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The Right to Transgender Identity

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Abstract

Do people have rights to their social identities? In previous work, we've argued that social identities like gender and race so fundamentally shape the way we relate to society and ourselves, that restricting expression of these identities would constitute an infringement on a person's dignity and autonomy (Baker & Green 2021). This chapter takes up a particular facet of the right to identity — transgender people's rights to their gender identities.[1] In sections 1 and 2, we discuss philosophical dimensions of identity and cash out transgender identity rights within the framework of judicial scrutiny. In American constitutional law, social groups that can be established as being particularly vulnerable (due to historical discrimination and political disenfranchisement) are given what's called 'suspect classification', which means their minority status owes them special legal protections. Drawing from extensive experimental survey data, we argue that transgender people constitute a suspect class, which means that transgender people's rights to identity entitle them to protection against targeted discrimination and abuse.

1. Identity Rights

What does it mean to claim, 'S has a right to Φ?'. For some types of rights, this amounts to something fairly minimal. Take someone's right to pick up a leaf on the ground (Warner 2008; 2021). The sense in which they have a right to pick up the leaf involves *permissibility* — i.e., they don't have an obligation to *not* pick it up. However, other kinds of rights — for example, claims — invoke stronger kinds of social and legal obligations. Specifically, claim-rights invoke directionality — if S has a right to Φ then something is owed to S in regards to their ability to Φ (see e.g., Feinberg & Narveson 1970; White 1982; Warner 2013). Bodily rights are often cited as claim-rights; if one has a right to birth control, then the state has an obligation to not prevent them accessing or using birth control. For the sake of present discussion, we'll mostly be talking about claim-rights. If people have claim-rights to their social identities, then individuals and institutions have obligations to protect and uphold individuals' abilities to exercise these rights (more on what this means in a moment).

[1] In this chapter we'll be using the term "transgender" very broadly to refer to any person who's gender identity does not correspond to their sex assigned at birth. This includes people who identify as transgender men, transgender women, transmasculine, transfeminine, nonbinary, agender, genderqueer, genderfluid, etc. However, not all transmasculine, transfeminine, nonbinary, agender, genderqueer, and genderfluid people identify themselves as 'transgender' (for more on labeling see Galupo & Sailer 2021).

But what does it mean to have a right to an *identity*? Identity rights have become an important legal concept. Much discussion of identity rights originates from Article 8 section 1 of the United Nations Convention on the Rights of the Child (UNCRC), which defines the 'Right to Personal Identity' as the following:

> States parties undertake to respect the right of the child to preserve his or her identity, including nationality, name, and family relations as recognized by law without unlawful interference. (UNCRC, 1989)

However, 'personal identity' as it's being invoked in Article 8 Section 1 isn't meant to be limited to just nationality, name, and family relations. For example, the Human Rights Law Clinic notes that UNCRC intentionally "opted for an expansive vision of the right to identity", emphasizing that even though "nationality, name, and family relations were seen as essential elements of identity, they were not intended to serve as limiting parameters" (McCombs & González 2007, 8). Thus, what counts as part of one's identity is left intentionally open within the context of international law because what counts as part of someone's identity will depend significantly on social context.

This approach is consistent with much of the philosophical work on identity, which stresses how our identities are shaped by social structures. For example, Judith Butler argues that gender identity isn't something we possess inherently (2006). Rather, it's something that we *do*, a role we perform that is created and shaped by social expectations. But even though our identities are shaped by culture, they are still real and significant. Linda Alcoff makes this point in her book *Visible Identities: Race, Gender, and the Self* (2006, p. 5-10):

> Social identities may be relational, then, as well as contextually variable, but they remain fundamental to one's experience of the world. […] One's racial and gender identity is fundamental to one's social and familial interactions [… and] determines in large part one's status within the community and the way in which a great deal of what one says and does is interpreted [... Thus, identities affect] our relations in the world, which in turn affects our interior life […]. If social identities such as race and gender are fundamental in this way to one's experiences, then it only makes sense to say that they are fundamental to the self..

Thus, social identities (including gender, race, nationality, and family relations) shape how we understand each other and ourselves. The complex significance of social identity underscores the importance of respecting peoples' identity rights. We've previously discussed violations of identity rights, arguing that "restricting the way someone expresses their social identities is a very clear infringement on their dignity and personhood […] because it denies them the agency to authentically represent their social identity" (Baker & Green 2021, 169-170). We cite misgendering as an example of violating someone's right to gender identity (where misgendering can include actions like intentionally deadnaming someone or refusing to use their correct pronouns). Being within an environment where one is frequently misgendered tends to be experienced as distressing and traumatic and is consequently associated with poor health outcomes (World Professional Association

for Transgender Health, 2012). However, when people are able to authentically embody and express their gender identities (for transgender people this can include medically and/or socially transitioning), physical and mental health outcomes are significantly improved (Durwood et al. 2017; Tordoff et al. 2022). Of course, if we follow feminist philosophers like Butler and Alcoff in acknowledging the way identity shapes our relationships and inner lives, these findings won't seem especially surprising. Social identity is essential to people's conceptions of self, so denying them the opportunity to fully express and inhabit their social identities infringes on their personhood.

Shifting back to jurisprudence, does the right to identity entail legal obligation? Short answer: yes. For example, Article 2 Section 8 of the UNCRC makes the obligation explicit, saying that states must "provide appropriate assistance and protection" to those deprived of their identity (1989). So, there exists a right to identity (expansively understood) and states have an obligation to uphold and enforce that right.

In American Constitutional law, the mechanism courts use to uphold vital rights is cashed out in so-called "tiers" of "scrutiny." That is, how closely courts scrutinize the government's justification for a particular action or law. Spread across three formal tiers (with a patchwork of sliding-scale, special context alternatives), the more important the right at issue, the higher a standard the government must meet to justify any intrusion on the right. If the government wants to stop a newspaper from publishing something, it needs a really, really good reason. If it wants to stop someone from selling snake oil, the way it does so just needs to make sense.

In this chapter we will argue that respecting transgender people's right to identity in the American legal context involves applying what's called *strict scrutiny* to cases which involve transgender discrimination. For a group to receive strict scrutiny in judicial review, the group must be what's called a *suspect class*. In section 3 we'll lay out the criteria for suspect classification and use the methodologies of experimental jurisprudence to argue that transgender people meet the criteria, which means that transgender discrimination cases should receive strict scrutiny.

As is discussed in section 1 of this volume, experimental jurisprudence empirically investigates laypeoples' intuitions (i.e., people without formal legal training) about legal concepts and applies these findings to jurisprudential debates. Kevin Tobia notes that this can take multiple forms: one can either run experiments to collect this data or apply data others have collected in a novel way (2022, 45). In this chapter we'll be doing the latter — reviewing data researchers have collected on laypeople's attitudes towards transgender issues and applying these findings to the jurisprudential question at hand: whether transgender people's right to identity compels strict scrutiny, thereby codifying the 'right to transgender identity'. We will be considering attitudes from two different layperson groups: transgender people and the general public.

To motivate of discussion of judicial scrutiny, consider the current political and legal landscape surrounding transgender legal rights in the United States. Does there presently exist a coherent right to transgender identity?

Such a right seems to exist in the case of employment discrimination. In *Bostock v Clayton* the Supreme Court ruled that workplace discrimination on the basis of sexuality and gender identity violated Title VII of the Civil Rights Act of 1964 (because such action constitutes discrimination "because of sex", which Title VII expressly prohibits). This substantive result suggests the outlines of a right to transgender identity, though the doctrinal scope of the decision is not so sweeping.

Assume the right exists in at least some minimal form for a moment — perhaps even as limited as the right to sell "filled milk"[2] or swing one's fist (which stops, as the truism goes, at someone else's face). We still must ask: how far does that right extend? For example, should states be allowed to deny transgender people access to bathrooms that align with their gender identity? 17 states plus the District of Columbia have prohibited discrimination based on gender identity in public accommodations (which includes bathrooms but also restaurants, hotels, libraries, gas stations, etc.). However, Arizona, Illinois, Kansas, Kentucky, Massachusetts, Minnesota, Mississippi, Missouri, South Carolina, Tennessee, and Texas have all proposed bills that would require transgender people to use the public toilets that correspond to their sex assigned at birth. In 2016, the US Department of Education prohibited public schools from discriminating against transgender students, which included access to bathrooms and changing rooms. However, the policy was rescinded by the Trump Administration in 2017 (Peters et al. 2017). As it currently stands, the public is strongly divided over the bathroom issue (Pew Research Center 2022).

Controversy surrounding access to public facilities has significant implications for transgender peoples' health and quality of life. For example, 14% of transgender Americans report being verbally, physically, or sexually assaulted or harassed in a public restroom during the last 12 months and 59% reported having avoided using public restrooms for fear of harassment or assault (US Transgender Survey 2015). This physical and psychological threat extends to transgender children as well. A 2019 study found that 36% of transgender and nonbinary students that were restricted from restrooms and locker rooms were sexually assaulted in the last year (Murchison et al. 2019). Thus, we proceed from the starting point that philosophical, legal, and empirical discussions of transgender identity can have serious and tangible effects.

2. What level of scrutiny?

Cases decided under the Constitution's Equal Protection Clause, at a basic level, put a citizen's right to be free of illegitimate discrimination on a scale weighed against the government's interest in legitimately discriminating (if it exists[3]). As a kind of heuristic, the Supreme Court has stratified this analysis into "tiers" of scrutiny: the more pernicious the kind of discrimination, the more searching the scrutiny courts use. Thus, designating tiers of judicial scrutiny is a mechanism for protecting the

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[2] *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938)

[3] We use the word "discriminating" here in both the pernicious and non-pernicious sense. Obviously, for example, the government has an interest in discriminating between (to be reductive about it) stupid policies and smart policies.

interest of vulnerable social groups. As a practical matter, then, the most important question during the life of many constitutional tort cases is "what level of scrutiny applies?" (Leitman 1994). Thus, put simply, scrutiny refers to how much of an interest the government must have before it can make decisions on the basis of a certain categorization — and how much tailoring such a law must have to meet that interest (e.g., if the government wants to regulate the content of drugs, it can do so pretty easily and without particularly careful tailoring; if the government wants to regulate religion, it must give a very good reason, and even then the law must be narrowly written to serve that interest).

There are three formal "tiers" that can answer the "what level of scrutiny" question: strict scrutiny, intermediate scrutiny, and so-called "rational basis." In turn, they require progressively less compelling showings from the government before it can impose certain restrictions on rights (e.g., a law saying black people cannot hold certain legal jobs would get the highest level of scrutiny, a law saying that people who have not passed the bar cannot hold those jobs would — at least without more context — likely get the lowest). Practicing lawyers frequently shorthand the issue to say that strict scrutiny means plaintiff wins, rational basis means the government wins, and intermediate scrutiny means all bets are off.[4]

All of this grows out of what has been called " the most famous footnote in the [Supreme] Court's history" (Strauss 2010): footnote 4 of *United States v. Carolene Products.* The relevant part of that footnote reads:

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious [or] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

As we discuss below, this basic idea—that some groups might, by reason of being "discrete and insular minorities," need some protections because the ordinary "political processes" will fail to protect them—develops into a multi-factor test and gets widely applied. As far as doctrinal labels, if the government targets a "suspect class" its actions get strict scrutiny; if it targets a "quasi-suspect" class, intermediate scrutiny; and anything else gets rational basis. But the basic concept (if not also its multi-factored progeny) presents a question well-suited for experimental jurisprudence: Can the ordinary political process be relied upon to protect particular minority groups, such that those groups' right to identity is sufficiently protected?

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[4] Many have argued this should not be the case (see, e.g., Jackson 2011).

But, by way of context, while the exact parameters of each test are beyond the scope of this chapter, this all falls out from the burdens the government faces: the showing required of the government under strict scrutiny is virtually impossible to make and requires the government to show there is literally no more narrow way to accomplish the same goal — and that the goal is a government interest of the highest priority; by the same token, rational basis only requires the government to show the law is rational — and that showing can even be a post hac explanation (e.g., it doesn't even have to be the real reason the government passed the law).

As Katie Eyer sets out in a recent article, this question is a live one for the transgender community (2022). And the stakes are high — courts are answering the question "what level of scrutiny should laws targeting transgender people get?" at the same time as an unprecedented wave of such laws is sweeping the country. In 2022 alone, more than 240 bills have been introduced that discriminate on the basis of gender status or modality (Lavietes & Ramos 2022).

Because of the nature of various constitutional interpretive canons[5], courts have often avoided resolving the basic question: what level of scrutiny applies to laws that make distinctions based on the fact that the people they governs are transgender? And given the incentives and structure of litigation, because of the Supreme Court's decision in *Bostock*, many plaintiffs have made the (rational) choice to argue that transgender status discrimination ought to be treated like traditional gender discrimination, and subject to intermediate scrutiny. But all of that leaves the question unanswered: is there something about the way society views transgender people that leaves them more out in the political wilderness than those who face traditional sex discrimination? If so, respecting their right to identity would then demand strict scrutiny.

3. Suspect Classification

The *Carolene Products* formulation, over time, has generally come to be expressed as four criteria that, if met in some imprecise way, trigger strict scrutiny or at least intermediate scrutiny (making the subject group a "suspect class" or "quasi-suspect class" respectively). They were stated in something like their present form in Justice Brennan's plurality opinion in *Frontiero v. Richardson*. Those factors are:

1. Those in the group have historically faced discrimination, prejudice, stigma, and the like.
2. The characteristic that binds the group is immutable — or at least, is the kind of thing society should not be demanding people change, like religion — or otherwise highly visible.
3. The group is typically powerless to protect itself through the ordinary political process.
4. The characteristic does not prevent members of the group from contributing to society.

(See, e.g., Hutchinson 2014, Bernhardt 2016).

Each of these factors is not dispositive. A practicing lawyer might be forgiven for not knowing them. And indeed, the most significant equal protection case of the Roberts/Alito Court era — *Obergefell v.*

[5] That is, courts avoid resolving weighty constitutional questions when a particular dispute can be resolved without those answers, saying that "is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." *Karnoski v. Trump*, __ F3d __, __, Slip Op. at *41 (9th Cir 2019). And the nature of many of the laws at stake means that, even given the heavy thumb on the scale in favor of the government under lower levels of scrutiny, the laws still do not pass muster. Thus, courts say, when a law is "unsupported by any legitimate state purpose," the Court "need not" figure out "the level of scrutiny applicable." *Denegal v. Farrell*, No. 1:15-cv-01251-DAD-MJS (PC), 2016 U.S. Dist. LEXIS 88937, at *18-19 (E.D. Cal. July 7, 2016).

Hodges[6] — does not even use the phrase "suspect class." Nor, at least without searching that decision closely, can scholars find the factors at play.[7] In some ways, that approach squares more closely with the broad statement of principles in *Carolene Products* itself than the multifactorial bean-counting of its progeny.[8] And some have suggested that *Obergefell* and the decisions leading up to it ultimately toss out the four factors entirely for an approach that basically just asks "do members of the group face unjust animus?" (see Araiza 2017). For convenience, we structure our discussion in the four-factor framework, understanding that the multifactorial approach may well be on the outs.

1. Historical Discrimination and Prejudice.

The first factor in traditional suspect class analysis is the question of whether the class has historically faced discrimination and prejudice.

Amongst the public, there seems to be a general recognition of past and present discrimination against trans people. For example, in 2022, the Pew Research Center found that 78% of Americans think discrimination against transgender people exists – 57% saying that there is "a great deal/fair amount" of discrimination and a further 21% saying there exists "some" discrimination. Pew also found that only 14% of Americans think that society is "extremely/very" accepting of transgender people, with a further 35% thought that society was "somewhat accepting" of transgender people, while a plurality (44%) felt that society was "little/not at all" accepting of transgender people. Thus, there is a fairly widespread recognition that transgender people experience considerable social prejudice.

Furthermore, the American public favorably views anti-discrimination protections for transgender people. For example, the University of Illinois found that 65% of Americans think that transgender people should "receive protections provided by anti-discrimination laws" (University of Illinois

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[6] 576 US 644 (2015).

[7] Bernhardt (2016) makes a compelling argument that these factors *are* at work in *Obergefell*, despite not appearing by name (noting "[w]hatever *Obergefell* lacked in the explicit naming conventions that some commentators may prefer, it more than made up for in substance and practical application").

[8] Azaria (2017) put it, the Supreme Court's 1985 decision in *City of Cleburne v. Cleburne Living Center*, 473 US 432 (1985) "mark[ed] the last time the Supreme Court performed a serious analysis of whether a group should be denominated a suspect class."

This appears very striking in comparison to the Second Circuit Court of Appeals' decision in *Windsor*, which carefully applies each factor (*Windsor v. United States*, 699 F.3d 169, 181-185 (2d Cir. 2012) ("Analysis of these four factors supports our conclusion that homosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect (rather than suspect) based on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect."), to the Supreme Court's decision that does not even name the test. *United States v. Windsor*, 570 U.S. 744 (2013); *see also, id.* at 764 (Scalia, J., dissenting) ("if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality…").

Springfield Research Office 2015) and a CNN poll reported that 75% of Americans support "laws that guarantee equal protection for transgender people in jobs, housing and public accommodations" (Agiesta 2016). However, as we noted in section 1, the public remains divided on certain policy areas, including bathroom and public facility access.

The public perception also largely coheres with the available data of transgender peoples' experiences of discrimination. We'll discuss findings from the 2015 U.S. Transgender Discrimination Survey (USTS), which was the largest survey of transgender and gender nonconforming people to date, with 27,715 respondents from all 50 US states, US territories, and US military bases. The 2015 USTS is still generally considered the research gold standard for information on transgender peoples' experiences.[9]

According to the 2015 USTS, the majority of transgender people (55%) had experienced intimate partner violence, 47% had been sexually assaulted, and 10% had experienced some type of family member violence. These patterns of discrimination extend beyond the home as well. Regarding employment, USTS found that 30% of respondents who were employed during the last year report being fired, denied a promotion, or "experiencing some other form of mistreatment in the workplace due to their gender identity or expression, such as being verbally harassed or physically or sexually assaulted at work". 77% reported taking "steps to avoid mistreatment in the workplace, such as hiding or delaying their gender transition or quitting their job". These troubles at work also contribute to the high rates of poverty and homelessness experienced by the transgender population. For example, 29% of transgender people were living in poverty (compared to the US national average of 9.1%, Kilduff 2022). The Executive Summary of the 2015 USTS cites unemployment as the likely contributing factor to the high rates of poverty reported within the transgender community, noting that the 15% unemployment rate of transgender people was three times higher than the national average.

Finally, we note that the *Carolene Products* formulation makes reference to discrimination both present and *historical*. However, the first iteration of the USTS (then called the' National Transgender Discrimination Survey') was conducted in 2008. Almost no survey data on transgender peoples' experiences or public opinion towards transgender people exist prior to the late 2000s.

Nonetheless, there is plenty of evidence of historical discrimination against transgender people, which explains the patterns of contemporary discrimination that we see in the Pew and USTS data. For example, the *Diagnostic and Statistical Manual of Mental Disorder*listed "Transsexualism" (in the DSM-3) and "Gender Identity Disorder" (in the DSM-4) as mental disorders, diagnoses which were used to justify medical discrimination and mistreatment of transgender people (Davy 2015). We also see evidence of historical discrimination in law enforcement. During the 1940s, 50s, and 60s police

[9] The last USTS was conducted in 2015 and data collection for the 2022 USTS is (at the time we are writing this) currently underway. Recent research suggests that if anything the American legal landscape has gotten more hostile to transgender people since 2015, making the issue of legal protections for transgender people especially pressing in the contemporary moment (Human Rights Watch 2022).

weaponized "mascarading laws" to target cross-dressing LGBT people, including transgender people (Eskridge 2002). This sort of policing became known as the "three item rule" because LGBT people would be required to prove they were wearing at least three items of clothing associated with their assigned sex when stopped by the police or else be arrested. Thus, throughout the 20th century we see transgender identity being pathologized and policed, which amply evidences that the contemporary discrimination has historical precedent.

2. Immutability.

The second factor is nominally "immutability." But a strict or literal sense of immutability is quite clearly *not* what courts mean here. Rather, as commentators have long observed, immutability gets a sense of whether people *should* need to change a particular characteristic. Or, as an often-cited concurrence put it:

> 'immutability' may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.
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> *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1988) (Norris, J., concurring).

Once framed that way, the value of experimental jurisprudence methodology is clear here: the question is simply "what kinds of things does society recognize as so core to a person's autonomy that they should not be required to change them to receive protection from the state?" All that means that some quality of a person is immutable in the relevant sense if it would be unreasonable for the state to demand it be altered.

Courts have long answered — albeit largely implicitly[10] — that religion meets the immutability criteria. *See, e.g., New Orleans v Dukes*, 427 US 297, 303 (1976) ('race, religion, or alienage" all trigger strict scrutiny). Perhaps that is because religion is special. But there seems to be broad scholarly consensus that religion and gender are more alike than they are different (see, e.g., Clark 2015). That is, as one scholar put it: "the great lesson of the transgender cases is that, where there is a will, there is a way to change one's sex, [and a]t least as far as immutability is concerned, religion and sex are more alike than different" (Kramer 2015). Basically, despite it being clear that gender and sex can (at least in some meaningful sense, like religion) be changed (thus, literally mutable), gender matches religion in being the kind of thing that we generally think people *ought* not be told they must change in order to, say, own land or vote. To make the case that transgender identity is similarly immutable, we point to empirical data on the stability of transgender peoples' gender identities and the relationship between gender identity and mental and physical health.

[10] That is, courts treat the answer to this question as so obvious as not even require analysis of the factors.

Regarding stability, a review of available studies on transition show that regret for transition is extremely rare (Bustos et al. 2021):

> A total of 27 studies, pooling 7928 transgender patients who underwent any type of GAS [gender assignment surgery… the] prevalence of regret after GAS was 1% (95% CI <1%–2%). […] The prevalence of regret among patients undergoing transmasculine and transfeminine surgeries was <1% (IC <1%–<1%) and 1% (CI <1%–2%), respectively.

This coheres with the survey data on detransitioners (people who transition and then transition back to their assigned gender). Turban et al. (2021) found that while 13.1% of participants surveyed for the 2015 USTS reported detransitioning, 82.5% of the detransitioners claimed their decision to detransition was influenced by "at least one external driving factor" (such as family pressure or social stigma). Only 15.9% of detransitioners reported detransitioning because they were influenced by "internal driving factor" (such as deciding they weren't actually transgender). A similar pattern of gender identity stability has been observed in transgender children, with 95% of transgender children continue to identify as transgender after 5 years (Olson et al. 2022).

Thus, transgender peoples' gender identities are stable and robust. Further, we argue that (quoting *Watkins v. U.S. Army*) gender identity is so "central to a person's identity", that penalizing a transgender person from authentically expressing their identity would be "abhorrent" and unnecessarily cruel. The empirical evidence supports this conclusion. For example, 40% of transgender people reported having attempted suicide during their lifetimes, compared to the 4.6% of the general population (USTS 2015). High suicide rates have been attributed to legal and social discrimination. Turban et al. (2020) found that suicide rates were higher for transgender people who'd been previously exposed to some form of professional or religious conversation therapy during their lives, defined as "psychological interventions that attempt to change one's gender identity from transgender to cisgender" (note that conversion therapy for LGBT minors is still legal in 21 US states and 4 US territories). However, legal interventions can help: providing access to gender-affirming healthcare (specifically gender-affirming surgeries) was found to reduce past-year suicidal ideation in adults by 44% (Almazan et al. 2021). In transgender youth social transition (e.g., changing names and pronouns) was found to reduce suicidal ideation by 29% and suicidal behavior by 56% (Russell et al. 2018). However, despite these known risks, the Human Rights Watch reported that 2022 was predicted to set a record in the US for laws targeting transgender adults and youths (Jones 2022).

We conclude, then, that denying transgender people the right to express their gender identities causes undue physical and psychological harm such that it's unreasonable for the state to insist on harming transgender people in this way as a precondition for their participation in society. Thus, transgender identity is immutable in the sense that asking transgender people to give up their gender identities would be an unreasonable ask on the part of the state.

3. Powerlessness.

Powerlessness is perhaps the easiest criterion — though still interpretively fraught. For instance, powerlessness in the relevant sense doesn't necessarily track a pure measure of political power. Consider, for example, poverty (which is obviously associated with a lack of political power): the "Supreme Court has held repeatedly that poverty, standing alone, is not a suspect classification." (*Harris v. McRae*, 448 U.S. 297, 323 1980).[11] So the question is whether the kind of powerlessness that matters is at play here. As we alluded to above, because of the historical background of the Equal Protection Clause, (at least if one is playing in the doctrinal sandbox) it often makes sense to ask "is this like race?" That is, when we are considering suspect classification, the question is whether the group at issue is powerless in a meaningfully similar way to the way people have been disempowered on the basis of race. And for transgender people, as explained below, the answer is yes. We argue that transgender people are powerless in a number of domains relevant for suspect classification, including political representation, housing access, and policing.

In terms of political power, the Human Rights Campaign found that 49% of transgender adults (and 55% of transgender adults of color) "said they were unable to vote in at least one election in their life because of fear of experiencing discrimination at the polls" (Bibi 2020). LGBTQ people are also generally underrepresented in positions of political power in the US. As of 2022, LGBTQ people make up 7.1% of the US population but only .2% elected official positions. According to the Victory Institute's 2022 census of "out LGBTQ elected officials", 35,854 more LGBTQ people would need to be elected to achieve "equitable representation", including 22 more LGBTQ people in the house of representatives. Though the Victory Institute didn't specifically publish the percentages of elected officials who are transgender, they did note that while the number of transgender elected officials is on the rise, transgender people are even more underrepresented in elected positions than their LGBQ counterparts (ibid). Thus, while we've seen an explosion of laws *about* transgender people, transgender law makers are still extremely rare. Due to this pervasive underrepresentation, it's clear that transgender people lack power when it comes to advocating for their legal and political interests.

This powerlessness also extends to basic needs, such as access to housing and shelter. For example, at some point in their lives almost a third of transgender people had experienced homelessness (USTS 2015). Further, 26% of people that had experienced homelessness in the last year reported having avoided staying in shelters "because they feared being mistreated" and 70% who had stayed in shelters reported "some form of mistreatment, including being harassed, sexually or physically assaulted, or kicked out because of being transgender" (USTS 2015).

Transgender people also experience considerable powerlessness when it comes to law enforcement and policing. According to the 2015 USTS Executive summary:

[11] But see *James v. Valtierra*, 402 U.S. 137, 145 (1971) ("an explicit classification on the basis of poverty … demands exacting judicial scrutiny") (Marshall, J., dissenting).

> In the past year, of respondents who interacted with police or law enforcement officers who thought or knew they were transgender, more than half (58%) experienced some form of mistreatment. This included being verbally harassed, repeatedly referred to as the wrong gender, physically assaulted, or sexually assaulted, including being forced by officers to engage in sexual activity to avoid arrest. […] Police frequently assumed that respondents—particularly transgender women of color— were sex workers.

Of course, there is a sense in which transgender people are gaining power nationwide. Over the last few years a number of transgender research groups and advocacy organizations have emerged — e.g., the National Center for Transgender Equality, the Transgender Law Center, and the Center for Applied Transgender Studies. However, as a *group*, transgender people lack political power, due to both the relatively small size of the community (.5% of US adults, according to a 2022 study conducted by the Center for Disease Control) and (current and historical) discrimination and disenfranchisement. Indeed, this kind of power very much resembles the way that Black people have politically organized — and many of the legal organizations (mentioned above) supporting transgender rights are modeled on the NAACP. Thus, while transgender people continue to make important social, intellectual, and political contributions, as a group transgender people are powerless in the sense that's relevant to discussions of scrutiny.

4. Social contribution.

While near endless ink has been spilled trying to suss out what immutability means, the societal contribution factor gets far less attention in modern literature. Perhaps some of that is because of just how dated the analysis sounds:

> And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

> It is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (intellectually disabled people are not a suspect class).

But putting the feel to one side, what is at work here is simple enough: the question is whether there is something inherent in being transgender that makes a person mechanically (e.g., physically or mentally) incapable of contributing to society. In the *Windsor* decision later affirmed by the Supreme

Court, (then-)Chief Judge Jacobs of the Second Circuit addressed this factor bluntly for sexual orientation discrimination (while also seeming to question the continued relevance of this factor):

> There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them. The aversion homosexuals experience has nothing to do with aptitude or performance.
>
> *Windsor v. United States*, 699 F.3d 169, 182-83 (2d Cir. 2012).

More recent courts have taken a similarly brusk approach to answering this question for transgender people – see e.g., *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 612 (4th Cir. 2020); *Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015). That is, modern cases basically treat this factor as a given, and do not have much of a test to apply.

Whatever the test, the data bears out that "[b]eing transgender bears no … relation" to social contribution. *Grimm*, 972 F.3d at 612. At most, the discrimination that comes along with being transgender might *hinder* such participation. But there is nothing about being transgender (separate from external social marginalization) that interferes with meaningful social contribution. And indeed we certainly see transgender people contributing to society. Consider Rachel Levine, who made history becoming the highest ranking transgender person to ever serve in the federal government when she was appointed as the Assistant Secretary for Health by President Biden. And in the entertainment industry, transgender actors and writers like Laverne Cox and Elliot Page are winning acclaim for their acting performances, portraying the rich and complex lives of transgender people.

However, we want to push the social contribution criteria one step farther and not merely claim that transgender people *can* contribute to society. Rather, transgender people — in virtue of being transgender — are actually able to contribute to society in unique ways. Before concluding we want to briefly sketch out the view, drawing from work in feminist social epistemology (sometimes called 'standpoint epistemology', see, e.g., Harding 1993, Toole 2019, Wu 2022).

Standpoint epistemologists claim that an agent's epistemic standing is influenced by their social identities which can include:

> spatial location or social identity, habits of perceptual attention, what Ian Hacking calls "styles of reasoning" and also the individual's own interests — interests which are fluid and open to interpretation but have some objective elements in regard to the condition of the knower's material reality (Alcoff 2007).

Thus, patterns of lived experiences associated with peoples' social identities can affect their epistemic standing regarding certain types of inquiry. To illustrate the epistemic significance of different standpoints, consider sexual harassment allegations. Men and women often react differently when called upon to assess the plausibility of sexual harassment allegations, with women assigning

the allegations more default plausibility than men. Cases of men intentionally downplaying the prevalence of sexual harassment are frequently discussed. But sometimes (perhaps often) one should imagine that men and women *are* doing their epistemic due diligence, considering the plausibility of the harassment allegations against their past experiences. However, one's social identity affects their past experiences. For example, women are more likely to have experienced sexual harassment than men, which gives them epistemic advantage in assessing sexual harassment accusations. Because men tend to have fewer experiences of sexual harassment, they assume the behavior just isn't very prevalent based. Standpoint theorists claim that in many cases oppressed groups share a unique set of lived experiences, which can yield fruitful epistemic insights.

Transgender people are no exception. For example, transgender writers and public figures frequently emphasize that transgender people have uniquely meaningful perspectives on gender. Laverne Cox makes this point about transwomanhood:

> I think trans women, and trans people in general, show everyone that you can define what it means to be a man or woman on your own terms. A lot of what feminism is about is moving outside of roles and moving outside of expectations of who and what you're supposed to be to live a more authentic life. (2014)

Further, there's an idea in queer theory that heterosexual cisgender people (i.e., straight people who are not transgender) tend to underestimate the significance of gender in modern culture because their social identities don't force them to critically reflect on gender (see e.g., Stone 1992; McKinnon 2015; Radi 2019). Conversely, transgender people appreciate the way gender shapes social organization and interpersonal relationships *because* they've had to actively confront their own experiences of gender (e.g., experiencing gender dysphoria/euphoria, undergoing social and medical transition, etc.). This makes transgender people (by virtue of occupying the 'transgender standpoint') especially sensitive to way gender affects: how we present ourselves, how we relate to each other (e.g., who we befriend and associate with), and even how we talk, move, and hold our bodies.

Hence, it's not merely the case that being transgender doesn't impede positive contribution to society. We've gestured at why being transgender might actually represents a unique, socially valuable epistemic standpoint. In this way, protecting transgender peoples' rights to identity doesn't only benefit LGBT people, it also benefits the larger community (who can learn from the unique epistemic standpoints occupied by transgender people).

4. Conclusion

As we have explained above, transgender people meet the classic criteria for strict scrutiny. And more to the point for this volume, the insights from the experimental jurisprudential approach counsel strongly in favor of that conclusion as well. So, protecting transgender peoples' right to

identity requires applying strict scrutiny to transgender discrimination cases in the American legal context.

However, we stress that points made in this chapter can be extended beyond the American context. Victor Madrigal-Borloz provided the following characterization of the global situation of transgender human rights, saying that "trans and gender-diverse people around the world are overwhelmingly and disproportionately the victims of violence to levels that offend the human conscience" (2018). We've laid out reasons why ordinary legal protections can fail to sufficiently protect transgender peoples' rights given existent patterns of political discrimination and disenfranchisement. As such, we stress that now is the time for individuals, private institutions, and governments to enact policies which uphold and protect transgender peoples' rights to exist and flourish as productive, equal members of society.

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