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## (Law) Breaking Gender: In Search of Transformative Gender Law

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# (LAW) BREAKING GENDER: IN SEARCH OF TRANSFORMATIVE GENDER LAW

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## I. OUTSIDERS INSIDE

A discussion that examines the law’s relationship to transgender, intersex, and gender variant people fits very well with this year’s LatCrit theme, “Outsiders Inside.”<sup>1</sup> A discussion that uses a critical gender lens to build a strategy for American policy-making for gender justice fits even better. I want to introduce and contribute to the “transformative gender law” discussion, which, I believe, embodies the spirit of this year’s conference theme as well as our panel’s theme, “New Ideas in Sexuality

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1. I use the term “gender variant people” to describe individuals who make gender non-conforming choices that affect their way of being. It is intended to be expansive, including the many transgender and intersex identities, as well as individuals who are without a gendered identity but challenge traditional gender norms. Gender Education & Advocacy Inc. provides a useful gender variance model and guidance. See GENDER EDUC. & ADVOCACY, INC., GENDER VARIANCE MODEL, <http://www.gender.org/resources/dge/gea02006.pdf> (last visited Sept. 26, 2010); GENDER EDUC. & ADVOCACY, INC., GUIDE TO USING THE GENDER VARIANCE MODEL (2001), <http://www.gender.org/resources/dge/gea02007.pdf>. For background about the unique challenges that intersex people face, see also Erin Lloyd, *Intersex Education, Advocacy & The Law: The Struggle for Recognition and Protection*, 11 CARDOZO WOMEN’S L.J. 283 (2005).

and Gender Law.”

This lively discussion among feminist/queer advocates and critical scholars examines two fundamental questions about law and society: what is gender, and how is the current legal regime responsive to gender? A small but growing minority, including myself, believes that the “formal equality” legal regime has become incoherent and that we ought to proactively construct an alternative that better delivers justice in a new civil rights era.

## II. CONTEXT FOR THE TRANSFORMATIVE GENDER LAW DISCUSSION

The transformative gender law discussion centers on gender outlaws. Gender outlaws are individuals who break social expectations about how to exist as a man or a woman.<sup>2</sup> Interestingly, no one conforms to the plethora of existing gender norms all of the time, and yet, in due course, its recursive nature actually facilitates non-conformity.<sup>3</sup> It is this tight tension—even contradiction—between permissible and impermissible deviation that inspires gender outsiders to analogize gender to performance.<sup>4</sup>

Performance theory explains gender as the expression of a set of assigned characteristics, designated feminine or masculine, which define “female” or “male” performance. The unity of a person’s performative experience constructs our “male” or “female” identities.<sup>5</sup> Some individuals, however, refuse their assigned roles or go off-script, choosing instead to play outside of their “intelligible” performance.<sup>6</sup> Performance theory, originally conceived as a feminist theory, animates many social theories today on gender, including critical gender legal studies.

Some critical gender theorists have confronted the “formal equality”

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2. See generally KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US* (1994) (coining the term “gender outlaw”).

3. See JUDITH BUTLER, *UNDOING GENDER* 42 (2004) [hereinafter *UNDOING GENDER*] (arguing that “[t]o assume that gender always and exclusively means the matrix of the ‘masculine’ and ‘feminine’ is precisely to miss the critical point that the production of that coherent binary is contingent, that it comes at a cost, and that those permutations of gender which do not fit the binary are as much a part of gender as its most normative instance”).

4. See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 1-3 (1990) [hereinafter *GENDER TROUBLE*] (positing that the “subject of women is no longer understood in stable or abiding terms”).

5. See *id.* at 22 (explaining that “[g]ender can denote a unity of experience, of sex, gender, and desire, only when sex can be understood in some sense to necessitate gender—where gender is a psychic and/or cultural designation of the self—and desire—where desire is heterosexual and therefore differentiates itself through oppositional relation to that other gender it desires”).

6. See *id.* at 23 (offering “Herculine” as a “sexual impossibility of identity” and an example of going “off-script”).

model's inability to serve transgender justice based on modern gender frameworks like performance theory.<sup>7</sup> Of interest are the unique equal protection issues raised by recent transgender cases. Some transgender litigants have brought successful sex-based workplace discrimination claims.<sup>8</sup> Critical scholars argue, however, that this rubric excludes those litigants who are unwilling to choose a female/male identity or those who face discrimination that is not fully captured by inequity principles.<sup>9</sup> Most recently, practitioner Andrew Gilden persuasively argued that a "transgender class" or "gender identity/expression class" are inadequate because they rely on a narrow, identity-based model.<sup>10</sup> I am convinced that a "formal equality" regime cannot exist without gender regulation, which I define as institutionally-enforced normative understandings of a binary gender scheme.<sup>11</sup> Gender regulation curtails personal freedom and thus impairs equal opportunity to freely live as one wishes. For that reason, we must consider what lies beyond the formal equality regime because what exists on the other side is what critical scholar Taylor Flynn calls "the opportunity of more."<sup>12</sup>

There are three vital questions driving the gender transformative law discussion today. First, how do we understand dynamic gender performance when the law enters the stage? Second, how do we address ethical concerns when gender outlaws are real characters? Finally, how do we begin to shape the law to fairly respond to complex ways of existing?

We have reached a pivotal point in gender legal theory because certain tensions threaten to break the formal equality regime in the not-so-distant

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7. See Dean Spade, *Keynote Address: Trans Law Reform Strategies: Co-optation, and the Potential for Transformative Change*, 30 WOMEN'S RTS. L. REP. 288, 297 (2009) (arguing that the effects of a "formal equality" model will be minimal because those who really need protection will not be afforded protection, for example a transgender individual, with merely a legal name change).

8. See, e.g., L. Camille Hébert, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535, 537 (2009) (offering identity discrimination and sex discrimination in the form of sex stereotyping as legal theories that have proven successful in the past).

9. See Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 102-03 (2008) (questioning a district court judge's decision to apply Title VII because the plaintiff did conform to the defendant's stereotypes about gender).

10. See *id.* at 103-04 (describing how some courts define "real" transgender individuals as those who have had multiple medical interventions and engage in heterosexual intercourse).

11. See UNDOING GENDER, *supra* note 3, at 42 (explaining that norms themselves are benign but carry with them an "intelligibility" that imposes legitimate and illegitimate parameters around behaviors).

12. See Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 TEMP. POL. & CIV. RTS. L. REV. 465, 467-68 (2009) (arguing that equality claims rest on a restrictive medical model that excludes non-medicalized claims by trans-people).

future. As gender variation becomes increasingly visible, gender regulation is stronger than ever. As non-discrimination laws begin to reflect our new gender ideologies, criminal laws continue to tightly control gender expression. I evaluate these tensions in an effort to continue encouraging gender law's re-imagination among activists, advocates, and scholars alike.

This article emphasizes two points. First, the formal equality model should be viewed as a transitory one that will soon reach its utilitarian ceiling. Its inherent essentialism contains fatal discursive and ethical problems. Second, theoretical principles should move away from heavy criticism and move toward an affirmative vision. I imagine a local law-making strategy that shifts from equality principles to nexus principles.<sup>13</sup> I hope that these points begin to outline a competing vision for transformative gender law.

### III. BREAKING GENDER: GENDER PERFORMANCE AND NON-DISCRIMINATION LAW

*How do we understand dynamic gender performance when the law enters the stage?*

Gender exists in ways other than the embodiment of two extremes: masculinity and femininity.<sup>14</sup> The basis upon which we impose these extremes is so tenuous that severe regulation is necessary to ensure conformity.<sup>15</sup> The threat of non-conformity grows to be so significant that gender compliance requires something more—state coercion.<sup>16</sup> State

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13. I use the term “nexus principles” to describe a constellation of values that emphasize individual capability rather than group membership. See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 16 (2008) (explaining that multiple identities do not create (dis)advantage but rather systems of power and privilege interact to create a web of (dis)advantage). In this sense, the object of legal consideration would shift from the formal equality regime's membership basis to a capability basis that analyzes unfair treatment in the context of whether a capable person was denied opportunity for reasons other than one's ability.

14. See GENDER TROUBLE, *supra* note 4, at 22-23 (suggesting that compulsive heterosexuality creates gender polarity, which may also produce compulsive heterosexuality, but nonetheless, demonstrates that gender is relationally produced, and conceivably, may exist in other ways as relationships change).

15. See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 3 (1995) (claiming that anti-discrimination law assumes sexual difference and that the state has played a role in enforcing this difference by never challenging this assumption). *But see* UNDOING GENDER, *supra* note 3, at 41 (stating that gender as well as other social and cultural norms may be subject to “larger regulatory operation of power”).

16. See Flynn, *supra* note 12, at 467 (emphasizing that “[n]ot only does the state have sole authority to legally categorize people by sex, but it also uses those categories as the basis for distributing rights and goods, such as marriage and its associated benefits, over which it maintains a *monopoly of power*”) (emphasis added).

coercion entails mandates to declare one gender or another on state documentation;<sup>17</sup> gender-specific public accommodations;<sup>18</sup> and access to civil institutions based on gendered relationships, like marriage.<sup>19</sup>

Perhaps gender regulation is more evident in the denial of equal protection. Gender variant people are fired from jobs, refused housing, and denied safe healthcare with increased visibility.<sup>20</sup> Such discrimination is invidious, even under basic formal equality principles. U.S. activists have responded by successfully revising state and local non-discrimination laws across the country to include “gender identity” and “gender expression” in their enumerated protections.<sup>21</sup> Thirteen states, the District of Columbia, and 108 cities and counties prohibit discrimination based on gender identity and gender expression.<sup>22</sup> This inclusion of “gender expression” both informs the transformative gender law discussion and reveals the limitations of formal equality.

Non-discrimination laws, premised on the formal equality model,

17. See Dean Spade, *Documenting Gender*, 59 HASTINGS L. J. 731, 734 (2008) (explaining that there is no clear legal gender for transgender people under the existing administrative matrix for gender identification and that this binary matrix poses a particular problem for transgender people that are in the process of reclassifying their gender).

18. See Diana Elkind, Comment, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 921 (2007) (describing how trans-people face pervasive discrimination, such as discriminatory bathroom access: “which bathroom to use is a fundamental and unnecessarily complicated choice that highlights the discord between the transgender individual’s personal identity and society’s label of what is acceptable”).

19. See Franklin H. Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 719-20 (2005) (noting that courts have used the “dimorphic” gender system to invalidate transgender marriages); see also Abigail Lloyd, *Defining the Human: Are Transgendered People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 169 (2005) (analyzing a spousal probate case involving a transgender person in which the court challenged the basis of the legitimacy of the marriage).

20. See, e.g., Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. OF WOMEN & L. 37, 37-38 (2000) (arguing that transgender discrimination is no different from basic sex discrimination).

21. See Transgender Law & Policy Inst., U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity or Expression, <http://www.transgenderlaw.org/nlslaws/index.htm#jurisdictions> (last visited Feb. 12, 2010) [hereinafter U.S. Jurisdictions] (listing the jurisdictions, that prohibit discrimination based on gender identity or gender expression); see also Jesse Hooley, *Normalising Transgender and Policing Transgression: Anti-Discrimination Law Reform Ten Years On*, 25 AUSTL. FEMINIST L.J. 79, 79 (2006) (analyzing the political process required for the production of a transgender bill, including anti-discrimination statues, in New South Wales); Heike Polster, *Gender Identity as a New Prohibited Ground of Discrimination*, 1 N.Z. J. PUB. & INT’L L. 157, 189 (2003) (citing Australian, Canadian, and European laws to show that trans non-discrimination inclusion is an international trend).

22. U.S. Jurisdictions, *supra* note 21.

enumerate specific characteristics in facially neutral language. Neutral construction formally offers universal protection. Neutrality can also protect against discrimination based on a perceived characteristic.<sup>23</sup> When advocates think about non-discrimination laws, they read classes into the characteristics, so that identity groups, like transgender people, are buffered from unfair treatment.

What, then, do advocates make of the concept of gender expression? It is distinct from gender because expression describes a behavior, not an immutable characteristic, yet activists pushed for its inclusion in non-discrimination laws. They did so because they sought protection from all *gendered* discrimination. A woman who wears men's clothes, for instance, is protected under gender expression if the harm she suffers is due to her lack of feminine conformity, regardless of her identity. This combination of "gender identity and expression" addresses something beyond transgender identity and speaks to the immanence of gender regulation. The inclusion of both terms indicates that gender regulation governs both gendered identity as well as gendered behavior.

Further, gender expression is a theoretically powerful element when gender is understood as a hyper-regulated identity.<sup>24</sup> If gender expression is seen as an exception, it begs the question whether other gender regulation prototypes can inform our future non-discrimination law-making? To explore this idea further, we turn to another area: criminal law.

#### IV. LAW-BREAKING GENDER: GENDER REGULATION AS CRIMINALIZATION

*How do we address ethical concerns when "gender outlaws" are real characters?*

The United States' criminal justice system exerts a substantial amount of state-enforced gender regulation.<sup>25</sup> Criminal gender regulation is in fact so

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23. See, e.g., N.M. STAT. ANN. §§ 28-1-2 (West 2009) (defining "sexual orientation [as] heterosexuality, homosexuality or bisexuality, whether actual or perceived" and "gender identity [as] 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[,] . . . physical characteristics[,] . . . anatomy, . . . or sex at birth").

24. See ME. REV. STAT. ANN. tit. 5, §4553(9-C) (2008) (defining "sexual orientation" as a person's "gender identity or expression"); N.M. STAT. ANN. § 28-1-7 (West 2009) (making it unlawful to discriminate against a person based on the person's sexual orientation or gender identity); OR. REV. STAT. § 659.030 (2009) (establishing that it is unlawful for an employer to discriminate on the basis of sexual orientation).

25. See Kylar W. Broadus, *The Criminal Justice System and Trans People*, 18 TEMP. POL. & CIV. RTS. L. REV. 561, 561-65 (2009) (describing systemic factors that contribute to increased trans exposure to the criminal justice system); see also Aeyal Gross, *Gender Outlaws Before the Law: The Courts of the Borderland*, 32 HARV. J.L. & GENDER 165, 166 (2009) (examining five "gender fraud" criminal cases of trans-men

pervasive that it is tantamount to criminalization.<sup>26</sup> Gender variant and transgender criminalization instructs urgency in the creation of real protections, exposes the limitations of identity-based protections, and highlights the re-orientation necessary to anchor a future gender legal model.

Gender outlaws—faeries, dommes, punks, butches, and trannies, among others—have long-resisted criminal gender regulation, particularly among urban, poor, and communities of color. Gender outlaws resist when they endure police brutality, when they develop their own survival techniques, and when they organize.<sup>27</sup> Some have even cautioned gay and lesbian activists that legal rights cannot, and should not, be sexual, and gender-rights activists' should not make that their primary goal.<sup>28</sup> On the other hand, some acknowledge that there is at least the potential for expanded rights, which in turn, may put affected communities in a better position to demand greater protection under the law.

Another part of our re-imaginative task is to examine how a re-directed gender-justice strategy can strengthen protective laws so they are more effective.<sup>29</sup> We must deliver justice to gender outlaws' most marginalized experiences. A handful of studies have documented gender outlaw realities in several major cities, including New York, Washington D.C., and San Francisco. We cannot glean much from these data, but what we do know is simply devastating.

In San Francisco, half of respondents reported employment discrimination, with sixty-four percent of respondents hovering around the poverty line, earning less than \$25,000 a year.<sup>30</sup> Nearly a third of respondents reported housing discrimination.<sup>31</sup> Close to half of the pool

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who in some instances received imprisonment for their convictions).

26. See Broadus, *supra* note 25, at 565-66 (portraying how transgendered people face some of the same systemic, abusive discrimination that people of color have faced since the time of Jim Crow segregation).

27. See Pooja Gehi, *Symposium Presentation: Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RTS. L. REP. 315, 325-27 (2009) (describing how low-income transgendered people are often forced to commit "survival crimes" because of "poverty exacerbated by discrimination").

28. See, e.g., Pauline Park, *GenderPAC, The Transgender Rights Movement and the Perils of a Post-Identity Politics Paradigm*, 4 GEO. J. GENDER & L. 747, 756-57 (2003) (criticizing GenderPAC's advocacy for non-identity gender rights).

29. See Dean Spade, *Keynote Address: Trans Law & Politics on a Neoliberal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 353, 356-357 (2009) (observing that non-discrimination laws have not rooted out systemic bias against different racial, gender, and national origin groups).

30. SHANNON MINTER & CHRISTOPHER DALEY, *TRANS-REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES* 12 (2003).

31. See *id.* at 16 (reporting that thirty-two percent of the pool experienced housing discrimination).

reported healthcare discrimination as a high priority area, and almost one-third reported experiencing discrimination in accessing healthcare.<sup>32</sup>

The leading Washington, D.C. study found that forty percent of transgendered residents who completed the survey had not finished high school, thirty-one percent earned less than \$10,000 a year, and another twenty-nine percent had no source of income.<sup>33</sup> One-fourth of respondents were HIV-positive, and twenty-two percent did not know their HIV status.<sup>34</sup> While seventy-five percent reported feeling safe in their living space, thirteen percent felt unsafe, citing the most common barriers to obtaining adequate housing as lack of income, employment, and estrangement from their birth-families.<sup>35</sup> Ninety-four percent of the respondents to the D.C. survey were people of color.<sup>36</sup>

Finally, the Sylvia Rivera Law Project (“SRLP”) report on transgender, intersex, and gender variant inmates offers an incisive criminalization critique, detailing how discrimination, poverty, and exposure to high-risk factors culminate into police interaction and incarceration.<sup>37</sup> I distill their analysis into two areas: ancillary criminalization and systemic criminalization.

Ancillary criminalization describes “public safety” laws and how their unfair enforcement negatively affects gender variant people. Let me offer three common scenarios: a female-appearing person of color who is walking home at night endures police harassment due to a suspicion that this person is engaging in sex-work; a queer, homeless, young person is threatened with arrest for trespassing when this person is at a public park; a transgender man, without adequate access to healthcare, is at risk for drug charges for seeking off-the-market hormone therapy supplies. These scenarios demonstrate that although some “public safety” laws do not expressly target gender variant people, they are disproportionately harmed, even targeted, in the enforcement of such laws.

Systemic criminalization is a well-known phenomenon within

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32. *See id.* at 14 (emphasizing that access to quality healthcare has been an important issue in the transgender population).

33. *See* JESSICA XAVIER & RON SIMMONS, THE WASHINGTON TRANSGENDER NEEDS ASSESSMENT SURVEY EXECUTIVE SUMMARY 1 (2000), [http://www.transhealth.transadvocacy.org/Needs\\_Assessments/DC.doc](http://www.transhealth.transadvocacy.org/Needs_Assessments/DC.doc) (providing the first quantitative report of the health and housing needs among transgendered people living in the District of Columbia).

34. *See id.* at 2 (stating that an additional eighteen percent have never been tested for HIV).

35. *Id.* at 3.

36. *Id.* at 1.

37. *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 13-16 (2007) [hereinafter IT’S WAR IN HERE].

marginalized communities in which biased laws, enforcement, institutions, and customs compound to have adverse effects. The SRLP report contains an authoritative description of systemic criminalization. Its analysis into transgender and intersex prison experiences begins with the ways in which structural forces reinforce one another to push many gender variant people into circumstances where fewer beneficial, lawful choices exist.<sup>38</sup> Extreme social marginalization leads to high-risk conditions and high-stakes choices, which for some, inevitably lead to severely diminished life chances.

The SLRP report essentially illustrates a school-to-prison pipeline for poor, gender variant people of color.<sup>39</sup> Early home displacement, bully-induced school drop-out, endemic (legally permissible) work and housing discrimination, and rampant institutional abuse can be traced as root causes of survival crime.<sup>40</sup> Moreover, institutional abuses, such as racial profiling and judicial officer trans-phobia, also increase transgender and intersex incarceration rates.<sup>41</sup> If poor people, people of color, non-English speaking people, disabled people, and other people with non-normative ways are branded as common criminals, then, gender non-conforming people—who often overlap into these categories—are widely advertised as “outlaws.” Here, we face another tension that informs our transformative gender law analysis: is it possible for literally visible “criminals” to be “invisible” under criminal law?

I call this queer contradiction the “punishment paradox.”<sup>42</sup> The punishment paradox connects two oft-discussed observations. On one hand, affected people, activists, and advocates are seeing the realities of systemic criminalization in urban areas at increasingly higher volume; on the other hand, legal gender scholars are commenting on how gender variance is ignored or at times, muted, in the law. Criminal law, in

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38. *See id.* at 9 (stating that: “Discrimination against transgender people in housing, employment, healthcare, education, public benefits, and social services is pervasive, pushing transgender people to the margins of the formal economy. With few other options, many low-income and poor transgender people engage in criminalized means of making a living, such as sex work.”).

39. *See id.* (observing that the school-to-prison pipeline is a pattern experienced by other marginalized groups, particularly black men, and that in some states, prison population projections are based on the school drop-out rate for this group). *See generally* AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI, MISSING THE MARK: ALTERNATIVE SCHOOLS IN THE STATE OF MISSISSIPPI (2009), [http://www.aclu.org/files/pdfs/racialjustice/missingthemark\\_report.pdf](http://www.aclu.org/files/pdfs/racialjustice/missingthemark_report.pdf).

40. IT’S WAR IN HERE, *supra* note 37, at 15-17.

41. *Id.*

42. This idea is similar to the hyper-visibility/invisibility dynamic that affects many marginalized communities, particularly in the United States. *See* Alisa Bierria et al., *To Render Ourselves Visible: Women of Color Organizing and Hurricane Katrina*, in WHAT LIES BENEATH: KATRINA, RACE, AND THE STATE OF THE NATION 31 (2007).

particular, is acutely confronting the rigidity of a binary gender construction as increasing numbers of gender variant people enter jails and prisons.<sup>43</sup> The natural question, then, is how can criminal law punish individuals who do not exist in the eyes of the law? Or alternatively, how do non-existent people experience criminalization?

The punishment paradox represents a total gender regulatory scheme. In the same way that groups—not individuals—are heavily burdened by criminal laws, unpopular behavior—not necessarily harmful behavior—can be subject to criminal regulation. Based on the premise that gender variant people are engaging in “wrongful behavior,” they are pushed to the social and economic margins, they are denied legal remedies to which they are entitled, and even worse, they are either directly or derivatively targeted by criminal laws. The punishment paradox shows that the primary theoretical issue that the transformative gender law discussion must address is not merely how law can undermine the gender binary, but how it can provide a blueprint for dismantling the entire gender regulatory scheme.

The ethical dimensions of a binary orientation become clear when theorists forget that our laws affect real people, especially people who have urgent survival needs such as employment, housing, and healthcare. They deserve the right to exist, at the very least, free from scrutiny, harassment, or punishment from other people, as well as state actors. Beyond the right to exist, gender variant people also deserve a positive entitlement to live with dignity and esteem. Most gender scholars have abrogated their ethical imperative to evaluate fully the impact of our proposals on marginalized gender outlaws. The point to stress is that only after embracing this imperative can we construct a *responsive* transformative law.

While some gender advocates are unwilling to imagine future law, others over-theorize their ideas. I am particularly interested in Andrew Gilden’s recent article on transformative gender law.<sup>44</sup> While I believe that Gilden provides incisive critiques on gender regulation, I am very concerned about his condemnation of transgender clients and their advocates who are litigating equal protection, Title VII, and other claims because he believes that litigation of this kind reinforces the binary gender paradigm by failing to challenge prevailing gender norms in the law. I think that we can accept his critical critiques, and, with them, we can ground a tangible law-making strategy that does not demonize victimized transgender people who seek legal relief.

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43. See Richael Faithful, *Transitioning Our Prisons Toward Affirmative Law: Examining the Impact of Gender Classification Policies on U.S. Transgender Prisoners*, 5 MOD. AM. 3, 3 (2009).

44. See generally Gilden, *supra* note 9.

V. TRANSFORMATIVE GENDER LAW: THE UNIVERSAL SOLUTION?

*How do we begin to shape the law to respond fairly to complex ways of existing?*

The formal equality critiques are well supported, whether from high-profile trans-advocates or gender post-modernists. It is a model that responds well to civil rights-era politics but is virtually silent on individual autonomy. As we reach the identity-protection ceiling, our choice is either to break through to freedom or to break under equality.

Existing non-discrimination laws, anchored in formal equality principles, suffer from three defects when examined against a criminalization backdrop. First, as previously discussed, enumerated protections are too narrow a sheath. Even with the addition of gender expression to some laws, they remain less meaningful in combating intersectional discrimination (the combinative effect of marginalization). Second, non-discrimination laws are untenable in the long term. The District of Columbia employment non-discrimination law exemplifies this problem.<sup>45</sup> The law enumerates sixteen protected statuses including “gender identity and expression.” I do not believe that the D.C. Code is over-inclusive, but I cannot imagine how it could function with such a long list of characteristics. Finally, non-discrimination laws will remain inherently dangerous until equal protection analysis is altered or shifted. Well-meaning parties are at risk of becoming litigants as long as neutral construction is inverted to benefit well-off people to the detriment of the law’s intended beneficiaries.<sup>46</sup> These three concerns strongly compel us to consider new options.

Andrew Gilden’s article envisions a system in which “legal rules may potentially counter such traditions by eliminating their means of perpetuation while simultaneously laying the foundations for a future that embraces a broad range of gendered expression.”<sup>47</sup> To do this, he suggests that advocates must make a “conceptual shift” so that the law may reinforce more positive gender norms.<sup>48</sup> Gilden then proposes a

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45. D.C. CODE § 2-1402.11 (2007) (defining characteristics including race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, and political affiliation).

46. See Darren Lenard Hutchinson, “Unexplainable on Grounds Other than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 638-81 (2003) (arguing that the equal protection doctrine has been inverted from its intended purpose due to the Court’s failure to contextualize equal protection claims).

47. Gilden, *supra* note 9, at 117-18.

48. *Id.* at 118.

comparison to other gender-fluid systems to guide the Western “legal reconstructive project.”<sup>49</sup> I hope that my previous points on criminalization reinforce his core arguments; however, I wish to redirect his conclusion that we are doomed until we change cultural norms around gender.

First, vigorous client advocacy and anti-essentialism<sup>50</sup> advocacy are not mutually exclusive work. Brilliant litigators consistently advance client and community interests, although, admittedly, it is extremely difficult to do. It is a strategy in which inexperienced advocates should not necessarily engage.<sup>51</sup> Gilden seems to argue that any “non-progressive” advocacy (advocacy that does not challenge gendered assumptions) is harmful because it reinforces the current legal regime. He categorically rejects such a “short-term strategy” that further entrenches gender norms.<sup>52</sup> I qualify his point to mean this: we should encourage experienced advocates to engage in creative, effective, progressive lawyering that advances client and community interests. I defer to skilled practitioners for specific thoughts on this issue. Activists, in the meantime, can employ new law-making strategies.

Second, formal equality critiques that condemn any “non-progressive” approaches are not very helpful. Politics is not a zero-sum game. In other words, shaping our current reality does not resign us to the status quo; rather, it can offer wisdom to be used toward our present strategy as we fulfill our transformative vision. I urge gender-justice supporters not to shy away from post-identity critiques because alternatives seem unpalatable—alternatives, after all, should seem like a stretch. Instead, we should view critiques as insights into our possible future. So, where do we go from here?

Martha Fineman’s vulnerability thesis is a useful framework for the transformative gender law discussion.<sup>53</sup> The vulnerability thesis envisions

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49. *Id.* at 120.

50. Anti-essentialism in this context means advocacy that is not restricted to normative gender binary understandings within the law. For example, a domestic violence lawyer who has a non-gender identified client is practicing “anti-essentialism” by using gender neutral pronouns and by resisting attempts to impose a normative gender marker (male, female, transgender) on the client. This practice strategy is increasingly common. See Morgan Lynn, *The Last Thing Hanging in the Closet: LGBT Intimate Partner Violence*, Remarks at the National LGBT Bar Association Career Fair and Conference 2009 (Sept. 11, 2009).

51. See Suzanne B. Goldberg, *Social Justice Movements and LatCrit Community: On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 653-61 (2002) (arguing that in some cases, anti-essentialist arguments have limited effectiveness and continue to be risky propositions).

52. Gilden, *supra* note 9, at 112-16.

53. See generally Fineman, *supra* note 13. Fineman’s vulnerable subject is a revised theory from the dependent subject featured in her previous work, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

the development of political and legal institutions on a “comprehensive vision of the human experience.”<sup>54</sup> Fineman argues that vulnerability is a variable condition based on human realities and that societal institutions, designed to “lessen[,] . . . ameliorate[,] . . . and compensate . . . for vulnerability,” should be responsive to these realities.<sup>55</sup> Most convincing about Fineman’s work is its implicit anticipation that international models will finally penetrate United States jurisprudence.<sup>56</sup> Her model predicts and utilizes constructive cultural and legal trends.

A positive, nexus-based civil rights model diverges from a formal equality model in three important ways. First, it assumes gender difference rather than gender conformity. The absence of a gender imperative necessarily diminishes its regulation. Second, a vulnerability model reverses the long-standing presumption that all discrimination is benign unless proven otherwise. Such a presumption for a state protection is consistent with a vulnerability thesis, and it is reasonable in light of the Fourteenth Amendment.<sup>57</sup> Third, a nexus-based civil rights model shifts the discriminatory landscape from one that is dominated by a state intervener to one that includes a state protector. A state protector obligation provides a venue in which systemic oppression of all kinds can be seriously challenged, rather than ignored by the law. Change is inevitable, a new model is necessary, and the vulnerability model holds distinct promise.

A positive, nexus-based model is also more likely to be responsive to gender criminalization. Ancillary criminalization is constitutionally suspect due to its disparate impact on gender variant people. Systemic

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54. Fineman, *supra* note 13, at 10.

55. *Id.* at 12-13.

56. *See id.* at 15 n.42 (pointing to international treaties as a model for collective asset provision). Fineman subtly juxtaposes the U.S., negative-right equality scheme to international and other nation-state positive-state models throughout to demonstrate alternative nation-state models for ensuring social rights and benefits, which Fineman describes as “assets.” Although she never explicitly argues for safety net policies like those in European nations, the responsive state model for which she advocates is, in part, an argument for European-like economic safety net policies.

57. *See* Hutchinson, *supra* note 46, at 617. Hutchinson explains the constitutional dimensions as follows:

Despite these critiques, which contest the granting of enhanced judicial solicitude exclusively to vulnerable classes, no scholar has argued that the Court should construe the Equal Protection Clause as guaranteeing judicial solicitude exclusively or primarily for the discrimination claims brought by powerful social classes and that the discrimination claims of vulnerable groups should normally enjoy a presumption of constitutionality. In fact, most scholars and jurists would likely dismiss this argument as utterly inconsistent with the historical context surrounding the Fourteenth Amendment, the intentions of the Framers of the Fourteenth Amendment, and the judicial elaboration of the meaning of equality.

criminalization is interrupted as the government adopts a protector obligation and provides more robust safety nets. More universalized healthcare, for instance, is a safety net that would immensely benefit marginalized gender variant people on the whole. Equally important, a more responsive legal regime opens the floodgates of accountability from lawmakers to police. Decision-makers will be on notice that their behavior will be scrutinized if it deviates from fundamental nexus principles. A new model cannot eliminate discrimination or its deeply-rooted systemic effects, but it can ameliorate a political climate that has tolerated it for far too long.

The equal protection model and vulnerability model fail, however, if the general discrimination argument is lost. The success of any model is contingent on justice-minded people creating conditions in which not only is all discrimination suspect, but all discrimination is not treated the same under the law. The simple fact is that denying a job to a gender variant person because ze<sup>58</sup> “doesn’t look right” is distinct from denying a gender-normative person the same job because ze is the least preferred candidate. Donald Lively and Stephen Plass contend that the formal equality regime is the result of competing governing values, not the result of a desire to end discrimination.<sup>59</sup> If we were to settle the values debate and re-orient equal protection toward justice rather than sameness, we would have an opportunity to address marginalization at its core.<sup>60</sup>

The vulnerability model is at risk of inversion without a nuanced cultural understanding of discrimination, rights, power, and vulnerability.<sup>61</sup> But if progressives and justice-activists can move the political environment, the vulnerability model promises universal protection along with the flexibility necessary to protect those likely to encounter situations that increase their vulnerability. A true safety valve can exist in a new model with a proviso that advocates continue to champion justice over equality.

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58. “Ze” is a gender-neutral pronoun that is intended to be an alternative to “she” or “he.” I intentionally used “ze” so as not to impose a gender identity onto the hypothetical gender variant person in the discussion.

59. Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1310 (1991).

60. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (proposing that the Equal Protection Clause itself retains no cognizable meaning, which has led to the development of a “mediating” value known as the antidiscrimination principle). Assuming that the analysis is true, the mediating equal protection principle may be replaced or re-conceived.

61. See generally Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) (arguing that the inverted formal equality regime, which she calls the entrenched system of status regulation, is poised to change its rhetoric, but also to continue its impact of deepening inequality).

## VI. CONCLUSION

Local non-discrimination laws are the seeds of a transformative gender law movement. Community organizers, who assess conditions and calibrate options, should consider pushing a positive, nexus-based, vulnerability-inspired, non-discrimination agenda for legal reform. We can pursue long-term strategies, such as packing the high Court with leftists who wish to reform the equal protection doctrine or building a congressional bloc with the political will to make new laws. However, we can also take risks at the local level. Local politics are the laboratory for radical re-imagination and for community members to make enduring change.<sup>62</sup> Communities can move to see whether this vision is possible at all, and if it is, they can reshape that vision to best deliver justice.

Transforming the equal protection regime does not eliminate gender regulation; rather, it significantly weakens it. The vulnerability model speaks to our longing for a just legal regime, one that presumes difference, considers context, and responds to fairness. This transformative vision is possible if scholars re-focus their analysis on gender outsiders who every day resist injustice, and away from the Court's equal opportunity myth.<sup>63</sup>

I invite any person into the transformative gender law discussion who is invested in long-term gender-justice. We will need insights from activists, advocates, scholars, and gender variant community members themselves to shape the political climate, contextualize the legal debate, and experiment with law-making options. As the formal equality regime gasps its final breaths, new ideas are rising to the surface. To borrow from a great justice-thinker, Cornel West, we risk our democratic maturation if we are unable to comfort the nihilism that has engulfed our modern politics.<sup>64</sup> To delve into our imperialist legacy is to unleash our democratic energies of "Socratic questioning, prophetic witness[ing], and tragicomic hope."<sup>65</sup> This idea embodies transformative gender law's purpose, which contemplates high stakes for a legal, social, as well as a moral future.

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62. See generally KRISTIN LAYNG SZAKOS & JOE SZAKOS, WE MAKE CHANGE: COMMUNITY ORGANIZERS TALK ABOUT WHAT THEY DO—AND WHY (2007) (documenting organizers who state that long-term, sustainable change is made by community members at the local level).

63. See Siegel, *supra* note 61, at 1135 (explaining that the U.S. Supreme Court's "modern equal protection opinions have created . . . a culture that now embraces 'equal opportunity' and 'nondiscrimination' as a form of civic religion").

64. CORNEL WEST, DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM 41 (2004).

65. *Id.*