourge of AIDS" became a genocidal fantasy of the Christian right, Sedgwick asked: "As gay community and the solidarity and visibility of gays as a minority population are being consolidated and tempered in the forge of this specularized terror and suffering, how can it fail to be all the more necessary that the avenues of recognition, desire, and thought between minority potentials and universalizing ones be opened and opened and opened?"³⁸ In the present historical moment, as those on the liberal-left spectrum begin to respond to the terrifying reality of the November 2016 election results, we would do well to heed Sedgwick's call.

37. Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. AND MARY J. WOMEN & L. 37, 57–58 (2000).

38. SEDGWICK, *supra* note 3, at 130.