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## Justifying the Margins: Granting Suspect Classification to Trans\* Individuals in the U.S. Judicial System, 55 UIC L. Rev. 403 (2022)

James Casey Edwards

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# JUSTIFYING THE MARGINS: GRANTING SUSPECT CLASSIFICATION TO TRANS\* INDIVIDUALS IN THE U.S. JUDICIAL SYSTEM

JAMES CASEY EDWARDS\*

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## I. INTRODUCTION

“[T]hey threw the said *Hall* on his backe, and then this exaiate felt the said *Hall* and pulled out his members whereby it appeared that hee was a perfect man, and more hee cannot depose.”<sup>1</sup> The violence in this excerpt from a 1629 colonial court hearing transcript depicts the egregious physical mistreatment of gender nonconforming individuals that have been normalized in our nation for centuries.<sup>2</sup> Thomas/Thomasine Hall was physically assaulted for an examination, where the court found Hall to be “a man and a woeman,” [*sic*] and was punished for violating gender laws.<sup>3</sup> Hall’s case highlights that gender nonconformity has been a part of our nation for centuries.<sup>4</sup> Since colonization, society’s understanding of gender has both regressed and progressed, yet the U.S. government and legal system still lag behind in acknowledging the sordid history of gender in this nation.<sup>5</sup> Policing and precluding trans\* individuals<sup>6</sup> from justice are still too common in the legal system.<sup>7</sup>

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\* James Casey Edwards, Juris Doctor Candidate 2022, UIC School of Law. I would like to thank every person who made this piece possible. I could not have made it through this process without the support and guidance of my family, friends, editors, and professors. A special thank you to all the historians and researchers who made this area a possibility by putting into text and media the experiences of LGBTQ+ communities and trans\* communities specifically so that these contexts can be brought into legal conversations.

1. Henry Mcllwaine, *Minutes of the Council and General Court of Colonial Virginia, 1622-1632, 1670-1676, with Notes and Excerpts from Original Council and General Court Records, in 1683, Now Lost (Richmond: The Colonial Press, Everett Waddy Co., 1924)*, AM. LEGAL HIST. \*193, \*194 (last updated Nov. 18, 2009), [www.houseofrussell.com/legalhistory/alh/docs/viriniageneralcourt.html](http://www.houseofrussell.com/legalhistory/alh/docs/viriniageneralcourt.html) [perma.cc/FX4H-449Q].

2. This Comment uses the term “gender nonconforming” to identify individuals who do not express their gender in manner consistent with the Western woman-man gender binary.

3. Mcllwaine, *supra* note 1, at 195 (explaining that Hall was most likely intersex, that Hall lost the right to choose a single gender, and that Hall’s punishment was to dress in all-male attire except for female-associated adornments on Hall’s head).

4. GENNY BEEMYN, *TRANSGENDER HISTORY IN THE UNITED STATES 2* (Laura Erickson-Schroth ed., 2014).

5. *Id.* at 1-2.

6. This Comment uses the term “trans\*” as an inclusive term, where the asterisk is specifically meant to signal the term as inclusive, rather than exclusive, in recognizing identities under the umbrella, and in accordance with the Oxford English Dictionary meaning: “to indicate inclusion of gender identities such as gender-fluid, agender, etc., alongside transsexual and transgender.” Katy Steinmetz, *The Oxford English Dictionary Added ‘Trans\*.’ Here’s What the Label Means*, TIME (Apr. 3, 2018), [www.time.com/5211799/what-does-trans-asterisk-star-mean-dictionary/](http://www.time.com/5211799/what-does-trans-asterisk-star-mean-dictionary/) [perma.cc/6QKC-CMJB].

7. Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 621

Trans\* rights are generally viewed as an afterthought in our legal and social systems, and therefore the community has been relegated to second-class citizenship.<sup>8</sup> On February 24, 2021, the U.S. House passed the Equality Act with bipartisan support.<sup>9</sup> Passing the Equality Act and signing it into law would demonstrate slight legislative progress, but the Act has still not become law as of 2022.<sup>10</sup> But in order for this legislation to provide actual protection for trans\* communities, the Judiciary must establish a strict scrutiny level of review for the newly protected classes.<sup>11</sup> Specifically, the Judiciary must reject the current standard under Title VII of the Civil Rights Act of 1964 to relate the protections of trans\* and gender nonbinary individuals through the term “sex” when addressing employment discrimination claims under the Title.<sup>12</sup> Instead, new, distinct protected classes must be created for trans\* communities. Without these classes, the communities will continue to be viewed as pathologies of socialized gender norms – as the “other” in terms of “sex.”<sup>13</sup> As such, it is unattainable for trans\* and nonbinary communities to achieve equal recognition under the law. Through heightening the legal standard of review, the legal system can account for past prejudices and work with other entities to expand trans\* inclusivity in America.

The violent history of policing of trans\* individuals warrants the promotion of the standard of review for gender identity to

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(2019) (discussing the ways in which LGBT rights advocates “debated jettisoning gender identity protections” from the Employment Non-Discrimination Act in order to “improve the law’s chances” at passing, and how the marriage equality movement centered middle-class gays and lesbians at the expense of non-conforming LGBTQ+ community members and advocating for other community concerns).

8. G.E. Branch III, *Trump Relegates Transgender Americans to Ranks of Second-Class Citizens*, DIVERSE (July 26, 2017), [www.diverseeducation.com/article/99528/](http://www.diverseeducation.com/article/99528/) [perma.cc/CGP7-ADXM].

9. Gabby Birenbaum, *House Passes the Equality Act in a Victory for LGBTQ Americans*, VOX (Feb. 26, 2021), [www.vox.com/2021/2/26/22303053/house-passes-equality-act-lgbtq-senate](http://www.vox.com/2021/2/26/22303053/house-passes-equality-act-lgbtq-senate) [perma.cc/FW4U-7KVZ]; Equality Act, H.R. 5, 117th Cong. (1st Sess. 2021).

10. Birenbaum, *supra* note 9.

11. As gender identity and gender expression fall on a spectrum, and these identities intersect with various identities and traits, this Comment refers to trans\* communities in the plural, rather than as a singular monolithic community.

12. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1733 (2020) (interpreting Title VII workplace protections under “sex” as including both sexual orientation and gender identity).

13. “Other” is used to reflect the positionality of gender nonconforming individuals in the U.S. where cisgender individuals comprise the mainstream, normative identity, and gender nonconforming individuals’ identities are pathologized as “other.”

suspect classification.<sup>14</sup> Understandings of trans\* communities are not afforded in current court cases or statutes using the term “sex.”<sup>15</sup> Rather than continue to enforce a standard of the “other identity seeking conformity” on members of trans\* communities, the U.S. Judiciary must work to develop policies where all genders are equally protected.<sup>16</sup> Gender must be understood as fluid and gender rights should not be confined to the court’s antiquated understanding of gender.<sup>17</sup> Policies, like the Equality Act, constitute a legislative step in the right direction and provide the framework for these sorts of protections.<sup>18</sup> However, more work is needed to provide true protections to trans\* and nonbinary communities—even assuming the Equality Act is signed into law.<sup>19</sup>

Throughout this Comment are critiques of how the U.S. government has precluded trans\* communities from equitable access to social systems.<sup>20</sup> Part II will discuss how the legal system currently applies intermediate scrutiny to claims of gender discrimination, including the legal implications of classifying trans\* individuals under the term “sex.”<sup>21</sup> Part II will also review the history of discrimination against trans\* communities and the development of the social and medical understanding of trans\*

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14. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (applying strict scrutiny review based on sex as an “immutable characteristic determined solely by the accident of birth” which “frequently bears no relation to ability to perform or contribute to society,” but only according to the female-male gender binary – failing to recognize trans\* identities).

15. George, *supra* note 7.

16. Tina Tchen, *Not Far Enough: Why the Law is Only the First Benchmark to True Equality*, BROOKINGS INST. (Aug. 2020), [www.brookings.edu/essay/not-far-enough-why-the-law-is-only-the-first-benchmark-to-true-equality/](http://www.brookings.edu/essay/not-far-enough-why-the-law-is-only-the-first-benchmark-to-true-equality/) [perma.cc/8XMY-JDL8] (describing the development of sexual harassment and gender discrimination protections in the workplace as inadequate for women and stressing the need for stronger legal recourse for gender-based discrimination).

17. Abigail C. Saguy et al., *Reassessing Gender Neutrality*, 54 L. & SOC’Y REV. 7, 16 (2020).

18. Tchen, *supra* note 16.

19. *Id.*

20. MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* 34-8 (Princeton Uni. Press 2009) (addressing specifically where U.S. immigration officials in the early 1900s would review the bodies of potential immigrants and classify those with ‘ambiguous’ gender presentations as being a potential “public charge,” meaning liability for the government or somehow limited in how the individual could contribute to society).

21. DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW* 16 (2d ed. 2015) (referencing the inconsistent legal treatment of gender across the U.S. and listing three areas trans\* communities are particularly impacted by as: “identification, sex segregation, and access to healthcare”).

identities. This includes the concept of queer theory, which helps to set the framework for re-imagining trans\* rights.<sup>22</sup>

Part III analyzes how litigation, the government, and non-profits focused on impact litigation address issues of inequity, discrimination, and erasure of trans\* communities. Intermediate scrutiny has been the normative standard for decades, but this classification does not respect the social position of trans\* communities. Social and medical understandings of trans\* individuals have progressed over the years.<sup>23</sup> The testimony of trans\* communities, in conjunction with society's knowledge, demonstrate that intermediate scrutiny is the incorrect level of review for gender identity.

Finally, Part IV proposes a framework for providing suspect classification to trans\* individuals. If the Equality Act becomes law, the courts must establish gender and gender identity as a new class rather than affording it the same interpretation as "sex." By heightening the level of scrutiny applied to gender identity, the courts would demonstrate a respect for the *actual* fluidity of gender and history of discrimination against trans\* communities. Applying suspect classification must serve as a judicial contribution to a series of essential changes.

## II. BACKGROUND

Although the Civil Rights Act of 1964 was passed over a half-century ago, it was not until June 2020 that the term "sex" was interpreted to exclude protections for anyone outside the woman-man gender binary in discrimination cases.<sup>24</sup> The history of gender in this country provides the context for requiring suspect classification for trans\* people, who are currently categorized based on interpretations of "sex" and reviewed under intermediate scrutiny.<sup>25</sup> Policy and case law has traditionally been violent toward trans\* communities, but recently both have adopted more inclusive stances.<sup>26</sup>

Mechanisms for patrolling gender are informed by both socially constructed ideologies perpetuated through academia and policies enacted by the state.<sup>27</sup> State policies and social norms have

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22. Martha A. Fineman, *Introduction: Feminist and Queer Legal Theory*, PUB. L. & LEGAL THEORY RSCH. PAPER SERIES 1, 6-7 (2009).

23. BEEMYN, *supra* note 4, at 14, 38, 42-43.

24. *Bostock*, 140 S. Ct. at 1737.

25. *Evancho v. Pine-Richland Sch. Dist.*, 237 F.Supp.3d 267, 288 (W.D. Pa. 2017) (applying intermediate scrutiny to trans\* communities).

26. Birenbaum, *supra* note 9.

27. Karen Celis et al., *Introduction: Gender and Politics: A Gendered World, A Gendered Discipline*, OXFORD HANDBOOK OF GENDER & POL. 1, 8-9, 13 (2013),

discriminated against trans\* communities in a distinguishable way from the discrimination faced by cisgender women.<sup>28</sup> Over time, these socially-identified-attributes and classes coalesced with a medical understanding of trans\* communities to inform humanity-centered approach to gender.<sup>29</sup> Those outside the hegemonic norms of the gender binary are subject to standards of review that put trans\* individuals at risk of losing social rights and securing lesser protections than their cisgender peers.<sup>30</sup>

### *A. Review Level in Court and Current Legislation*

Current legislation and policies afford intermediate level scrutiny to trans\* communities.<sup>31</sup> However, the Equality Act, suspect classification, and legal interpretations could impact this intermediate level review classification.

#### *1. Intermediate Scrutiny and Suspect Classification*

Identities considered to be immutable characteristics, such as race, ethnicity, and religion, are considered suspect classifications and automatically receive the highest level of review – strict scrutiny.<sup>32</sup> United States courts rely on common law when reviewing claims of discrimination based on sex.<sup>33</sup> The Court adopted “intermediate scrutiny” or “heightened scrutiny” as a mid-level form of review for sex, which provides a less stringent standard than strict scrutiny.<sup>34</sup> Historically, courts have used this lower level of scrutiny to both protect non-cisgender male identifying individuals and to strike down policies often deemed

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[www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199751457.001.0001/oxfordhb-9780199751457-e-34?print=pdf](http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199751457.001.0001/oxfordhb-9780199751457-e-34?print=pdf) [perma.cc/JQB5-86TU] (discussing the development of discourse on gender in political science and other academic discipline and the influence of government policies in reproducing or challenging gender inequality).

28. *Id.*

29. BEEMYN, *supra* note 4, at 39-41.

30. *Id.* at 20.

31. *Bostock*, 140 S. Ct. at 1737.

32. Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 146 (2011).

33. *See Reed v. Reed*, 404 U.S. 71 (1971) (constituting the first time that the Equal Protection Clause of the Fourteenth Amendment was applied to prevent gender-based discrimination).

34. *City of Cleburne, Tx. v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (stating that “[a] gender classification fails unless it is substantially related to a sufficiently important governmental interest”) (citing *Mississippi Uni. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976)).

sexist or that rely on gender stereotypes.<sup>35</sup>

President Obama provided a framework for the Executive to acknowledge the difference between sex and gender identity.<sup>36</sup> Under the Obama Administration, an expanded interpretation of sex as inclusive of gender identity started to be recognized within Executive interpretations of Title VII and Title IX.<sup>37</sup> These expansions were later rescinded under the Trump Administration.<sup>38</sup> Conversely, in *Bostock v. Clayton Cnty., Ga.*, in 2020,<sup>39</sup> the Supreme Court established that the term “sex” now encompassed gender identity and sexual orientation under Title VII.<sup>40</sup> From this holding, members of trans\* communities are offered the same intermediate level of scrutiny as cisgender individuals.<sup>41</sup> This interpretation has its roots in individual privacy rights found in the Fourteenth Amendment in support of same-sex relationships.<sup>42</sup>

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35. *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (rejecting an employment discrimination claim made by a transgender employee because “transsexual” is too complex to define and the term “sex” was not expanded to include a trans gender identity); *DeMarlherbe v. Int’l Union of Elevator Constructors*, 449 F. Supp. 1335, 1351 (N.D. Cal. 1983); *see also Doe v. Alexander*, 510 F. Supp. 900, 904 (D. Minn. 1981) (stating the plaintiff “failed to either raise a fundamental constitutional right or establish that she is a member of a suspect class so as to invoke a higher standard of judicial review” as “transsexuals” do not “constitute a suspect class”).

36. Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014) (amending Exec. Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969) and Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965) to expand workplace protections against discrimination on the basis of “sex, sexual orientation, gender identity, or national origin” for government contractors). Exec. Order. No. 13,672, 41 C.F.R. § 60 (Dec. 9, 2014).

37. Selena Simmons-Duffin, *‘Whiplash’ of LGBTQ Protections and Rights, From Obama to Trump*, NPR (Mar. 2, 2020), [www.npr.org/sections/health-shots/2020/03/02/804873211/whiplash-of-lgbtq-protections-and-rights-from-obama-to-trump](http://www.npr.org/sections/health-shots/2020/03/02/804873211/whiplash-of-lgbtq-protections-and-rights-from-obama-to-trump) [perma.cc/H75R-LFEF]; *see also* Office for Civ. R., *Title IX and Sex Discrimination*, U.S. DEP’T OF EDUC., [www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) [perma.cc/F7HZ-4AC4] (last visited Mar. 6, 2022) (discussing the scope an application of Title IX of the Education Amendments of 1972, which “protects people from discrimination based on sex in education programs or activities that receive federal financial assistance.”)

38. *Id.*; *see also* GLAAD, *GLAAD Accountability Project: Donald Trump*, [www.glaad.org/tap/donald-trump](http://www.glaad.org/tap/donald-trump) [perma.cc/Q4DB-FK9C] (last visited Feb. 17, 2022) (noting on April 3, 2020, the “Department of Justice filed a ‘statement of interest’ in U.S. District Court for the District of Connecticut, which stated that it has a ‘significant interest’ in ensuring that Title IX of the Education Amendments Act of 1972 is interpreted as excluding transgender female athletes . . .”).

39. *Bostock*, 140 S. Ct. at 1733 (interpreting Title VII workplace protections under “sex” as including both sexual orientation and gender identity).

40. *Id.*

41. *Id.*

42. *Lawrence v. Tex.*, 539 U.S. 558, 560, 573-74 (2003) (finding that there is

Suspect classification is one way of guaranteeing the highest level of judicial review – strict scrutiny.<sup>43</sup> The Court applies different tests to determine whether a group that an individual belongs to is designated as suspect.<sup>44</sup> The collective factors of these tests consider: (1) prejudice against a discrete and insular minority; (2) history of discrimination against the group; (3) the ability of the group to seek political redress; (4) the immutability of the group’s defining trait; and (5) the relevancy of that trait.<sup>45</sup> Some courts do not consider all the factors in each case and vary the amount of weight given to the factors reviewed without clear guidance as to why.<sup>46</sup>

The Court has not considered sex to be a suspect classification largely because of its perception that women are not excluded from representation in the political process.<sup>47</sup> Significantly, courts that have found that trans\* individuals do, in fact, meet the elements of suspect classification nevertheless apply intermediate scrutiny.<sup>48</sup>

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a protection of privacy for intimate relationships); *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (adding that “[i]f rights were defined by [those] who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied”).

43. Strauss, *supra* note 32, at 136-37.

44. *Id.* at 138-39.

45. *Id.*

46. *Id.*

47. Strauss, *supra* note 32, at 145-46; *see also Evancho*, 237 F.Supp.3d at 288 (applying the intermediate standard of review to students seeking injunctive relief where they were not allowed to use the restroom that corresponds with their gender identity). The *Evancho* court stated that that the Supreme Court uses four factors when examining a potential “new” classification:

. . . (1) whether the class has been “historically subjected to discrimination,” . . . (2) whether the class has a defining characteristic that “frequently bears no relation to ability to perform or contribute to society,” . . . (3) whether the class exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group,” . . . and (4) whether the class is “a minority or politically powerless.”

*Evancho*, 237 F.Supp.3d at 288 (internal citations omitted).

48. In *Evancho*, the court declared:

. . . that an intermediate standard of Equal Protection review applies in this case. The record before the Court reflects that transgender people have historically been subject to discrimination or differentiation; that they have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society; that as a class they exhibit immutable or distinguishing characteristics that define them as a discrete group; and that as a class, they are a minority

This is because courts currently reason that “gender identity is entirely akin to ‘sex’ . . . [it] is neither transitory nor temporary.”<sup>49</sup> Sex refers to “the different biological and physiological characteristics of males and females, such as reproductive organs, chromosomes, hormones, etc.” and gender refers to “the socially constructed characteristics of women and men – such as norms, roles and relationships of and between groups of women and men.”<sup>50</sup> When courts center sex, they create an understanding of trans\* identities as anything how they relate to the binary of sex, and therefore inherently fail to consider the different socialization process of trans\* communities.

## 2. *The Equality Act*

On May 20, 2019, the U.S. Senate received H.R. 5 and referred it to the Committee on the Judiciary.<sup>51</sup> This legislation is referred to commonly by its short title – the Equality Act.<sup>52</sup> It did not pass during the 116th Congress after the Senate referred the Act back to the House for amendments.<sup>53</sup> In 2021, the Biden Administration and Democrats in both the House and Senate pushed to have the legislation signed into law as soon as possible.<sup>54</sup> Despite pushback from many conservative leaders, the Act passed in the House of Representatives on February 25, 2021.<sup>55</sup>

The Equality Act is a sweeping piece of legislation that, if

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with relatively little political power.

*Evancho*, 237 F.Supp.3d at 288 (citing *Adkins v. N.Y.C.*, 143 F.Supp.3d 134, 138-41 (S.D.N.Y. 2015)).

49. *Evancho*, 237 F.Supp.3d at 288-89.

50. *Gender Matters*, COUNCIL OF EUROPE, [www.coe.int/en/web/gender-matters/sex-and-gender#19](http://www.coe.int/en/web/gender-matters/sex-and-gender#19) [perma.cc/XNE5-PP5H] (last visited Mar. 5, 2022) (stating also that “Gender is an area that cuts across thinking about society, law, politics and culture, and it is frequently discussed in relation to other aspects of identity and social position, such as class, ethnicity, age and physical ability”).

51. H.R. 5 § 1.

52. *Id.*

53. Ty Gamble-Eddington, *The Equality Act: How We Got Here and How to Get it Passed*, GLAAD (Sept. 30, 2020), [www.glaad.org/amp/equality-act-how-we-got-here-and-how-we-move-forward](http://www.glaad.org/amp/equality-act-how-we-got-here-and-how-we-move-forward) [perma.cc/S6BV-2EEX].

54. *Id.*

55. Josh Milton, *Trans Flag Hung Outside Marjorie Taylor Greene’s Office by Mother of Trans Kid. She Hit Back with Transphobia.*, PINKNEWS (Feb. 25, 2021), [www.pinknews.co.uk/2021/02/25/majorie-taylor-greene-marie-newman-trans-rights-equality-act/](http://www.pinknews.co.uk/2021/02/25/majorie-taylor-greene-marie-newman-trans-rights-equality-act/) [perma.cc/U9TA-EMWH] (explaining that Representative Marjorie Taylor Greene responded to a trans pride flag hung outside a neighbor’s office by hanging a sign that said, “There are TWO genders. MALE & FEMALE. Trust the science!”).

signed into law, would update the Civil Rights Act of 1964.<sup>56</sup> The updates would provide classifications for protections based on gender identity and sexual orientation.<sup>57</sup> Explicitly acknowledging sexual orientation and gender identity would end the need for trans\* communities to rely on interpretations of the word “sex” for legal recognition.<sup>58</sup> Protections would extend to areas such as housing, jury selection, education, employment, and federally-funded programs.<sup>59</sup>

### *B. Trans\* Existence and Oppression as a Suspect Class*

Trans\* communities’ histories fit neatly within the aforementioned factors associated with suspect classification.

#### *1. A Discrete and Insular Minority*

Identifying members of the LGBTQ+ population is more difficult than with other identities because the U.S. Census has historically precluded the LGBTQ+ community from self-identifying.<sup>60</sup> Reported approximate numbers are further limited because it requires individuals to self-identify – meaning they must feel comfortable coming out to the body collecting data.<sup>61</sup> As of 2017, there were a reported 1.55 million people who identify as transgender living in the United States.<sup>62</sup> These population numbers are large enough to make trans\* communities discrete (visible and identifiable) and insular as the communities are able to socially interact as a discrete group; however, the population is still small enough to require protection as influence on the political process for protection is still minimal.<sup>63</sup>

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56. *Id.*; H.R. 5.

57. Milton, *supra* note 55.

58. *Id.*

59. *Id.*

60. See National LGBTQ Task Force, *Queer the Census*, NAT’L LGBTQ TASK FORCE, [www.thetaskforce.org/queerthecensus.html](http://www.thetaskforce.org/queerthecensus.html) [perma.cc/YY3F-NBKC] (last visited Feb. 20, 2021) (conducting outreach to the LGBTQ+ community because “the Census doesn’t explicitly ask about our sexual orientation and gender identity”).

61. *Id.*

62. Jody L. Herman et al., *Age of Individuals Who Identify as Transgender in the United States*, WILLIAMS INST. 1-3 (Jan. 2017) (citing to an estimated 1.4 million U.S. adults and approximately 150,000 youth identifying as transgender).

63. Strauss, *supra* note 32, at 148-50.

## 2. History of Discrimination: The Gender Binary

The Americas were initially a land of many gender identities and gender expressions.<sup>64</sup> Immediately upon European colonization, cisgender identities enveloped the land and led to cisgenderism and what is now experienced as the gender binary.<sup>65</sup>

According to the National Congress of American Indians, prior to the colonization of the Americas, at least sixty-five Native American Nations had their own vocabulary to identify individuals who did not align with Western binary gender roles.<sup>66</sup> These individuals are now commonly referred to as Two-Spirit.<sup>67</sup> They were upheld as having specialized work roles, a varied gender expression, spiritual capabilities, and were sometimes described as engaging in same-sex relationships.<sup>68</sup> Once Europeans arrived to colonize the Americas in 1492, Two-Spirit individuals were often murdered and referred to with the pejorative term *berdache*.<sup>69</sup> This derogatory French term was used against individuals from Native communities whose gender identity did not reflect their “sex assigned at birth.”<sup>70</sup>

Subsequently, more laws have been enacted which monitor and discriminate against trans\* individuals. These laws include “walking while trans” policies, policies of erasure, and laws governing workplace discrimination.

### a. Walking While Trans Laws

Dating back to the 1600s, cases, such as that of Thomas/Thomasine, were put before courts for the purpose of

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64. BEEMYN, *supra* note 4, at 5-7.

65. Erica Lennon & Brian J. Mistler, *Cisgenderism*, 1 TRANSGENDER STUD.Q. 63, 63-4 (2014) (defining ‘cisgenderism’ as referring “to the cultural and systemic ideology that denies, denigrates, or pathologizes self-identified gender identities that do not align with assigned gender at birth as well as resulting behavior, expression, and community”).

66. Harlan Pruden & Se-ah-dom Edmo, *Two-Spirit People: Sex, Gender & Sexuality in Historic and Contemporary Native America*, NAT’L CONGRESS OF AM. INDIANS 2 (2015), [www.ncai.org/policy-research-center/initiatives/Pruden-Edmo\\_TwoSpiritPeople.pdf](http://www.ncai.org/policy-research-center/initiatives/Pruden-Edmo_TwoSpiritPeople.pdf) [perma.cc/9LWW-7S5M] (last visited Oct. 10, 2020).

67. *Id.*

68. *Health Resources: Two-Spirit*, INDIAN HEALTH SRVS., [www.ihs.gov/lgbt/health/twospirit/](http://www.ihs.gov/lgbt/health/twospirit/) [perma.cc/3SHL-V56W] (last visited Feb. 20, 2021).

69. Pruden & Edmo, *supra* note 66, at 23-4 (depicting the clash of European and Christian views of gender identity with those of the Native American Nations, resulting in violence against and the murder of Two-Spirit individuals, including feeding their bodies to dogs).

70. *Id.*

scrutinizing and violently policing trans\* bodies.<sup>71</sup> The U.S. has a long history of limiting rights to trans\* individuals based on strict policing of their bodies and clothing.<sup>72</sup> Starting in the 1800s, masquerade laws required individuals to dress in ways stereotypically associated with their sex assigned at birth.<sup>73</sup> The laws were allegedly a means of stopping tax evading farmers from fleeing town but were repurposed to socially and lawfully police gender expression.<sup>74</sup> These policies and acts of aggression and suppression from the 1600-1800s were early forms of “walking while trans” laws.<sup>75</sup>

Similar laws known as “walking while trans” laws, still exist in many states today.<sup>76</sup> In 2019, a New York police officer testified that for decades, he would arrest transgender women of color based solely on their clothing, where they gathered, who they congregated with, and would even look for “Adam’s apples” when patrolling the women.<sup>77</sup> These laws are described as a “weapon in profiling” and were said to be enacted to prevent general loitering by sex workers.<sup>78</sup>

“Walking while trans” laws encourage social policing of trans\* bodies and have been reported to disproportionately target Black trans\* people.<sup>79</sup> There are already several laws in place which forbid officers from profiling individuals in this way, yet they are not

71. McIlwaine, *supra* note 1.

72. CANADAY, *supra* note 20, at 4 (“[T]he state’s identification of certain sexual behaviors, gender traits, and emotional ties as grounds for exclusion (from entering the country, serving in the military, or collecting benefits) was a catalyst in the formation of homosexual identity.”).

73. Hugh Ryan, *How Dressing in Drag Was Labeled a Crime in the 20th Century*, HISTORY (June 28, 2019), [www.history.com/news/stonewall-riots-lgbtq-drag-three-article-rule](http://www.history.com/news/stonewall-riots-lgbtq-drag-three-article-rule) [perma.cc/ZTZ3-PSF3].

74. *Id.*

75. Jesse McKinley & Luis Ferré-Sadurní, *N.Y. Repeals Law that Critics Say Criminalized ‘Walking While Trans’*, N.Y. TIMES (Feb. 3, 2021), [www.nytimes.com/2021/02/03/nyregion/walking-while-trans-ban.html](http://www.nytimes.com/2021/02/03/nyregion/walking-while-trans-ban.html) [perma.cc/U79T-HY48] (describing “walking while trans” laws as loitering laws, “originally designed to discourage street prostitution” that have been “interpreted far more broadly, resulting in what civil rights advocates [say is] a pattern of police harassment of anyone who they view[] as looking different or suspicious,” and results in disproportionate stops of trans\* individuals.)

76. *Id.*

77. Graham Rayman, *NYPD Changes How it Applies Loitering Law as it Settles Legal Aid Lawsuit Over Arrests of Transgender People, Women Accused of Prostitution*, N.Y. DAILY NEWS (June 5, 2019), [nydailynews.com/new-york/nyc-crime/ny-nypd-settles-legal-aid-lawsuit-loitering-prostitution-transgender-20190605-exywzz6t6jdwrrnngz3k26c3gaa-story.html](http://nydailynews.com/new-york/nyc-crime/ny-nypd-settles-legal-aid-lawsuit-loitering-prostitution-transgender-20190605-exywzz6t6jdwrrnngz3k26c3gaa-story.html) [perma.cc/A4KN-RK8A].

78. McKinley & Ferré-Sadurní, *supra* note 75 (quoting New York State Assemblywoman Amy Paulin, the Assembly sponsor of the repeal).

79. *Id.*

enough of a deterrent.<sup>80</sup>

### b. Erasure of Trans\* Communities

Erasure is another tactic for carrying out discrimination against trans\* and nonbinary communities.<sup>81</sup> Gender identity was not even present in proposed protections legislation until this century.<sup>82</sup> Though not included in legislation, trans\* individuals have always existed and been punished for their identity.<sup>83</sup> For example, even within the Equality Act, section 2(a)(4) refers to discrimination as the denial of services “women” face due to being pregnant or breastfeeding, which serves to erase the lives of pregnant trans\* men.<sup>84</sup>

### c. Workplace and Education Discrimination

Cases of gender discrimination where an individual is fired for being trans\* have been met with mixed outcomes.<sup>85</sup> After Title VII was enacted, many trans\* employees started filing complaints alleging discrimination.<sup>86</sup> Under the recent *Bostock* decision, trans\* individuals are protected under the term “sex” so long as employers rely on sex stereotypes when scrutinizing an employee’s

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80. Rayman, *supra* note 77 (discussing the ways in which New York Police Department officers would look for physical characteristics of sex workers when enforcing loitering laws, leading to a lawsuit by The Legal Aid Society for unlawfully targeting trans\* individuals).

81. BEEMYN, *supra* note 4, at 35 (telling the history of Human Rights Campaign lobbying for the Employment Non-Discrimination Act to not include ‘gender identity’ and therefore protections for trans\* communities as a means of getting the legislation passed in the mid 1990s).

82. The Civil Rights Act of 1964 did not incorporate language regarding gender identity. Gender identity did not make any of the Employment Non-Discrimination Act (“ENDA”) bills that failed until Barney Frank introduced a version incorporating the language in 2007. Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (1st Sess. 2007).

83. RIA BRODELL, *BUTCH HEROES* 46 (MIT Press 2018) (telling the story of Frank Blunt, who left Nova Scotia at age thirteen and fled to Wisconsin). Blunt began presenting as a man, but when convicted of larceny in 1894, the court and local papers misgendered Blunt and exposed their gender identity to the public. *Id.*

84. H.R. 5.

85. *Bostock*, 140 S.Ct. at 1734 (holding “an employer who fires an individual merely for being . . . transgender violates Title VII.”); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (concluding “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination”).

86. *Bostock*, 140 S.Ct. at 1734; *Glenn*, 663 F.3d at 1317.

appearance.<sup>87</sup>

Any youth identifying as trans\* are also targeted by discriminatory policies. For 2022 state legislative sessions, at least thirteen states have proposed, are deliberating on, or have passed anti-trans\* laws to preclude trans\* students from competing on youth sports teams that correspond with their gender identity.<sup>88</sup> Beyond competition, trans\* students are also filing lawsuits in attempts to be able to use restrooms and locker rooms that match their gender identities.<sup>89</sup> These experiences have left youth feeling isolated, depressed, burdened, and humiliated.<sup>90</sup>

Further, youth are susceptible to so-called conversion therapy in states that do not outlaw the practice—seventy-three percent of the LGBTQ+ population live in such states and are at-risk.<sup>91</sup> Conversion therapy is a procedure whereby practitioners “attempt

87. *Bostock*, 140 S.Ct. at 1734; *Glenn*, 663 F.3d at 1317; see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989) (stating that in enacting Title VII “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes”) (quoting *L.A. Dep’t. of Water & Power v. Manhart*, 435 U.S. 702, 707 n. 13 (1978)), *superceded by statute as stated in Comcast Corp. v. Nat’l Assoc. of African-American-Owned Media*, 140 S. Ct. 1009 (2020).

88. *Legislative Tracker: Youth Sports Bans*, FREEDOM FOR ALL AMERICANS, [www.freedomforallamericans.org/legislative-tracker/student-athletics/](http://www.freedomforallamericans.org/legislative-tracker/student-athletics/) [perma.cc/78L4-RDGX] (last visited Feb. 18, 2022); see also Jo Yurcabo, *Trump Promises to Ban Transgender Women from Sports if Re-Elected*, NBC NEWS (Jan. 31, 2022), [www.nbcnews.com/nbc-out/out-politics-and-policy/trump-promises-ban-transgender-women-sports-re-elected-rcna14248](http://www.nbcnews.com/nbc-out/out-politics-and-policy/trump-promises-ban-transgender-women-sports-re-elected-rcna14248) [perma.cc/G5ZA-2FP2] (stating that in 2021, “more than [thirty] states considered bills that would ban transgender student-athletes from playing on sports teams that align with their gender identity,” that “[t]en states have enacted such measures,” and that so far in 2022 “[seventeen] states are considering similar bills”); see also Ella Schneiberg, *These are the States Trying to Stop Trans Kids from Playing Sports*, HUMAN RIGHTS CAMPAIGN (Feb. 10, 2021), [www.hrc.org/news/these-are-the-states-trying-to-stop-trans-kids-from-playing-sports](http://www.hrc.org/news/these-are-the-states-trying-to-stop-trans-kids-from-playing-sports) [perma.cc/2QTD-FWA8] (stating that “in 2021, at least [sixty-six] bills have been introduced targeting transgender people in sports”).

89. *Kasper v. School Bd. Of St. Johns Cnty.*, 968 F.3d 1286, 1291 (11th Cir. 2020) (evaluating the school’s policy where a trans\* student was not allowed to use the boys’ restroom); *M.A.B. v. Bd. Of Ed. of Talbot Cnty.*, 286 F.Supp.3d 704, 708 (D. Md. 2018) (identifying a fifteen year-old student who identified as a transgender boy and was not allowed to use the boys’ locker rooms with cisgender peers).

90. *Kasper*, 968 F.3d 1291.

91. Movement Advancement Project, *Equality Maps: Conversion “Therapy” Laws*, MOVEMENT ADVANCEMENT PROJ. (Feb. 23, 2021), [www.lgbtmap.org/equality-maps/conversion\\_therapy](http://www.lgbtmap.org/equality-maps/conversion_therapy) [perma.cc/XK5N-NEDY] (noting that only twenty states have outright bans on conversion therapy for minors, one state and one territory have partial bans, three states are currently subject to federal injunctions against conversion therapy, and twenty-six states and four territories have no laws or policies prohibiting the practice).

to change [an LGBTQ+ person's] sexual orientation or gender identity.”<sup>92</sup> These practices state that they intend to “cure” individuals of their gender dysphoria using techniques such as shaming, hypnosis, inducing vomiting, and electric shock therapy.<sup>93</sup> Individuals who go through therapy are more likely to report drug use, unprotected sex, have higher levels of depression, and are 8.4 times more likely to attempt suicide.<sup>94</sup> All laws that have passed restricting the practice are not able to prevent the practice by religious entities.<sup>95</sup>

#### d. Exclusion from Social Movements Focusing on LGBTQ+ Issues – No T.

Discrimination has not come solely from outside the LGBTQ+ community. Historically, trans\* people have been at the forefront of resistance to societal oppression for the LGBTQ+ community.<sup>96</sup> The movement started with isolated incidents of resistance to gender restricting laws.<sup>97</sup> Most prominently, masquerade laws were enacted throughout the country in the 1800s in an attempt to constrict gender presentation to binary norms.<sup>98</sup>

As a counter-cultural act in the mid-1900s, the LGBTQ+ community began disseminating newsletters and gathering in consciousness-raising circles at people's homes.<sup>99</sup> These attempts to make queer and trans\* identities known to the larger public were

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92. *Id.*

93. *LGBT Policy Spotlight: Conversion Therapy Bans*, MOVEMENT ADVANCEMENT PROJ. 1 (2017), [www.lgbtmap.org/file/policy-spotlight-conversion-therapy-bans.pdf](http://www.lgbtmap.org/file/policy-spotlight-conversion-therapy-bans.pdf) [perma.cc/8HMQ-2KN8].

94. *Id.* at fig. 1.

95. *Id.*

96. BEEMYN, *supra* note 4, at 22-4 (providing an overview of the involvement of trans\* communities in leading the Stonewall Riots and subsequent community organizing only to be excluded by organizations such as the Gay Activists Alliance (“GAA”) in New York City, where the organization focused exclusively on promoting the equal rights of mostly “[w]hite middle-class gay men”).

97. Abram J. Lewis, “Free Our Siblings, Free Ourselves”: *Historicizing Trans Activism in the U.S., 1952-1992*, AM. HISTORIAN, 36, 38-9 (2019) [www.oah.org/tah/issues/2019/may/free-our-siblings-free-ourselves-historicizing-trans-activism-in-the-u.s-1952-1992/](http://www.oah.org/tah/issues/2019/may/free-our-siblings-free-ourselves-historicizing-trans-activism-in-the-u.s-1952-1992/) (last visited Feb. 17, 2022) (discussing the Compton Cafeteria uprising and Stonewall Riots).

98. Ryan, *supra* note 73.

99. Theresa Theophano, *Daughters of Bilitis*, GLBTQ (2004) [www.glbqtarchive.com/ssh/daughters\\_bilitis\\_S.pdf](http://www.glbqtarchive.com/ssh/daughters_bilitis_S.pdf) [perma.cc/TPQ7-7XX8] (stating that the Daughters of Bilitis lesbian organization began publication of their national magazine *The Ladder* in 1956, and The Mattachine Society's newsletter started around the same time, along with “ONE, Inc., an independent gay-themed magazine”).

met with contempt from the federal government.<sup>100</sup> The communities were heavily surveilled by the FBI.<sup>101</sup> Federal legislators sought to exterminate the movement by labeling LGBTQ+ individuals as Marxist, starting what came to be known as the Lavender Scare.<sup>102</sup> This labeling took an intersectional hit on queer and trans\* communities of color, who received similar labels for being a part of the Black Panther Party and all those who fought for equity and liberation.<sup>103</sup>

More recognized uprisings against constant policing and discrimination led by trans\* individuals began in the 1950s and 1960s.<sup>104</sup> The most prominent incident of resistance was at the Stonewall Inn in Greenwich Village, New York City in 1969.<sup>105</sup> Resisters sought economic opportunity and a reduction in constant policing of their bodies.<sup>106</sup> At that point, police scheduled regular raids on LGBTQ+ bars, arrested individuals, and published their

100. See *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (upholding the First Amendment rights of the magazine to be published after a lower court ruled that *ONE Magazine* violated obscenity laws).

101. James Gleason, *LGBT History: The Lavender Scare*, NAT'L LGBT CHAMBER OF COM. (Oct. 3, 2017), [www.nglcc.org/blog/lgbt-history-lavender-scare](http://www.nglcc.org/blog/lgbt-history-lavender-scare) [perma.cc/E69K-UP3E]; see also Patrick Kelleher, *Police Chief Resigns in Disgrace After Calling Trans People 'Perverted Freaks' and Threatening to Kill 'Marxist Democrats'*, PINKNEWS (Nov. 9, 2020), [www.pinknews.co.uk/2020/11/09/lang-holland-marshall-arkansas-resign-police-parler-transgender/](http://www.pinknews.co.uk/2020/11/09/lang-holland-marshall-arkansas-resign-police-parler-transgender/) [perma.cc/5R9E-TWJM] (explaining where the chief of police in Marshall, Arkansas was forced to resign after posting online that trans people are “perverted” and threatening to kill “Marxist Democrats”).

102. Gleason, *supra* note 101; Kelleher, *supra* note 101.

103. Freedom of Information/Privacy Acts Release, *Mattachine Society*, FED. BUREAU OF INVESTIGATION 7, 25-6, 36, [www.vault.fbi.gov/mattachine-society/mattachine-society-part-01-of-03/view](http://www.vault.fbi.gov/mattachine-society/mattachine-society-part-01-of-03/view) [perma.cc/2DHE-5B49] (last visited Feb. 15, 2021); Gleason, *supra* note 101.

104. Erin Faith Wilson, *Beyond Stonewall: 9 Lesser-Known LGBT Uprisings*, ADVOCATE (June 25, 2015), [www.advocate.com/pride/2015/06/25/beyond-stonewall-9-lesser-known-lgbt-uprisings](http://www.advocate.com/pride/2015/06/25/beyond-stonewall-9-lesser-known-lgbt-uprisings) [perma.cc/8TQX-EK98].

105. BEEMYN, *supra* note 4, at 22-3.

106. *Id.* at 22 (citing DAVID CARTER, *STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION* (St. Martin's Press 2004); LESLIE FEINBERG, *TRANS LIBERATION: BEYOND PINK OR BLUE* 107 (Beacon Press 1998); SUSAN STRYKER, *TRANSGENDER HISTORY: THE ROOTS OF TODAY'S REVOLUTION* (Basic Books 2008)). Stryker specifically notes that

Back then we were beat up by the police, by everybody . . . . You get tired of being just pushed around,' recalls Sylvia Rivera, a Puerto Rican transgender woman who was a leader in the riots and the LGBT organizing that occurred afterward. 'We were not taking any more of this . . .'

BEEMYN, *supra* note 4, at 22.

names in local newspapers as a form of community shaming.<sup>107</sup> This uprooted the lives of many hetero-married people and depleted sources of income for drag queens and other trans\* performers already forced to endure economic hardships.<sup>108</sup>

In order to elevate their political status, many gay and lesbian organizers dissociated with trans\* communities.<sup>109</sup> The most recognized lesbian newsletter at the time dismissed their transgender editor and moved forward with a different agenda.<sup>110</sup> The notion of Trans Exclusionary Radical Feminists stems from this agenda of separating cisgender and trans\* identities.<sup>111</sup> Non-trans\* women organizing for LGBTQ+ liberation sought rights only for people who had lived a “female” experience their entire lives.<sup>112</sup> Cisgender gay men did similarly in founding the Gay Activists Alliance, composed mostly of White middle-class gay men from New York City.<sup>113</sup> Even in 1993, there was pushback from the bisexual community when leaders would not add transgender to the name of a national march called the “March on Washington for Lesbian, Gay, and Bi Equal Rights and Liberation.”<sup>114</sup>

In 1970, trans activists Sylvia Rivera and Marsha P. Johnson, both well-established leaders in the community, started the Street Transvestite Action Revolutionaries.<sup>115</sup> The group was formed in an effort to combat trans\* homelessness and hunger as the

107. Chris Johnson, *Before Stonewall, Newspapers Complicit with Police in Gay Bar Raids*, WASH. BLADE (June 25, 2019), [www.washingtonblade.com/2019/06/25/before-stonewall-newspapers-complicit-with-police-in-gay-bar-raids/](http://www.washingtonblade.com/2019/06/25/before-stonewall-newspapers-complicit-with-police-in-gay-bar-raids/) [perma.cc/L87U-9VKZ].

108. *Id.*

109. BEEMYN, *supra* note 4, at 23-4.

110. SUSAN STRYKER, *TRANSGENDER HISTORY* 103-05 (Basic Books 2008), [www.transreads.org/wp-content/uploads/2019/03/2019-03-17\\_5c8eb1ebaced4\\_susan-stryker-transgender-history2.pdf](http://www.transreads.org/wp-content/uploads/2019/03/2019-03-17_5c8eb1ebaced4_susan-stryker-transgender-history2.pdf) [perma.cc/V5HQ-9VUG]

(referencing the Daughters of Bilitis pushing out trans member Beth Elliott and contextualizing the 1973 West Coast Lesbian Feminist Conference’s Robin Morgan speech, where Morgan referred to Elliott as a “male transvestite” who was “leeching off women who have spent entire lives *as women* in women’s bodies’ . . . ‘I charge him as an opportunist, an infiltrator, and a destroyer—with the mentality of a rapist.’”).

111. JUSTIN A. GUTZWA, *ENCYCLOPEDIA OF QUEER STUDIES IN EDUCATION: TRANS-EXCLUSIONARY RADICAL FEMINISTS (TERFS)* 695-96 (4th ed. 2021).

112. BEEMYN, *supra* note 4, at 28-30 (describing when the Michigan Womyn’s Festival excluded trans participation, out of which arose Camp Trans as an inclusive counter event).

113. *Id.* at 23-4.

114. *Id.* at 29-30.

115. *Street Transvestite Action Revolutionaries found STAR House*, GLOB. NETWORK OF SEX WORK PROJ., [www.nswp.org/timeline/street-transvestite-action-revolutionaries-found-star-house](http://www.nswp.org/timeline/street-transvestite-action-revolutionaries-found-star-house) [perma.cc/7GXX-9LXD] (last visited Nov. 22, 2020).

community experiences higher rates of both.<sup>116</sup> Eventually, Street Transvestite Action Revolutionaries inspired the formation of other trans\*-led efforts to combat stereotypes that trans\* individuals are mentally ill, tied to Nazism,<sup>117</sup> or enact violence by simply existing.<sup>118</sup> In reality, throughout the second-half of the twentieth century, trans\* communities' were stripped of their already scant resources and violence towards trans\* communities grew.<sup>119</sup> Where visibility and acceptance of gay and lesbian rights expanded, trans\* individuals were pushed further to the margins of society.<sup>120</sup> Their stories were erased through revisionist history writing, again alienating the community from society.<sup>121</sup>

Throughout the 1970s and 1980s, groups were also formed to support and disseminate information about trans\* men.<sup>122</sup> Resource guides and books were published to share the experiences of trans\* men as a means of survival and brought awareness to their existence.<sup>123</sup> Previously, most of the conversation around trans\* experiences focused on trans\* women.<sup>124</sup>

In the 1990s, queer theory, which is sometimes referred to as “third-wave feminism,” began to take hold in academia.<sup>125</sup> Incorporating the intersectional framework of analysis rooted in Black feminist thought,<sup>126</sup> queer theory emphasized an expansive

116. *Id.*

117. JANICE G. RAYMOND, *THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* 104, 152 (Teachers College Press 1994), [www.transreads.org/wp-content/uploads/2019/03/2019-03-20\\_5c91a4ba712fd\\_document26.pdf](http://www.transreads.org/wp-content/uploads/2019/03/2019-03-20_5c91a4ba712fd_document26.pdf) [perma.cc/NC57-TJGV] (suggesting that “at least one transsexual operation was done in the [Nazi concentration] camps,” that “some transsexual research and technology may well have been initiated and developed in the camps,” and that “[a]ll transsexuals rape women’s bodies by reducing the real female form to an artifact, appropriating this body for themselves.”).

118. *Id.* at 136.

119. STRYKER, *supra* note 110, at 72-3.

120. George, *supra* note 7, at 601.

121. *Id.*

122. Jeremy Lybarger, *Lou Sullivan’s Diaries are a Radical Testament to Trans Happiness*, *NEW YORKER* (Sept. 16, 2019), [www.newyorker.com/books/page-turner/lou-sullivans-diaries-are-a-radical-testament-to-trans-happiness](http://www.newyorker.com/books/page-turner/lou-sullivans-diaries-are-a-radical-testament-to-trans-happiness) [perma.cc/D7XQ-ETWV] (noting how earlier works, such as “The Transsexual Phenomenon” by endocrinologist Harry Benjamin, failed to discuss the experiences of trans\* men).

123. *Id.*

124. *Id.*

125. ROSEMARIE TONG, *FEMINIST THOUGHT: A MORE COMPREHENSIVE INTRODUCTION* 284-89 (3d ed. 2009), [www.excoradfeminisms.files.wordpress.com/2010/07/feminist\\_thought\\_a\\_more\\_comprehensive\\_intro.pdf](http://www.excoradfeminisms.files.wordpress.com/2010/07/feminist_thought_a_more_comprehensive_intro.pdf) [perma.cc/GN6F-CCKU].

126. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 18, 21 (Taylor & Francis 1990) (referencing organizations such as The Combahee River Collective).

view of gender oppression that did not limit the experience of “womanhood” to just one narrative.<sup>127</sup> Leaders in this arena sought to bring trans\* experiences to the forefront and cautioned organizers against intersectional analysis of identities.<sup>128</sup> In 1992, Leslie Feinberg published the pamphlet, “Transgender Liberation: A Movement Whose Time Has Come.”<sup>129</sup> Hir<sup>130</sup> books focused on the empowerment of trans\* communities and set the tone for activists to come.<sup>131</sup>

Violence against trans\* individuals started to be documented in the mainstream in the 1990s – most prominently with the murder of Brandon Teena in 1994.<sup>132</sup> Protests throughout the country started to blur the lines between activism and academia and set the course for trans\* liberation.<sup>133</sup> Entities such as the Transexual Menace in New York City sought to hold the media accountable for misgendering and deadnaming trans\* victims of hate crimes.<sup>134</sup> To date, trans\* women of color are murdered at a disproportionate rate in the U.S. and are often misgendered in media.<sup>135</sup> In part to combat this violence, the Southern Comfort Conference began in 1991, the International Conference on Transgender Law and Employment Policy was held from 1992-1997, the Gender Public Advocacy Coalition was formed, and a National Gender Lobby Day was created.<sup>136</sup>

The internet has allowed for rapid community building and has placed a sense of urgency on legislators to provide equal opportunity

127. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 3-4, 8 (Taylor & Francis e-Library 2002) (Routledge 1999).

128. BEEMYN, *supra* note 4, at 26-7 (contributing essay from Talia Beltcher, Philosophy Professor, Cal. State Los Angeles referencing the works of Emi Koyama).

129. LESLIE FEINBERG, *TRANSGENDER LIBERATION: A MOVEMENT WHOSE TIME HAS COME* 4 (World View Forum 1993).

130. Devin-Norelle, *Gender-Neutral Pronouns 101: Everything You've Always Wanted to Know*, THEM. (May 22, 2020), [www.them.us/story/gender-neutral-pronouns-101-they-them-xe-xem](http://www.them.us/story/gender-neutral-pronouns-101-they-them-xe-xem) [perma.cc/GVZ9-7UG8] (defining “hir” – the pronoun Leslie Feinberg uses – as a “gender-neutral pronoun[] that initially arose out of the necessity for pronouns that were more inclusive of women, and later to be more inclusive of a wide spectrum of genders”).

131. *Id.*

132. Stephanie Fairington, *Two Decades After Brandon Teena's Murder, a Look Back at Falls City*, ATLANTIC (Dec. 31, 2013), [www.theatlantic.com/national/archive/2013/12/two-decades-after-brandon-teenas-murder-a-look-back-at-falls-city/282738/](http://www.theatlantic.com/national/archive/2013/12/two-decades-after-brandon-teenas-murder-a-look-back-at-falls-city/282738/) [perma.cc/5UVJ-89DK].

133. BEEMYN, *supra* note 4, at 29-30.

134. *Id.* at 29.

135. Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY (2011), [transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](http://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf). [perma.cc/88U6-Y9JE].

136. BEEMYN, *supra* note 4, at 30.

to trans\* people.<sup>137</sup> Despite these opportunities, over the past thirty years, trans\* individuals have still been left out of legislation regarding employment discrimination,<sup>138</sup> access to healthcare, and the overall fight for LGBTQ+ rights.<sup>139</sup>

Currently, organizers have seen the most stable success in state and local legislatures rather than at the federal level.<sup>140</sup> Where individual states and municipalities have passed trans\*-inclusive nondiscrimination laws and ordinances, the federal government has only enacted protections via the Executive Office.<sup>141</sup> However, the extended protections from 2012-2016 were quickly stripped between 2016 and 2020.<sup>142</sup>

Activists are combatting intersectional oppression that impacts trans\* people of color at a far higher rate than their white community members.<sup>143</sup> Modern organizations like the Sylvia

137. *The Influence of Social Media for Trans Youth*, CTR. FOR INNOVATIVE PUB. HEALTH RSCH., [www.innovativepublichealth.org/blog/the-influence-of-social-media-for-trans-youth/](http://www.innovativepublichealth.org/blog/the-influence-of-social-media-for-trans-youth/) [perma.cc/F2NX-G84B] (last visited Nov. 12, 2020); *see also* Steven Kurutz, *Monica Roberts, Transgender Advocate and Journalist, Dies at 58*, N.Y. TIMES (Oct. 13, 2020), [www.nytimes.com/2020/10/13/us/monica-roberts-dead.html](http://www.nytimes.com/2020/10/13/us/monica-roberts-dead.html) [perma.cc/ZZ2M-8B5S] (emphasizing the role Roberts's TransGriot blog had on informing the public about transgender issues).

138. Chris Johnson, *10 Years Later, Firestorm Over Gay-Only ENDA Vote Still Informs Movement*, WASH. BLADE (Nov. 6, 2017), [www.washingtonblade.com/2017/11/06/10-years-later-firestorm-over-gay-only-enda-vote-still-remembered/](http://www.washingtonblade.com/2017/11/06/10-years-later-firestorm-over-gay-only-enda-vote-still-remembered/) [perma.cc/SD9U-V6GM] (discussing where the Human Rights Campaign was willing to remove transgender protections from the Employment Non-Discrimination Act in 2007 in order for it to pass through Congress).

139. *See* Equality Act, H.R. 5, 117th Cong. § 2(a)(3) (1st Sess. 2021) (outlining the exclusions LGBTQ+ individuals face in society); *see also id.* at § 2(a)(4) (discussing life events experienced by “women” that includes language for pregnancy, not accounting for the possibility of a trans\* man’s pregnancy).

140. Grant, *supra* note 135, at 68 (recommending more federal and state protection laws be implemented, but noting that “[o]nly a handful of the states/localities that currently have legal protections have written regulations or guidelines showing employers how to properly treat transgender and gender non-conforming employees”).

141. *Id.*

142. GLAAD, *supra* note 38 (coinciding with the transition of power between President Obama’s Administration and President Trump’s Administration after President Trump assumed office in 2017).

143. Grant, *supra* note 135, at 2, 6, 8, 72. Grant explains that sixty-three percent of respondents “had experienced a serious act of discrimination” and “[forty-one percent] of respondents reported attempting suicide, compared to 1.6 [percent] of the general population,” with rates rising for those who lost a job due to bias ([fifty-five percent]), were harassed/bullied in school ([fifty-one percent]), had low household income, or were the victim of physical assault ([sixty-one percent]) or sexual assault ([sixty-four percent]).” *Id.* at 2, 8. Grant also notes that participants who were Black, Latinx, and American Indian experienced higher rates of discrimination. *Id.*

Rivera Law Project (“SRLP”), Transgender Law Center, amongst others, have set forth initiatives to combat these issues.<sup>144</sup> Many rely on a legal-political-social approach to addressing the problems.<sup>145</sup> Direct services entities in the legal system can provide protections for trans\* individuals with access to legal services.<sup>146</sup> Impact litigation can be used to further common law approaches to inclusivity, exemplified by the outcome in *Bostock*.<sup>147</sup> Pushing for political reform via nondiscrimination policies and hate crime legislation promotes more protections as well.<sup>148</sup> However, these first two prongs also buttress a criminal legal system.<sup>149</sup> The system inherently harms trans\* individuals through funneling resources toward enforcing punishment in the name of upholding a “social good.”<sup>150</sup> This is why many legal groups also focus on the social reform component, which seeks to educate the masses and change cultural norms in order to promote a fundamental inclusion and uplifting of trans\* lives and experiences.<sup>151</sup>

### 3. *Ability to Seek Political Redress: State ID Laws, Changing Identity Documents, and Voting*

Because of the law’s failure to keep up with gender identity, trans\* individuals are losing access to the democratic process.<sup>152</sup> Voter ID laws vary across states, with thirty-five states currently implementing voter ID requirements.<sup>153</sup> These laws often preclude trans\* individuals from voting in elections if they are unable to update the gender marker on their government ID.<sup>154</sup> A recent

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144. Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 579 (2010).

145. *Id.* at 579-80.

146. *Id.* at 579.

147. *Bostock*, 140 S.Ct. at 1735 (declaring that Title VII does not allow for discrimination on the basis of gender).

148. Arkles et al., *supra* note 144, at 581-82.

149. *Id.*

150. *Id.* at 582.

151. *Id.* at 582-83.

152. Katelyn Burns, *The Long History of Trans Voters’ Disenfranchisement, Explained*, VOX (Sept. 23, 2020), [www.vox.com/identities/21441200/history-of-trans-voters-disenfranchisement-explained](http://www.vox.com/identities/21441200/history-of-trans-voters-disenfranchisement-explained) [perma.cc/GX7W-HAHJ].

153. *Voter ID Laws*, NAT’L CONF. OF STATE LEG. (Jan. 7, 2022), [www.ncsl.org/research/elections-and-campaigns/voter-id.aspx](http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx) [perma.cc/9KCP-RRMM].

154. Burns, *supra* note 152 (referencing the intersection of voter ID laws with gender and name change laws, where trans people previously had to sterilize themselves in order to get an ID, but there have been improvements).

study found that 378,000 transgender adults who would otherwise be eligible to vote do not have up-to-date documentation, with approximately 105,000 individuals in this group facing substantial barriers to voting.<sup>155</sup>

Nearly one in three trans\* individuals also fall below the poverty line in the U.S., making obtaining expensive identification documents even less feasible.<sup>156</sup> Obtaining updated documentation places additional burdens on the community. As of 2020, only ten states and New York City do not require medical evidence in order to update the gender marker on an individual's birth certificate.<sup>157</sup>

In addition to preclusion from the polls, there are very few LGBTQ+ politicians in positions of power to advocate on behalf of trans\* communities.<sup>158</sup> With limitations on voting in conjunction with comprising less than one-half percent of the nation's population, there is little opportunity for more trans\* inclusion and representation in politics.<sup>159</sup>

### *C. Understandings of Gender in the Sociological and Medical Fields*

#### *1. Immutability and Relevancy of Trans\* Identities*

Trans\* identities are uniquely structured by social norms and

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155. Adam P. Romero, *The Nineteenth Amendment and Gender Identity Discrimination*, AM. BAR ASS'N (May 6, 2020), [www.americanbar.org/groups/litigation/publications/litigation\\_journal/2019-20/spring/the-nineteenth-amendment-and-gender-identity-discrimination/](http://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/the-nineteenth-amendment-and-gender-identity-discrimination/) [perma.cc/RH9D-LVJS] (citing Kathryn O'Neill & Jody L. Herman, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2020 General Election*, WILLIAMS INST. (2020); Jody L. Herman & Taylor N.T. Brown, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2018 General Election*, WILLIAMS INST. (Aug. 2018)).

156. M. V. Lee Badgett et al., *LGBT Poverty in the United States*, WILLIAMS INST. (Oct. 2019), [www.williamsinstitute.law.ucla.edu/publications/lgbt-poverty-us/](http://www.williamsinstitute.law.ucla.edu/publications/lgbt-poverty-us/) [perma.cc/KA2W-3GXS] (finding that trans\* individuals have a poverty rate of about thirty percent).

157. *Summary of State Birth Certificate Gender Change Laws*, NAT'L CTR. FOR TRANSGENDER EQUALITY (Apr. 2020), [www.transequality.org/sites/default/files/images/Summary%20of%20State%20Birth%20Certificate%20Laws%20Apr%2028%202020.pdf](http://www.transequality.org/sites/default/files/images/Summary%20of%20State%20Birth%20Certificate%20Laws%20Apr%2028%202020.pdf) [perma.cc/3XCU-WP8N] [hereinafter '*Summary of State*'].

158. Dan Avery, *Congress Will Have a Record Number of LGBTQ Lawmakers Next Session*, NBC NEWS: OUT POL. & POL'Y (Nov. 8, 2020), [www.nbcnews.com/feature/nbc-out/congress-will-have-record-number-lgbtq-lawmakers-next-session-n1246487](http://www.nbcnews.com/feature/nbc-out/congress-will-have-record-number-lgbtq-lawmakers-next-session-n1246487) [perma.cc/2E4Q-64UJ].

159. *Id.*

expectations, as well as medical science recognition. Despite existing throughout time, trans\* individuals have only been recognized in the U.S. as pathologies to the mainstream of gender.<sup>160</sup> Over the past century, sociologists have expanded their understanding of gender identity and gender expression as a complex and never stagnate identity shaped by both the individual and society as a whole.<sup>161</sup> Medical science has vacillated between recognizing the need for gender affirming care and classifying gender dysphoria and nonbinary identities as disorders. The intersections of these fields frame the U.S.'s boundaries for gender at a legal and governmental level today just as much as it has historically.

a. The historical and sociological development of gender as a social construct.

The gender binary as it exists today is so embedded in U.S. culture that it is hard to imagine a time before its existence.<sup>162</sup> Particularly, social control over bodies and restrictions on gender expression has been linked to the antebellum south.<sup>163</sup> Throughout the 1900s, the language used for individuals identifying outside the gender binary changed repeatedly.<sup>164</sup> For instance, in 1949 Simone de Beauvoir posited that the male identity is at the core of Western society.<sup>165</sup> This opened the door to a new way of thinking about

160. BEEMYN, *supra* note 4, at 9.

161. Celis, *supra* note 27.

162. BEEMYN, *supra* note 4, at 5-7.

163. Aliyyah I. Abdur-Rahman, "The Strangest Freaks of Despotism": *Queer Sexuality in Antebellum African American Slave Narratives*, 40 *JOHNS HOPKINS UNIV. PRESS AFRICAN AM. REV.* 223, 230 (2006) (discussing the intersections of race, sexuality, and gender identity, where views at the time were that homosexuality was a pathology where individuals "inverted" their sex-roles through acting and presenting in a way that did not align with the social norms for their perceived gender). Further, Black people were viewed as genderless, as they were exploited for any and all activities. *Id.* Thus white enslavers did not associate Black people with any gender. *Id.*

164. See RALPH WERTHER, *THE AUTOBIOGRAPHY OF AN ANDROGYNE* xi, 7, 35-37 (1919) (referring to himself, the author, as "fairie" and "androgyné" as well as identifying as "one-third" woman and describing a group as "women in masculine attire with masculine genitals" in his diary entries from the 1800s).

165. SIMONE DE BEAUVOIR, *THE SECOND SEX* (Constance Borde & Sheila Malovany-Chevallier trans., Vintage Books 2011), [www.uberty.org/wp-content/uploads/2015/09/1949\\_simone-de-beauvoir-the-second-sex.pdf](http://www.uberty.org/wp-content/uploads/2015/09/1949_simone-de-beauvoir-the-second-sex.pdf); see also CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (Harvard Uni. Press 1991), [www.dcac.du.ac.in/documents/E-Resource/2020/Metrial/24Robinson1.pdf](http://www.dcac.du.ac.in/documents/E-Resource/2020/Metrial/24Robinson1.pdf) [perma.cc/PQL9-P84B] (approaching the issue as dominance in society stemming from a dichotomy where heterosexuality is at the core of female subordination, specifically).

gender as a malleable set of roles rather than a predetermined set of traits.<sup>166</sup>

In the 1960s and 1970s, theorist Sandra Bem's research demonstrated that sex-roles are socialized traits and that enforcing rigid sex-roles based on stereotypes was not societally beneficial.<sup>167</sup> She uncovered that every person exhibits characteristics and preferences outside their sex-role stereotype, and therefore advocated for another path, androgyny.<sup>168</sup> Rigid gender roles had a direct adverse impact on trans\* people in society.<sup>169</sup> By the late 1990s, a more inclusive vocabulary for, and understanding of, trans\* communities emerged in academia and created a new lexicon for gender discourse.<sup>170</sup>

Just after Bem's research published, Michel Foucault brought a post-structuralist view to queer theory, rejecting the notion that any absolute truths exist.<sup>171</sup> Judith Butler simultaneously posited that gender and sexuality are inextricably linked and are actions people perform, rather than stagnant identities.<sup>172</sup> The theorists overlaid panoptic social monitoring onto identity expression, where individuals constantly monitor one another's actions and appearances – at times this method of enforcing social norms plays out in courtroom settings.<sup>173</sup>

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166. DE BEAUVOIR, *supra* note 165; MACKINNON, *supra* note 165.

167. Sandra L. Bem, *The Measurement of Psychological Androgyny*, 42 J. CONSULTING & CLINICAL PSYCH. 155, 162 (1974) (concluding that “[i]n a society where rigid sex-role differentiation has already outlived its utility, perhaps the androgynous person will come to define a more human standard of psychological health”).

168. *Id.* at 155.

169. *Id.* at 161-62 (concluding that “[i]t is hoped that the development of the [Bem Sex Role Inventory] will encourage investigators in the areas of sex differences and sex roles to question the traditional assumption that it is the sex-typed individual who typifies mental health and to begin focusing on the behavioral and societal consequences of more flexible sex-role self-concepts”).

170. BEEMYN, *supra* note 4, at 28 (discussing the adopting of “transgender” as an umbrella term for those who identify outside the gender binary and its incorporation into writing in the 1980s and 1990s).

171. Ki Namaste, *The Politics of Inside/Out: Queer Theory, Poststructuralism, and a Sociological Approach to Sexuality*, 12 SOCIO. THEORY 220, 222 (1994), [www.csun.edu/~snk1966/Namaste%20-%20The%20Politics%20of%20Inside-Out%20-%20Queer%20Theory,%20Poststructuralism,%20and%20a%20Sociological%20Approach%20to%20Sexuality.pdf](http://www.csun.edu/~snk1966/Namaste%20-%20The%20Politics%20of%20Inside-Out%20-%20Queer%20Theory,%20Poststructuralism,%20and%20a%20Sociological%20Approach%20to%20Sexuality.pdf) [perma.cc/SY72-XZ7K] (stating Foucault's theory that all identities are developed by human interdependence on present and past experiences, rather than determined by nature alone).

172. BUTLER, *supra* note 127, at 1-2, 8, 127 (challenging members of society to disrupt the gender binary and promote gender fluidity).

173. *Id.* at 1-2; *see also* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 136 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (emphasizing the foundations of sexual expression coming from external societal forces inscribing

In the 1980s, feminist theory also questioned the objectivity of scientific studies of gender.<sup>174</sup> This adjustment challenged scientists' unconscious biases in shaping societal gender roles.<sup>175</sup> Discourse of gender shifted from an "either/or" nature versus nurture model to a "both/and" more fluid model.<sup>176</sup>

With the understanding of the biological, psychological, and social influences on gender, Sari van Anders developed a biopsychosocial model of the sexual configurations theory.<sup>177</sup> Academia then promoted the idea that gender is not always linked to a medical experience or dysphoria.<sup>178</sup> It does not always require a physical change to the body but is also informed by political and social circumstances.<sup>179</sup>

Each of the theories set out above comes together to influence queer theory.<sup>180</sup> A tenet of queer theory establishes that LGBTQ+ liberation should not be linked directly to equality within the social and political confines of this country as they currently exist.<sup>181</sup> Instead, as a means of resistance, queer theory works to remain unrestricted in attempts to create social change.<sup>182</sup>

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internal notions of identity on each individual).

174. ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN 13-18 (2d ed. 1992).

175. *Id.*

176. *Id.*

177. Sari M. van Anders, *Beyond Sexual Orientation: Integrating Gender/Sex and Diverse Sexualities via Sexual Configurations Theory*, 44 ARCHIVES OF SEXUAL BEHAV. 1177, 1192-93 (2015) (positing that sex, sexual orientation, and gender are not entirely essentialist and that biology, psychology, and social customs all play into each identity).

178. *Id.*

179. Jessie Earl, *Do You Need Gender Dysphoria to Be Trans?*, ADVOCATE (Jan. 18, 2019), [www.advocate.com/commentary/2019/1/18/do-you-need-gender-dysphoria-be-trans](http://www.advocate.com/commentary/2019/1/18/do-you-need-gender-dysphoria-be-trans) [perma.cc/TJZ5-W65C].

180. Fineman, *supra* note 23, at 5-7.

181. *Id.* at 6-7 (quoting Laurie Rose Kepros, *Queer Theory: Weed or Seed in the Garden of Legal Theory?*, 9 NLGLA WRITING COMPETITION 279, 284 (1999)) (arguing instead, that it emphasizes "'the manner in which heterosexuality has, silently . . . maintained itself as a . . . privileged norm; and an implicit, if not explicit, questioning of the goals of formal equality that, on their face simply reify the very categories that have generated heterosexual privilege and Queer oppression'").

182. *Id.*; *see also* CANADAY, *supra* note 20, at 4 (asserting "[t]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules,' . . . 'than in its capacity to persuade that the world described in its image and categories is the only attainable world.'") (quoting Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 109, 115 (1984)).

b. Medical development of the understanding of gender.

In 1918, Magnus Hirschfeld, a German sexologist, coined the term “transvestite” as a “desire to express one’s gender in opposition to their” gender assigned at birth.<sup>183</sup> Hirschfeld developed some of the first methods of gender affirming care.<sup>184</sup> His practices included hormone therapy and gender affirming surgeries.<sup>185</sup> His understanding of trans\* individuals as people to care for rather than people to “cure” set a positive tone early on, but the latter would soon take hold in the political and legal realms.<sup>186</sup>

Shortly thereafter, Dr. Alfred Kinsey founded the Institute for Sex Research in 1947.<sup>187</sup> He was one of the first researchers to use the term “transsexual” in his gender studies.<sup>188</sup> In doing so, he opened the door for a new way to view sex and gender in the medical context.<sup>189</sup>

Then, in the 1950s, psychologist John Money<sup>190</sup> coined the

183. Farah Naz Khan, *A History of Transgender Health Care: As the stigma of being transgender begins to ease, medicine is starting to catch up*, SCI. AM. (Nov. 16, 2016), [www.blogs.scientificamerican.com/guest-blog/a-history-of-transgender-health-care/](http://www.blogs.scientificamerican.com/guest-blog/a-history-of-transgender-health-care/) [perma.cc/5LUX-XJYG] (providing that it is nearly impossible to prove that Hirschfeld’s institute was the first to perform a gender affirming surgery as most of the institute’s primitive records were destroyed in the 1933 Nazi book burnings).

184. *Id.* (identifying Hirschfeld as one of the first members of the scientific community to treat patients subjectively based on their needs rather than objectively view individuals experiencing gender dysphoria as in need of a cure, as other medical providers of the time attempted to do); see also Christoph M. Zhang, *Biopolitical and Necropolitical Constructions of the Incarcerated Trans Body*, 37 COLUM. J. GENDER & L. 257, 258 (2019) (defining gender affirming care as “any regimen or procedure administered by the medical establishment that trans people may elect to receive, with the aim of modifying their bodies to match their internal sense of gender.”).

185. Khan, *supra* note 183 (performing five surgeries on Lili Elbe, portrayed by Eddie Redmayne in the film *The Danish Girl*, from 1930-1931).

186. HENRY BENJAMIN, *THE TRANSSEXUAL PHENOMENON* 10 (Symposium Pub. 1999) (building on Hirschfeld’s work to support individuals rather than “curing” them through psychotherapy).

187. Khan, *supra* note 183.

188. *Id.*

189. *Id.*

190. Phil Gaetano, *David Reimer and John Money Gender Reassignment Controversy: The John/Joan Case*, THE EMBRYO PROJECT ENCYCLOPEDIA (Nov. 15, 2017), [www.embryo.asu.edu/pages/david-reimer-and-john-money-gender-reassignment-controversy-johnjoan-case](http://www.embryo.asu.edu/pages/david-reimer-and-john-money-gender-reassignment-controversy-johnjoan-case) [perma.cc/MSJ9-PG9B] (discussing Money’s abysmal treatment of child patients with regard to gender, specifically noting where Money omitted mention of gender dysphoria from his notes of a patient and that Money would conduct “tortuous and abusive” experiments on children.).

term “gender role.”<sup>191</sup> Money also began research on the practice of medical sex “reassignment” procedures that set the standard for modern treatments.<sup>192</sup> The idea of gender affirming care also came into the mainstream in this decade with the public transition of Christine Jorgensen.<sup>193</sup>

In 1979, a Johns Hopkins study said psychosocial outcomes in transgender patients receiving treatment were not better than those who did not have gender affirming surgery.<sup>194</sup> This study was a setback in the perceived validity of gender affirming care and medical support for individuals experiencing gender dysphoria.<sup>195</sup> The lost opportunity to normalize gender affirming care also opened the door to transmedicalism within the field, which permeated into the legal system.<sup>196</sup>

Subsequently, the American Psychiatric Association published its third edition of the Diagnostic and Statistical Manual (“DSM-3”), which identified “gender identity disorder” as a mental disorder.<sup>197</sup> Most people who identify as transgender reject this medical finding,<sup>198</sup> although it has provided a legal mechanism through which transgender individuals have been able to obtain certain rights.<sup>199</sup> In 2014, the American Psychiatric Association published the DSM-5, replacing “gender identity disorder” with “gender dysphoria,” continuing to classify gender nonconformity as

191. John Money, *Ph.D.*, KINSEY INST., [www.kinseyinstitute.org/about/profiles/john-money.php](http://www.kinseyinstitute.org/about/profiles/john-money.php) [perma.cc/JR32-2BTK] (last visited Oct. 11, 2020) (discussing Money’s study of psychoendocrinology and developmental sexology).

192. *Id.*; see also Iain Morland, *Intersex*, 1 *TRANSGENDER STUD. Q.* 111, 112 (noting that John Money insisted that sex anatomy is a precursor to gender, which contradicts his belief that gender deviates from sex anatomy in transgender individuals).

193. Stephanie Barajas, *Christine Jorgensen*, OUTHISTORY, [outhistory.org/exhibits/show/tgi-bios/christine-jorgensen](http://outhistory.org/exhibits/show/tgi-bios/christine-jorgensen) [perma.cc/8PWZ-93A2] (last visited Nov. 21, 2020).

194. Jon K. Meyer & Donna J. Reter, *Sex Reassignment: Follow-up*, 36 *ARCH. GEN. PSYCH.* 1010, 1012 (1979) (creating the first ever standards of care for the health and wellbeing of gender nonconforming individuals).

195. *Id.*

196. Zhang, *supra* note 184, at 258 (defining transmedicalism as “the understanding of transness as an essentially medical condition” with gender dysphoria as a required symptom).

197. William Byne et al., *Gender Dysphoria in Adults: An Overview and Primer for Psychiatrists*, 3 *TRANSGENDER HEALTH* 57, 59 (2018), [www.liebertpub.com/doi/10.1089/trgh.2017.0053](http://www.liebertpub.com/doi/10.1089/trgh.2017.0053) [perma.cc/G72W-JBHJ] (updating the term gender identity disorder to “gender dysphoria” in 2013’s DSM-5).

198. Illinois Legal Aid Online, *Transgender Law*, YOUTUBE at 15:45-20:46 (Apr. 22, 2014), [youtu.be/-VMSV6amdO4](https://youtu.be/-VMSV6amdO4) [perma.cc/WR7P-CYYP].

199. *Id.*

a mental disorder.<sup>200</sup>

## 2. *The Relevancy of that Trait*

Individuals identifying as trans\* are only limited in their ability to contribute to society, such as via employment or military service, due to social and policy barriers – not their gender identities.<sup>201</sup> Trans\* people work as neurobiologists, technology developers, attorneys, foreign service officers, and actors.<sup>202</sup> The limiting policies force trans\* people, especially trans\* people of color, into the prison system and poverty, and out of employment, medical treatment, and politics, simply for being trans\*.<sup>203</sup> Thus, trans\* identity does not shape the communities' abilities to partake in society, it is U.S. laws and norms that prohibit trans\* participation.

### *D. How the U.S. Government Lags Behind on Gender*

United States courts still impose standards that are inconsistent with modern sociological, medical, and scientific' understandings of gender classification.<sup>204</sup> Instead, the courts rely on a limited view of trans\* history and experiences when assessing rights-based cases.<sup>205</sup> These rights are rooted in an interpretation of the world where liberties are defined by those granting rights, and not through the lens of the communities seeking rights.<sup>206</sup> Rather, the systems have determined which portions of the

200. *Id.*

201. *Brumby*, 663 F.3d at 1321 (11th Cir. 2011) (striking down defendant's argument that an employee's transgender identity was relevant to their work because it would disrupt the workplace if the employee used a bathroom associated with their gender identity); *see also* *Doe 2 v. Shanahan*, 917 F.3d 694, 697 (D.C. Cir. 2019) (stating "[s]pecifically, prohibiting transgender people from serving [in the military] would exclude qualified individuals on a basis that has no relevance to one's fitness to serve").

202. Brynn Tannehill, *The Top 50 Successful Transgender Americans You Should Know*, LGBTQ NATION (Jan. 12, 2017), [www.lgbtqnation.com/2017/01/top-50-successful-transgender-americans-know/](http://www.lgbtqnation.com/2017/01/top-50-successful-transgender-americans-know/) [perma.cc/6JDE-MJ8T].

203. Avery, *supra* note 158 (discussing how racism, police brutality, and the COVID-19 pandemic disproportionately impact people of color and LGBTQ individuals).

204. *See* Earl, *supra* note 179 (describing gender dysphoria as "the distress or discomfort at realizing that one's gender identity given to them at birth does not match with the gender identity they feel most comfortable with.>").

205. Arkles et al., *supra* note 144, at 584.

206. *Id.*

community are “normal” enough to be allowed to enjoy cisgender-centered rights.<sup>207</sup>

The first case to consider transsexualism explicitly in the U.S. was not until 1966.<sup>208</sup> The outcome of that case serves as a clear example of the discrepancies between the fields of medicine and law.<sup>209</sup> At the same time the medical field endorsed gender affirming care, and society started to understand more about gender as a social construct, the courts, and government remained focused on rules that precluded gender identity.<sup>210</sup>

### 1. *Criminal and Civil Justice*

United States courts have developed disproportionately slower than modern sociological, medical, and scientific fields in interpreting gender.<sup>211</sup> For example, courts have been inconsistent in upholding access to gender affirming care for individuals who are incarcerated.<sup>212</sup> In order to demonstrate the need of gender affirming care, many courts require the trans\* person to adequately plead gender dysphoria or gender identity disorder.<sup>213</sup> This transmedicalist viewpoint dismisses all social and scientific understandings of gender.<sup>214</sup>

On the legislative front, explicit laws around punishing cross-dressing and targeting gender identity and expression first appeared in the mid-1800s.<sup>215</sup> In 2009, Congress passed the

207. SPADE, *supra* note 21, at xv.

208. Anonymous v. Weiner, 270 N.Y.S.2d 319 (1966) (holding that despite undergoing gender affirming surgery, the health department was only able to change gender markers on birth certificates in the case that it was recorded incorrectly at the time of birth).

209. *Id.*

210. *Id.*

211. George, *supra* note 7, at 556-58.

212. See Fields v. Smith, 653 F.3d 550, 559 (7th Cir. 2011) (holding that the department of corrections could not take away “even the consideration of hormones or surgery”); *but see* Gibson v. Collier, 920 F.3d 212, 215-16 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 653 (2019) (finding no Eighth Amendment where a correctional facility declines to provide gender affirming care to a transgender inmate); *see also* Williams v. Kelly, 181 Fed.Appx. 353 (5th Cir. 2020) (ruling that a plaintiff was not subject to cruel and unusual punishment where the plaintiff medically needed a lower dose of hormones, but only gender affirming surgery would allow her to withstand her gender dysphoria and drop her dosage); *Id.* (misgendering Plaintiff Williams throughout the entire appellate panel hearing).

213. *Id.*

214. *Id.*

215. STRYKER, *supra* note 110, at 33-4 (noting as well that gender identity and sexual orientation were not as distinguished from one another during that time period).

Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, including in the definition of a federal hate crime any hate crimes based on actual or perceived gender identity or gender-related characteristics.<sup>216</sup>

In furtherance of the Hate Crimes Prevention Act, more progress was made between 2010 and 2016 under President Obama's administration.<sup>217</sup> President Obama extended workplace protections to include gender identity for federal government contractors in 2014.<sup>218</sup> Also during that time, Attorney General Eric Holder issued a memorandum declaring that Title VII of the Civil Rights Act of 1964 would be interpreted to include discrimination against gender identity under sex discrimination.<sup>219</sup> The Trump administration subsequently repealed that interpretation, but the Supreme Court extended the protections again in 2020.<sup>220</sup>

The scope of harm created by transphobia spans beyond the bounds of courtrooms and the federal government.<sup>221</sup> Changing the legal protections for individuals does not necessarily get to the root of the problem with discrimination.<sup>222</sup>

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216. Hate Crime Acts, 18 U.S.C. § 249 (2021) (adding a provision for supervised release in its May 2021 amendment).

217. The Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2010) (closing the ability to engage in sex-based discrimination, including gender identity, as of January 2014); *see also Know Your Rights | Medicare*, NAT'L CTR. TRANS EQUALITY, [www.transequality.org/know-your-rights/medicare](http://www.transequality.org/know-your-rights/medicare) [perma.cc/M2UM-5Z7T] (last visited Oct. 7, 2020) [hereinafter '*Know Your Rights*'] (confirming that since 2014, gender affirming care is covered under Medicare).

218. Exec. Order No. 13672, Further Amendments to Exec. Order 11478, Equal Employment Opportunity in the Federal Gov't, and Exec. Order 11246, Equal Employment Opportunity, 79 Fed. Reg. 42971 (2014) (providing; *see also* SPADE, *supra* note 21, at 140-43 (rebutting the administration's efforts at trans equality as pinkwashing state aggression insofar as allowing transgender individuals to serve in the military).

219. Unlawful Employment Practices, 42 U.S.C. § 2000e-2(a) (2000) (prohibiting discrimination from private employers, state, and local governments); 42 U.S.C. § 2000e-16(a) (2000), [www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination](http://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination) [perma.cc/HNQ3-Z238] (providing that federal agencies engaged in personnel actions must not discriminate based on sex).

220. Debra Cassens Weiss, *Sessions Memo Says Title VII Doesn't Bar Discrimination Against Transgender People*, ABA J. (Oct. 6, 2017), [www.abajournal.com/news/article/sessions\\_memo\\_says\\_title\\_vii\\_doesnt\\_bar\\_discrimination\\_against\\_transgender](http://www.abajournal.com/news/article/sessions_memo_says_title_vii_doesnt_bar_discrimination_against_transgender) [perma.cc/JW8S-NDL7]; *but see Bostock*, 140 S. Ct. at 1734 (declaring that Title VII does not allow for discrimination on the basis of gender).

221. S. Elizabeth Malloy, *What Best to Protect Transsexuals from Discrimination: Using Current Legislation or Adopting a New Judicial Framework*, 32 WOMEN'S RTS. L. REP. 283, 303 (2010).

222. *Id.* at 283-84.

## 2. Immigration

The U.S. Government continues to fall behind social and medical developments of gender, specifically when it comes to immigration.<sup>223</sup> Historically, immigration settings have always subjected LGBTQ+ individuals to heightened critique.<sup>224</sup> Scholars familiar with both legal issues of immigration and gender identity have criticized the immigration system as upholding the gender binary and reinforcing the “born into the wrong body” narrative.<sup>225</sup> The courts and legislature have left this area of law open for asylum seekers to remain under attack through the immigration process.<sup>226</sup>

## 3. Other Federal Interventions.

Following *Bostock*, the federal government filed and supported lawsuits precluding trans\* youth from participating in sports that reflect their gender identity.<sup>227</sup> While many states moved to adopt the new interpretation of sex as applying to fair housing and other areas, the federal government moved to rescind Obama-era protections set out by the United States Department of Housing and Urban Development (“HUD”).<sup>228</sup> The federal government has also

223. Stefan Vogler, *Determining Transgender: Adjudicating Gender Identity in U.S. Asylum Law*, 33 GENDER & SOC’Y 439, 439-40 (2019).

224. See e.g., CANADAY *supra* note 20, at 4.

225. Vogler, *supra* note 223, at 440 (opining that the government both “constitutes” and “purports only to regulate” gender identity, but in reality creates problems where transgender individuals can only then be offered protections as far as the court understands their identity); see also *Jeune v. U.S. Atty. Gen.*, 810 F.3d 792, 795-96 (11th Cir. 2016) (reviewing whether or not asylum claims should be granted where the person fears persecution for their gender identity in their country of origin).

226. See Vogler, *supra* note 223, at 439-40 (describing an asylum seeker from México nearly being denied asylum due to her non-binary gender identity as the court almost applied a sexual orientation status to her as a gay person instead, and noting that “[c]ategorization is fundamental to state power, and . . . [a] seemingly ‘progressive’ change in categories may not be enough to change institutional gender orders if the processes by which people are put in those categories remains structured around a gender binary or other limiting ways of understanding gender.”)

227. See Luke Broadwater & Erica L. Green, *DeVos Vows to Withhold Desegregation Aid to Schools Over Transgender Athletes*, N.Y. TIMES (Sept. 18, 2020), [www.nytimes.com/2020/09/18/us/transgender-students-betsy-devos.html](http://www.nytimes.com/2020/09/18/us/transgender-students-betsy-devos.html) [perma.cc/A6D9-XKA4] (presenting the Education Department’s threat against Connecticut schools for allowing transgender students to compete on teams aligning with their gender identity).

228. See Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44811 (proposed July 24, 2020) [hereinafter ‘HUD Sex Based Proposal’] (rescinding previous Obama Administration policies which provided

gone so far as to support lawsuits that directly opposed the Affordable Care Act (“ACA”).<sup>229</sup> Through its expansion of Medicaid and Medicare coverage and inclusion of nondiscrimination policy interpretations, the ACA offered access to more medical support for trans\* individuals.<sup>230</sup>

Accordingly, these are all battles that trans\* individuals have been fighting for many years. Housing security, mental health, and access to health care are all prevalent and growing problems in trans\* communities.<sup>231</sup>

### III. ANALYSIS

Inherent in the social limitation of gender as a binary is violence against anyone identifying outside that binary.<sup>232</sup> Social movements, including LGBTQ+ movements, have taken up fighting for equal rights via anti-discrimination laws and hate crime legislation.<sup>233</sup> Even where trans\* individuals are not excluded from the organizing or policies, the movements have still shifted to a co-optation and adaptation model<sup>234</sup> that does not provide equity in

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for the protection of transgender individuals to have access to housing resources based on their gender identity); *see also* Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 86 Fed. Reg. 22125 (Apr. 27, 2021) (withdrawing the 2020 proposed rule).

229. *California v. Texas*, 141 S.Ct. 2104 (2021); Ian Millhiser, *The Fate of Obamacare is in the Supreme Court's Hands Yet Again*, VOX (Mar. 2, 2020), [www.vox.com/2020/3/2/21147037/obamacare-supreme-court-texas-john-roberts](http://www.vox.com/2020/3/2/21147037/obamacare-supreme-court-texas-john-roberts) [perma.cc/3LSR-AREL].

230. *See Know Your Rights*, *supra* note 217 (confirming that since 2014, gender affirming care is covered under Medicare).

231. Micky B. & Ash Stephens, *Trans Agenda for Liberation*, TRANSGENDER L. CTR., [www.transgenderlawcenter.org/trans-agenda-for-liberation](http://www.transgenderlawcenter.org/trans-agenda-for-liberation) [perma.cc/DKN5-5NPL] (last visited Nov. 22, 2020).

232. *Violence Against Trans and Non-Binary People*, NAT'L RES. CTR. ON DOMESTIC VIOLENCE, [www.vawnet.org/sc/serving-trans-and-non-binary-survivors-domestic-and-sexual-violence/violence-against-trans-and](http://www.vawnet.org/sc/serving-trans-and-non-binary-survivors-domestic-and-sexual-violence/violence-against-trans-and) [perma.cc/UW8C-N6HK] (last visited Feb. 18, 2022) (showcasing statistics regarding violence against trans and non-binary people, including a heightened risk of sexual assault, homelessness, sex work, intimate partner violence, and verbal harassment).

233. *See supra* at Part II (discussing the Street Transvestite Action Revolutionaries and other LGBTQ+ organizations pushing for anti-hate crime legislation amongst other legal protections for LGBTQ+ communities).

234. *See Arkles, et al. supra* note 144, at 608-09 (elucidating that the model of co-optation and adaptation applies primarily to non-profit organizations and organizations engaged in impact litigation. The approach utilizes the same litigation or social systems implemented by individuals in power for use to further a justice-centered cause (co-optation), but ultimately the goals change and are adapted to those more palatable to those in power who are able to make

actuality.<sup>235</sup>

This section analyzes recent cases reviewing legal protections for trans\* individuals under heightened scrutiny. Next, this section will review how trans\* communities fit the criteria for suspect classification. Then, as a counter to judicial reforms, this section will explore the issues most prioritized by non-profit organizations at the forefront of the fight for equal rights for trans\* communities.<sup>236</sup> Finally, this section will evaluate the current state of political attitudes towards trans\* inclusion.<sup>237</sup> The analysis for each area of trans\* rights takes into consideration the foundation set out in the Background.<sup>238</sup>

### *A. Heightened Scrutiny and Quasi-Suspect Classification*

In 2020, *Bostock* highlighted a bright-line rule of interpreting “sex” as inclusive to both sexual orientation and gender identity.<sup>239</sup> Under this standard, gender discrimination fits within heightened scrutiny.<sup>240</sup> In *Frontiero v. Richardson*, the Supreme Court determined that sex does not impact or relate to someone’s ability to contribute or perform in society, and therefore is not subject to strict scrutiny.<sup>241</sup> However, the Court did acknowledge that sex is an “immutable characteristic determined solely by the accident of birth,” granting sex a quasi-suspect classification, and therefore an intermediate or heightened level of review.<sup>242</sup> If a plaintiff receives

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a change to law and policy (adaptation). An example is in *Obergefell*, where LGBTQ activists have been calling for healthcare rights for trans\* communities for decades, but the organizations involved in the litigation put forth the case about same-sex marriage based on public perception. This model projects progress, but at its core requires marginalized groups to assimilate to hegemonic norms at the expense of the rights originally sought.)

235. *Id.* at 579.

236. *Id.*

237. *For Transgender Activists, Election Stokes Hopes and Fears*, ABC 8 NEWS (Oct. 26, 2020), [www.wric.com/news/politics/2020-election/for-transgender-activists-election-stokes-hopes-and-fears/](http://www.wric.com/news/politics/2020-election/for-transgender-activists-election-stokes-hopes-and-fears/) [perma.cc/5KHG-L4RP] [hereinafter ‘*For Transgender Activists*’].

238. *See supra* at Part II (elaborating on the legal requirements for suspect classification and the history of trans\* communities within the sociological and medical contexts as the foundation for the proceeding application).

239. *See Bostock*, 140 S. Ct. at 1731 (declaring that Title VII does not allow for discrimination on the basis of gender).

240. *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020) (concluding that “heightened scrutiny applies to Grimm’s claim because the bathroom policy rests on sex-based classifications *and* because transgender people constitute at least a quasi-suspect class”).

241. *Craig*, 429 U.S. at 197-98; *Frontiero*, 411 U.S. 677.

242. *Frontiero*, 411 U.S. at 686.

heightened scrutiny, the policy in question must be “substantially related to a sufficiently important governmental interest.”<sup>243</sup> This provides additional protections for an individual against government discrimination. A trans\* identity therefore qualifies as a quasi-suspect classification and receives heightened scrutiny.<sup>244</sup>

This interpretation was not always applied, and consequently courts have varied the level of scrutiny used to analyze trans\* claimants.<sup>245</sup> Some courts have relied on historical tradition and interpretation of legislative intent when enacting Title VII to preclude claims of transgender discrimination.<sup>246</sup> These textualist approaches have reasoned that the term “sex” was never meant to expand beyond the scope of male and female, and therefore trans\* individuals are not protected by the law.<sup>247</sup>

There are also problems with how claimants litigating gender discrimination based on transgender status are treated in the courtroom. Many courts still require claimants to demonstrate their trans\* identity through invasive and antiquated procedures.<sup>248</sup> These intensive reviews of medical histories and evaluations of the physical bodies of trans\* individuals are the modern equivalent to the assault on Thomas/Thomasine<sup>249</sup> and are not equally applied to cisgender individuals in court.

### *B. Litigation Centers Trans\* Visibility and Rights*

On October 30, 2020, a federal judge in the Middle District of Georgia issued a ruling that stated trans\* workers in the state government cannot be denied access to insurance coverage for

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243. *Grimm*, 972 F.3d at 607 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (internal quotations omitted)).

244. *Evancho*, 237 F.Supp.3d at 287-88.

245. Malloy, *supra* note 221, at 302-04 (discussing how in *Holloway*, 566 F.2d at 661, the court found that “sex” does not encompass a transgender identity and framed the issue as being fired for pursuing gender affirming care, not gender identity discrimination).

246. *Id.* at 303 n. 183 (citing *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) (stating that there was no clear congressional intent to interpret “sex” broadly as applying to transgender claimants)).

247. *Id.* at 302-04.

248. *See* M.A.B., 286 F.Supp.3d 704 (discussing the plaintiff’s birth sex, genitalia, gender dysphoria, depression, history in therapy, status of transition, and medical history to determine the validity of the plaintiff’s gender identity); *see also* F.V. v. Barron, 286 F.Supp.3d 1131, 1136 (D. Idaho 2018) (defining biological sex as “determined by numerous elements, which can include chromosomal composition, internal reproductive organs, external genitalia, hormone prevalence, and brain structure”).

249. McIlwaine, *supra* note 1.

gender affirming care.<sup>250</sup> This came just months after the Supreme Court's decision in *Bostock* extended equal protections based on gender identity to the workplace.<sup>251</sup> Another example of post-*Bostock* litigation that had direct implications for trans\* communities in *California v. Texas*.<sup>252</sup> This section will focus on the expansions of gender affirming care under the ACA at stake in that case.<sup>253</sup>

In *California*, the intersection between gender, disability, socioeconomic status, wealth, and healthcare was on full display.<sup>254</sup> The lawsuit erased and downplayed all of the damaging impacts trans\* communities will face should the ACA be repealed.<sup>255</sup> The advocates in the case prioritized the repeal of the tax associated with the individual mandate penalty rather than address the disparate negative impacts on trans\* communities.<sup>256</sup> After repealing the penalty in 2017, Republican governors from eighteen states filed the lawsuit as a means of dismantling the ACA.<sup>257</sup> As such, the thousands of trans\* people who only have health care because of the ACA are potentially at risk of losing their coverage.<sup>258</sup>

As it directly pertains to trans\* communities, section 1557 of the ACA protects against gender identity and sexual orientation discrimination.<sup>259</sup> Other modifications to the ACA under the Obama

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250. *Lange v. Houston Cnty., Ga.*, 499 F.Supp.3d 1258 (M.D. Ga. 2020).

251. *Bostock*, 140 S.Ct. at 1734 (declaring that Title VII does not allow for discrimination on the basis of gender).

252. *California*, 141 S.Ct. at 2106.

253. Caroline Medina & Lindsay Mahowald, *Repealing the Affordable Care Act Would Have Devastating Impacts on LGBTQ People*, CTR. FOR AM. PROGRESS (Oct. 15, 2020), [www.americanprogress.org/issues/lgbtq-rights/news/2020/10/15/491582/repealing-affordable-care-act-devastating-impacts-lgbtq-people/](http://www.americanprogress.org/issues/lgbtq-rights/news/2020/10/15/491582/repealing-affordable-care-act-devastating-impacts-lgbtq-people/) [perma.cc/R4EH-YS34].

254. *Id.*

255. MaryBeth Musumeci, *Explaining California v. Texas: A Guide to the Case Challenging the ACA*, KAISER FAMILY FOUND. (Sept. 1, 2020), [www.kff.org/health-reform/issue-brief/explaining-california-v-texas-a-guide-to-the-case-challenging-the-aca/](http://www.kff.org/health-reform/issue-brief/explaining-california-v-texas-a-guide-to-the-case-challenging-the-aca/) [perma.cc/2LGV-EAZ4].

256. Nicole Rapfogel & Emily Gee, *The Health Care Repeal Lawsuit Could Strip Coverage from 23 Million Americans*, CTR. FOR AM. PROGRESS, (June 24, 2020), [www.americanprogress.org/issues/healthcare/news/2020/06/24/486768/health-care-repeal-lawsuit-strip-coverage-23-million-americans/](http://www.americanprogress.org/issues/healthcare/news/2020/06/24/486768/health-care-repeal-lawsuit-strip-coverage-23-million-americans/) [perma.cc/T4FM-QAGA].

257. *Id.*

258. *Id.*

259. Press Release, Health & Human Servs., *HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs*, U.S. DEPT. OF HEALTH & HUMAN SERVS. (June 12, 2020), [www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html](http://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html) [perma.cc/DZ4T-MA2R]; see also Nico Lang, *22 States Are Suing Trump for*

Administration include the expansion of Medicare and Medicaid to include gender affirming medical care.<sup>260</sup> Repealing the ACA would be a negative and multifaceted attack on the livelihood of trans\* communities.<sup>261</sup> As stated in Part II, there are still states that have not elected to expand coverage of Medicare and Medicaid.<sup>262</sup> The LGBTQ+ community experiences higher rates of poverty and discrimination in the medical field, and consequently benefited greatly from the previous expansions of the ACA and the ACA as a whole.<sup>263</sup>

Without access to affordable care, the courts would not only strip trans\* communities of a right to life-saving treatment but would also be restricting the ability of trans\* people to participate in day-to-day life.<sup>264</sup> In states that require medical proof in order to obtain correctly gendered identification, trans\* individuals would be harshly limited in finding jobs, receiving healthcare, or applying for other government benefits guaranteed to cisgender Americans.<sup>265</sup> Living under these restrictions would then perpetuate the same norms of exclusion of trans\* people of color, poor people, immigrants, and non-straight identifying individuals.<sup>266</sup>

Repealing the ACA, on its face, simply deconstructs a healthcare system that our country has adopted over the past decade. In practice, repeal will go to further marginalize an already targeted group.<sup>267</sup> Discriminatory policies are allowed in the U.S. when they serve a social goal or purpose and the discrimination is

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*Targeting Trans Health Care Protections*, THEM. (July 23, 2020), [www.them.us/story/22-states-suing-trump-for-targeting-trans-health-care-protections](http://www.them.us/story/22-states-suing-trump-for-targeting-trans-health-care-protections) [perma.cc/W832-5U6M] (nothing that LGBTQ+ individuals are also more likely to be frontline workers during the COVID-19 pandemic and therefore further at-risk if the ACA is ruled unconstitutional).

260. Nondiscrimination In Health Programs and Activities, 45 C.F.R. § 92 (2016) (providing healthcare protections by disallowing service providers from rejecting to cover care based on someone identifying as trans).

261. Medina & Mahowald, *supra* note 253.

262. *Id.*

263. Medina & Mahowald, *supra* note 253.

264. George, *supra* note 7, at 608-10 (describing the discrimination faced by nonbinary and trans\* individuals).

265. *Summary of State*, *supra* note 157.

266. Sandy James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY 4, 8, 93-4 (2016), [www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf](http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf) [perma.cc/6NLW-YJG7] (noting that Black and Latinx trans\* individuals were more likely to be uninsured, and that fourteen percent of trans\* individuals bought their insurance through a health insurance marketplace such as healthcare.gov).

267. *Id.*

proportional to the perceived benefits.<sup>268</sup> Further restricting trans\* communities' access to medical care also runs the risk of limiting access to updated government identification and voting in elections.<sup>269</sup> Here, if the *California* Court were to have upheld the lower courts' findings that the ACA is unconstitutional, it would have discriminated disproportionately against the LGBTQ+ community, and trans\* individuals specifically.<sup>270</sup>

### C. Distinguishing the Legal Interpretations of Sex

One way that courts review for discrimination, such as the potential outcome in *California*, is through identifying the impacted community as a suspect class.<sup>271</sup> Suspect classification is subject to strict scrutiny, which requires the government to demonstrate a compelling purpose for drawing distinctions between classes of individuals, and that the distinction is necessary to achieve the purpose of the law.<sup>272</sup> Suspect classification does not apply to sex.<sup>273</sup>

The defining factors of a suspect class are ambiguous and leave room for argument as to who should be included.<sup>274</sup> In *Bostock*, the Court interpreted sex to mean sex, sexual orientation, and gender identity, and extended Title VII workplace protections to all of those identities.<sup>275</sup> With that, the Court also consolidated both sexual orientation and gender identity into the term "sex," meaning that the LGBTQ+ community is subject to an intermediate level of

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268. Rachel McKinnon & Aryn Conrad, *Including Trans Women Athletes in Competitive Sport: Analyzing the Science, Law, and Principles and Policies of Fairness in Competition*, 46 PHILOSOPHICAL TOPICS 7 (forthcoming).

269. See *supra* Part II(B)(3) (discussing the low population of trans\* individuals in the U.S. and the inability for the communities to access political redress).

270. Medina & Mahowald, *supra* note 253; *California*, 141 S.Ct. 2104 (ruling that the plaintiffs did not have Article III standing to bring their constitutional claims against the ACA, but issuing no specific ruling as to the constitutionality of the ACA).

271. Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 489 (2004).

272. *City of Cleburne*, 473 U.S. at 440 (ruling laws subject to strict scrutiny "will be sustained only if they are suitably tailored to serve a compelling state interest") (citations omitted); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); Strauss, *supra* note 32, at 137, 144 n. 44-5, 145 (citing *Korematsu v. U.S.*, 323 U.S. 214 (1944) and *McLaughlin v. Florida*, 379 U.S. 184 (1964) as referencing suspect classifications for race prior to setting out ways to determine suspect classification in the 1970s).

273. See *Frontiero*, 411 U.S. at 686 n. 17 (asserting that women are underrepresented in decision-making positions, but are not powerless or small).

274. Strauss, *supra* note 32, at 146-47.

275. See *Bostock*, 140 S.Ct. at 1734 (declaring that Title VII does not allow for discrimination on the basis of gender).

scrutiny.<sup>276</sup>

In taking this approach, the Court failed to recognize the disconnect between the historical and current status of trans\* individuals in the U.S.<sup>277</sup> Where, in *Frontiero*, the Court determined that women are able to take part in society without obstruction, the reality for trans\* individuals could not be more different.<sup>278</sup> Cisgender women have been granted access to political capital and social progress in a way that is not true for people who identify as trans\*.<sup>279</sup> Trans\* communities, in actuality, perfectly fit into the criteria for a suspect classification in need of strict scrutiny review.

In 2019, the Ninth Circuit issued a ruling in *Karnoski v. Trump*, which applied intermediate scrutiny to a ban on transgender individuals serving in the military.<sup>280</sup> Defendants argued that “rational basis review applies because the classifications challenged [] are based on ‘gender dysphoria’ and ‘gender transition’ rather than transgender status.”<sup>281</sup> The policy itself stated that “[t]ransgender persons with a history or diagnosis of gender dysphoria are disqualified from military service, except under [certain] limited circumstances,” and that “[t]ransgender persons who require or have undergone gender transition are disqualified from military service . . . [t]ransgender persons without a history or diagnosis of gender dysphoria . . . may serve . . . in their biological sex.”<sup>282</sup>

In *Karnoski*, the Ninth Circuit disagreed with the district court’s grant of suspect classification and strict scrutiny to transgender individuals.<sup>283</sup> The ultimate question in this case, as

276. *Id.* (arguing for plaintiff the idea that you could not think of one’s sex in the workplace if you were thinking about their identity as transgender, as that would mean you are thinking about their sex and their actual gender identity, whereas previously, in *Obergefell*, the Court also refused to extend suspect classification to sexual orientation).

277. Sharita Gruberg, *Beyond Bostock: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020), [www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/](http://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/) [perma.cc/4CRU-YMYE].

278. *Id.*; B. & Stephens, *supra* note 231.

279. George, *supra* note 7, at 601-02.

280. *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019) (explaining that *Witt v. Dep’t of the Air Force*, 527 F.3d 806 (9th Cir. 2008) informs the application of intermediate scrutiny, but does not displace it when applied in the military context).

281. *Karnoski*, 926 F.3d at 1201.

282. *Id.* at 1191, 1201; *Witt*, 527 F.3d at 821; *see also* *Sell v. U.S.*, 539 U.S. 166, 179-81 (2003) (creating the “as-applied” standard of review when analyzing government intrusion into private lives of homosexual relationships).

283. *Karnoski*, 926 F.3d at 1199.

well as others in this area, is whether or not the state has a compelling interest in protecting transgender people who are denied equality based on their identity and the burdens they face because of their identity.<sup>284</sup> When reviewed under a lower level of scrutiny, trans\* individuals receive less protection than their cisgender counterparts in litigation. Recently, *Fulton* was the only case on the Supreme Court docket which could have revisited the interpretation of and scrutiny level for sex.<sup>285</sup>

#### *D. Community Organizing and Non-Profit Co-Optation*

Organizations take many paths in hopes of reform, from pursuing litigation and judicial scrutiny reforms, to emphasizing systemic changes for true trans\* liberation through policy change. In October 2020, many transgender rights activists spoke about ongoing struggles and ensuing fears about the upcoming election.<sup>286</sup> Shannon Minter of the National Center for Lesbian Rights (“NCLR”) is an attorney who identifies as trans\*, and he recognized that the Trump Administration was using “the full power of the presidency and the executive branch to inflict maximum damage on the transgender community.”<sup>287</sup> Organizations like NCLR have identified several key policy areas in which they believe more protections for trans\* communities can be developed.<sup>288</sup> These organizations, however, largely fail to utilize an intersectional analysis of the issues by framing their work through a primarily legal lens, according to other groups.<sup>289</sup>

Starting in the 1990s, national organizations such as the NCLR, Lambda Legal, the American Civil Liberties Union, and the Gay and Lesbian Advocates and Defenders focused on impact litigation as a tool for fighting for equality.<sup>290</sup> This mechanism is

284. *Id.* at 1200-01.

285. *See generally* *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *rev'd*, 141 S.Ct. 1868, 1871 (2021) (litigating whether the protections for religious exercise under the First Amendment outweigh the Due Process protections provided by the Fourteenth Amendment when deciding whether or not a Catholic affiliated adoption agency that has legal contracts with Philadelphia may reject same-sex couples seeking to adopt children on religious grounds).

286. *For Transgender Activists*, *supra* note 237.

287. *Id.*

288. Arkles et al., *supra* note 144, at 579, 586 (stating that the NCLR is a part of the LGBT Roundtable, which “has become the body of legal experts with whom attorneys should consult to strategize about LGB“T” impact litigation priorities”).

289. *Id.* at 588.

290. *Id.* at 586.

confined to the legal understanding of sex.<sup>291</sup> The cases often only prioritized cisgender individuals who identify as gay, lesbian, or bisexual.<sup>292</sup> In order to further their own agendas, many of these organizations directly excluded trans\* individuals from being a part of the lawsuits or of the organizations as a whole.<sup>293</sup>

One of the greatest critiques of pursuing the impact litigation and scrutiny reform model is that in doing so, the organizations are buttressing systems that inherently oppress trans\* communities.<sup>294</sup> Case law developments, such as *Obergefell v. Hodges*<sup>295</sup> in 2015, are limited to benefit only same-sex couples who fit into the heteronormative model of monogamous marriage.<sup>296</sup> The system of marriage is routinely used for access to other resources such as healthcare coverage for spouses and tax credits.<sup>297</sup>

Where marriage was prioritized by the often affluent cisgender queer community, the actual needs of trans\* communities were ignored.<sup>298</sup> Trans\* people are criminalized for homelessness, targeted by “walking while trans” laws, and for other crimes that subject them to the prison industrial complex.<sup>299</sup> By expanding the criminal justice system further with anti-discrimination laws or interpretations of Title VII, non-profits and our society are largely replicating systems that perpetuate more harm than good.<sup>300</sup>

In order for trans\* communities to gain any ground via impact litigation, they must forget the plethora of gender identities and expressions available.<sup>301</sup> Instead, a “model minority” mirroring the norms of cisgender culture must be selected and pushed into the litigation system as a means of proving that they fit into the gender binary, therefore, are also worthy of human rights.<sup>302</sup>

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291. George, *supra* note 7, at 601-02.

292. *Id.* at 581 (emphasizing that where advocates highlight the ways in which transgender men and women are similar to cisgender men and women, the highlighting of gender normativity within the trans\* community reinforced a binary “divide between male and female”).

293. *Id.*

294. SPADE, *supra* note 21, at 12.

295. *Obergefell v. Hodges*, 576 U.S. 644, 650 (2015) (holding that same-sex marriage is legally protected under the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

296. Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662, 1662 (2017); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87, 95 (2014).

297. Hunter, *supra* note 296.

298. SPADE, *supra* note 21, at 22, 31.

299. Grant, *supra* note 135, at 158.

300. Arkles et al., *supra* note 144, at 581-82.

301. STRYKER, *supra* note 110, at 23, 55; George, *supra* note 7, at 601-02; Arkles et al., *supra* note 144 at 579, 589.

302. Arkles et al., *supra* note 144 at, 580, 608.

In recent years, the non-profit industrial complex has expanded its ability to carry out impact litigation.<sup>303</sup> Though there is a place for expanding defense mechanisms for marginalized communities, there is also a disconnect between what these cases seek to accomplish and what the community actually needs.<sup>304</sup> This largely stems from the organizations being staffed by individuals with graduate degrees earning decent salaries.<sup>305</sup> In addition to not reflecting the communities they seek to serve, these organizations also develop policy agendas and litigation strategies without centering the experiences of the most marginalized individuals.<sup>306</sup> By predetermining goals, the essence of the struggle is lost, and instead powerful leaders simply are given a platform to enact their own agendas.<sup>307</sup>

Alternative models are put forth by those like the SRLP.<sup>308</sup> Litigation can be a tool for protecting rights under these systems through direct services, but ultimate equity will not come solely from these services.<sup>309</sup> Instead, partnership with community organizers and centering the individual's goals for the lawsuit ensures those most impacted receive a better outcome.<sup>310</sup>

According to these organizations, while there is some value to litigation, it cannot serve as the main tool to provide for individuals who are already punished by the legal system.<sup>311</sup> Non-profit organizations must expand their models and come to understand the holistic and intersectional models of progress needed to achieve longstanding and meaningful change.

Therefore, alternative methods of proactively creating positive rights legislation are needed.<sup>312</sup> Dismantling the current legal and social systems of oppression that discriminate directly against trans\*, poor, indigenous, Black, and queer communities must be at

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303. *Id.* at 586.

304. Malloy, *supra* note 221, at 296-98 (reviewing cases where trans\* individuals were not recognized by their proper gender identity in courts and the litigation did not serve to address the needs of spouses, employees, and disability protections for issues such as gender dysphoria).

305. Arkles et al., *supra* note 144, at 614 (describing the principles of “empowerment lawyering” and centering the client in the process of decision making).

306. SPADE, *supra* note 21, at 12, 29.

307. *Id.*

308. Arkles et al., *supra* note 144, at 614-15 (explaining SRLP's vision of change in coordinating direct services alongside education and reform work with community organizers in order to enact deeper systemic changes).

309. *Id.*

310. *Id.*

311. SPADE, *supra* note 21, at 89.

312. Arkles et al., *supra* note 144, at 579.

the forefront of this change.<sup>313</sup>

### *E. Current Political Outlook*

Following the decision in *Bostock*, several state governments moved to enact the new interpretation of “sex” under Title VII.<sup>314</sup> Conversely, the federal government actively took steps to disparage the majority of the Court and swiftly moved to enact new restrictions.<sup>315</sup> One primary example came in the HUD proposal to repeal a policy protecting gender identity in homeless shelters.<sup>316</sup> Another restriction was the federal government’s active pursuit of limiting transgender athletes from competing in sports.<sup>317</sup> Although the HUD policy was withdrawn in 2020,<sup>318</sup> this section focuses on this proposed repeal of gender identity protections in homeless shelters, specifically, how politicians reacted to it, and how it reflects political pushback against trans\* inclusion.<sup>319</sup>

In response to *Bostock*, many states began changing their interpretation of sex for housing and other government programs.<sup>320</sup> Alternatively, under the Trump Administration, HUD put forth a proposal on July 1, 2020, that, if enacted, would have allowed shelters receiving HUD funding to deny resources to the homeless

313. *Id.*

314. *See Bostock*, 140 S.Ct. at 1736 (interpreting sex as inherently intertwined with gender in the context of workplace discrimination).

315. *See* HUD Sex Based Proposal, HUD Sex Based Proposal, 85 Fed. Reg. 44811 (rescinding previous Obama Administration policies which provided for the protection of transgender individuals to have access to housing resources based on their gender identity); *see also* Broadwater, *supra* note 227 (presenting the Education Department’s threat against Connecticut schools for allowing transgender students to compete on teams aligning with their gender identity).

316. HUD Sex Based Proposal, 85 Fed. Reg. 44811.

317. *Id.*

318. Chris Johnson, *HUD Appears to Have Given Up on Anti-transgender Homeless Shelter Rule*, WASH. BLADE (Dec. 29, 2020), [washingtonblade.com/2020/12/29/hud-appears-to-have-given-up-on-anti-transgender-homeless-shelter-rule/](https://www.washingtonblade.com/2020/12/29/hud-appears-to-have-given-up-on-anti-transgender-homeless-shelter-rule/) [perma.cc/R9K5-4QFZ].

319. *See supra* at Part II (addressing the varied treatment from President Obama’s Administration to President Trump’s Administration in restriction acknowledgment of trans\* communities and their rights).

320. *See, e.g.*, Henry Cordes, *State Agency Applies U.S. Supreme Court Ruling on LGBT Job Rights to Housing Cases*, OMAHA WORLD HERALD (Aug. 12, 2020), [www.omaha.com/news/local/govt-and-politics/state-agency-applies-u-s-supreme-court-ruling-on-lgbt-job-rights-to-housing-cases/article\\_2d42d906-1aca-5938-8b8e-d954d2b757c2.html](https://www.omaha.com/news/local/govt-and-politics/state-agency-applies-u-s-supreme-court-ruling-on-lgbt-job-rights-to-housing-cases/article_2d42d906-1aca-5938-8b8e-d954d2b757c2.html) [perma.cc/5YQM-FH6A] (explaining that the Nebraska Equal Opportunity Commission and anti-bias agency would “investigate and resolve cases alleging such discrimination not only in employment, but also in the sale and rental of housing” after the *Bostock* decision was released).

based on perceived sex.<sup>321</sup> This policy would have allowed organizations to use physical and medical traits in order to identify people who may be trans\*.<sup>322</sup> The entities could then reject trans\* people services if their perceived sex assigned at birth differed from the sex the facility provides for.<sup>323</sup> This proposal thus failed to comprehend the social and legal definitions of “sex” and medical understanding of trans\* bodies and experiences in a way that directly harms, stigmatizes, and isolates trans\* communities.<sup>324</sup>

Similarly, the federal government backed states who have implemented restrictions preventing trans\* individuals from competing in sporting events.<sup>325</sup> The Trump administration endorsed the belief that allowing trans\* women athletes to compete under their identifying gender is unfair to cisgender women athletes.<sup>326</sup> Geneticists and community organizers have decried such policies and accusations, identifying research pointing to the exact opposite.<sup>327</sup> Many trans\* advocates have also pointed to the flaws of trying to enact a biological or scientific model of evaluating trans\* athletes’ bodies as a means of determining whether or not they should be allowed to participate.<sup>328</sup> These stances directly counter the ruling of *Bostock* and fundamentally misrepresent the social shift towards the inclusion of transgender individuals at the legal level.<sup>329</sup>

There is no single way to resolve the problem of the disenfranchisement of trans\* communities and the discrimination these communities face. Whether it be litigation alone, only providing for intermediate scrutiny, non-profit direct service provisions, or current political trends, there is a fundamental lack

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321. HUD Sex Based Proposal, 85 Fed. Reg. 44811.

322. *Id.*

323. *Id.*

324. *Housing & Homelessness*, NAT’L CTR. FOR TRANSGENDER EQUALITY, [www.transequality.org/issues/housing-homelessness](http://www.transequality.org/issues/housing-homelessness) [perma.cc/X795-24GY ] (last visited Nov. 1, 2020) (explaining that even with protections from HUD under the Fair Housing Act, trans individuals still faced a higher rate of homelessness and discrimination within shelters).

325. Gillian R. Brassil & Jeré Longman, *Who Should Compete in Women’s Sports? There are ‘Two Almost Irreconcilable Positions’*, N.Y. TIMES (Aug. 18, 2020), [www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html](http://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html) [perma.cc/CWC3-X39Z].

326. *Id.*

327. *Id.*

328. *Id.*

329. Andrew Kreighbaum & Erin Mulvaney, *School Bathroom, Sports Battles Loom After Supreme Court Ruling*, BLOOMBERG L. (June 23, 2020), [www.news.bloomberglaw.com/us-law-week/school-bathroom-sports-battles-loom-after-supreme-court-ruling](http://www.news.bloomberglaw.com/us-law-week/school-bathroom-sports-battles-loom-after-supreme-court-ruling) [perma.cc/X4AL-HBHB] (noting that legal experts believed that transgender students would have more legal support after *Bostock*, despite the rulings from the Trump administration).

of intersectional thinking in addressing the crises faced by trans\* communities today.<sup>330</sup> Policies are still rooted in surveillance of trans\* bodies and the courts have a duty to provide adequate protections as more inclusive policy is developed and passed.

#### IV. PROPOSAL

Socially, the disenfranchisement of and discrimination against trans\* communities is a problem for everyone. As leading activist Raquel Willis said on 2020's World Transgender Day of Remembrance:

[A]ll the cisgender men and women who don't understand why they should be paying attention to what's happening to the trans[\*] community need to understand that every time they have been policed around what they can wear, what their interests can be, what they are capable of, that is tied to the same spectrum of violence based on gender.<sup>331</sup>

Society and politicians must do more to provide equity to trans\* communities, but there are also steps to be taken in the legal field to promote protections until equality comes. As set out in the Transgender Law Center's Trans Agenda for Liberation, "[t]rans[\*] justice is migrant justice, disability justice, racial justice, environmental justice, reproductive justice, economic justice, and gender justice."<sup>332</sup> Therefore, it will take a multi-faceted approach to resolve trans\* oppression – including putting forth solutions in the legal field.<sup>333</sup> Even direct social inclusion in legal settings is important, as evidenced by legal workplaces creating LGBTQ+ affinity groups.<sup>334</sup>

While community organizers fight to end the criminalization of

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330. SPADE, *supra* note 21, at 109.

331. Madison J. Gray, *Trans Day of Remembrance: Activist Raquel Willis Reminds Us That All Black Lives Matter*, BET (Nov. 20, 2020), [www.bet.com/news/national/2020/11/20/transgender-day-of-remembrance-2020.html](http://www.bet.com/news/national/2020/11/20/transgender-day-of-remembrance-2020.html) [perma.cc/F2CK-36TA].

332. B. & Stephens, *supra* note 231.

333. *Id.*; Arkles et al., *supra* note 144, at 580.

334. Aebra Coe, *Why LGBT Affinity Groups Are More Important Now Than Ever*, LAW360 (Nov. 20, 2020), [www.law360.com/legalindustry/articles/1331123/why-lgbt-affinity-groups-are-more-important-now-than-ever](http://www.law360.com/legalindustry/articles/1331123/why-lgbt-affinity-groups-are-more-important-now-than-ever) [perma.cc/9MYJ-N7E7]. In Coe's piece, Tiernan Brady, global director of inclusion at Clifford Chance LLP states, "[s]ometimes that resistance is hidden and it's murmured . . . 'Some people say, 'That's too sensitive, we don't talk about that here.' Leadership needs to make space for people to talk about it." *Id.*

trans\* bodies—including HIV status, disabilities, and sex work<sup>335</sup>—the law can promote trans\* individuals to suspect classification status under the Equal Protection Clause and afford the communities more protection against gender discrimination under Titles VII and IX.<sup>336</sup> The opportunity to expand this principle through common law may come through future litigation rising to the Supreme Court.<sup>337</sup> If the Equality Act passes and applies retroactively, gender identity will be legislatively protected and the courts must in-turn apply suspect classification and strict scrutiny to the class.<sup>338</sup>

In order to qualify, the court must first review all five components of a suspect class. First, the Supreme Court must recognize the qualitative research to conclusively state that being trans\* is an immutable characteristic insofar as it is not simply a life choice.<sup>339</sup> Second, the Court must confirm that a trans\* identity situates members of the community into a class of a discrete and insular minority that faces prejudice.<sup>340</sup> Third, the Court must look to the growing library of the history of discrimination faced by trans\* communities in every area of our society. Fourth, the Court must note that people who identify as trans\* in positions of power currently are vastly outnumbered, leaving little actual political power to make a change in their hands. Finally, the Court must hold that this trait is relevant to every portion of a trans\* person's life and does not negate their ability to participate in society.

First, for immutability, the Court must find in favor of trans\* communities using the *Frontiero* court's test of the trait being

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335. B. & Stephens, *supra* note 231.

336. Jordan Goodson, *Why Sexuality Should Be Given the Same Legal Protections as Race*, HARV. J. OF L. & GENDER NEWS, [www.harvardjlg.com/2018/12/why-sexuality-should-be-given-the-same-legal-protections-as-race/](http://www.harvardjlg.com/2018/12/why-sexuality-should-be-given-the-same-legal-protections-as-race/) [perma.cc/P3AJ-D6CY] (last visited Nov. 16, 2020) (emphasizing the importance of clarifying language through the judiciary for protecting the rights of the LGBTQ+ community).

337. *Fulton*, 922 F.3d 140 (litigating whether the protections for religious exercise under the First Amendment outweigh the Due Process protections provided by the Fourteenth Amendment when deciding if a Catholic affiliated adoption agency that has legal contracts with Philadelphia may reject same-sex couples seeking to adopt children on religious grounds).

338. H.R. 5.

339. Anne Fausto-Sterling, *Science Won't Settle Trans Rights*, BOSTON REV. (Feb. 10, 2020), [www.bostonreview.net/science-nature-gender-sexuality/anne-fausto-sterling-science-wont-settle-trans-rights](http://www.bostonreview.net/science-nature-gender-sexuality/anne-fausto-sterling-science-wont-settle-trans-rights) [perma.cc/8P53-WRFH].

340. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (stating “prejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and [so] may call for a correspondingly more searching judicial inquiry”).

“determined solely by the accident of birth.”<sup>341</sup> Meaning, the identity trans\* individuals are being discriminated against for is their gender identity they were born with and have no control over.<sup>342</sup> Science, medicine, and sociologists have all identified the social construction of gender in how people present themselves.<sup>343</sup> Prior to the European construct of the gender binary in the U.S., trans\* people were accepted as they were, without question of if they could potentially change.<sup>344</sup> Currently, if a person identifies as trans\*, they can elect to receive gender affirming treatments but receiving treatment does not take away their identity as a trans\* person.<sup>345</sup> The potential to receive or actually receiving often times inaccessible medical care should not remove gender identity from the category of immutability.<sup>346</sup>

Second, trans\* communities are a discrete and insular minority that faces prejudice.<sup>347</sup> The Court must overturn *Graham v. Richardson* and *Holloway v. Arthur Andersen & Co.* in order to accomplish this step of the test.<sup>348</sup> In society, trans\* people are an identifiable community, meaning the community is discrete.<sup>349</sup> The community is insular in that interaction amongst community members takes place frequently and in varied social settings.<sup>350</sup>

Per the third component of the suspect classification, there is ample evidence upon which the Court would find that trans\*

341. *See Frontiero*, 411 U.S. at 686 n. 17 (1973) (defining immutable characteristic as courts have predominantly adopted since).

342. *Id.* at 686.

343. *See supra* Part II (specifying that gender is not something that can be physically determined based on appearance, but is rather a socialized identity).

344. *See supra* Part II(B)(2) (discussing Native American communities with gender identities outside the modern binary as well as the genocide of non-binary individuals and progression of what came to be “walking while trans” laws).

345. *See supra* Part II (elaborating on the multiple ways in which gender identity can be expressed and varies from person-to-person).

346. *See Evancho*, 237 F.Supp.3d at 288 (stating that “transgender people as a class . . . exhibit immutable or distinguishing characteristics that define them as a discrete group”) (citing *Adkins v. N.Y.C.*, 143 F.Supp.3d 134, 138-41 (S.D.N.Y. 2015)).

347. *Evancho*, 237 F.Supp.3d at 288.

348. *See Holloway*, 566 F.2d at 663 (concluding that transgender individuals are “not necessarily a ‘discrete and insular minority’” and the court refused to expand the meaning of “sex” under Title VII so as to include employment discrimination against individuals who have gender affirming treatment); Strauss, *supra* note 32, at 149 n. 67.

349. *See supra* Part II(B)(1) (discussing the population of trans\* communities at approximately 1.5 million according to recent data, meaning the group is large enough and presents as a single unit enough in social contexts to be discrete and insular).

350. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 726, 729 (1985).

individuals have historically faced discrimination.<sup>351</sup> Concrete examples of discrimination include a history of exclusion from housing, employment, and health care.<sup>352</sup> Additionally, the clear erasure of trans\* experiences from our nation's history, including the genocide of gender non-conforming individuals committed upon the founding of the United States, go to demonstrate a form of discrimination against the community.<sup>353</sup> As of 2021, trans\* students are targeted for their bathroom use and choice to play sports, employers still fire individuals for identifying as trans\*, and some states still have "walking while trans" laws.<sup>354</sup> Even within the LGBTQ+ community, there is a longstanding history of exclusion for trans\* people.<sup>355</sup> It took until 2020 for any nationally binding opinions to establish that trans\* individuals are protected under Title VII, and even still, this victory only came from a legal expansion of the interpretation of the term "sex."<sup>356</sup> Currently enacted laws fail to even incorporate the term transgender or use the term gender identity at the federal level, promoting an ongoing erasure of trans\* experiences.

Fourth, at best, trans\* communities have minimal opportunity for political redress. On their own, trans\* communities represents zero percent of the composition of the U.S. Congress as of November 2020.<sup>357</sup> Though there are trans\* representatives throughout state legislatures and state judiciaries, the proportions do not adequately

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351. See *supra* Part II(B)(2) (providing historical context of anti-trans\* exclusion from mainstream LGB movements, ongoing discrimination in work and education settings, erasure of trans\* identities and experiences through language in policies, and policies specifically targeting trans\* communities disproportionately); *Evancho*, 237 F.Supp.3d at 288 (concluding that "transgender people as a class have historically been subject to discrimination or differentiation").

352. See *supra* Part II(B)(2) (explaining the ways in which trans\* individuals are precluded from acquiring proper medical care due to lack of government identification and access to insurance, preclusion from employment based on gender expression, and President Trump's Administration's proposed policy of only allowing entry into homeless shelters according to sex rather than gender identity).

353. See *supra* Part II(B)(2)(a) (discussing Native American communities with gender identities outside the modern binary as well as the genocide of non-binary individuals).

354. See *supra* Part II(B) (describing the increased number of laws and proposed legislation prohibiting students from competing in sports according to their gender identity and state policies for loitering serving to target trans\* communities and sex workers disproportionately).

355. See *supra* Part II(B)(2)(d) (describing the ways in which ENDA and organizations advocating for equality stopped advocating for trans\* communities in order to help policies pass).

356. *Bostock*, 140 S.Ct. at 1737.

357. Avery, *supra* note 158.

provide for ample say in policies impacting trans\* lives.<sup>358</sup> Opportunities for coalition building with LGBTQ+ legislators and their allies provide hope for protection. However, as stated herein, the longstanding history of trans\* people being abandoned by the cisgender community—LGBQ+ identifying or not—does not provide for actual political redress.<sup>359</sup> Additionally, where states require identification to vote but do not provide equitable access to identification materials or medical treatment required to obtain such documents, trans\* people are even precluded from the most fundamental right of voting in our democracy.<sup>360</sup>

Finally, a person's identity as trans\* does not determine their ability to participate in society.<sup>361</sup> Alternatively, many current laws, such as voter ID laws, unnecessarily preclude trans\* people from voting based on this characteristic.<sup>362</sup> Many trans\* people are able to physically vote, but the limitation comes in by way of laws preventing them from fulfilling the requirements of voter ID laws.<sup>363</sup> Alternative examples include where a trans\* person is denied access to coverage for gender affirming care and therefore forced to endure gender dysphoria or some other harm that limits their full participation in society.<sup>364</sup> These policies are rooted in transphobia and create socially constructed barriers for trans\* communities – the barriers are not inherent to the trans\* identity.

Upon reversing course and elevating gender identity to a suspect classification and strict scrutiny level of review, there will be far more protections offered to trans\* communities. Laws enacted where the government does not have a compelling interest to discriminate will be struck down earlier by lower courts.<sup>365</sup> Suspect classification will allow trans\* people to receive adequate medical care and mental healthcare. They will be able to freely

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358. *Id.*

359. *See supra* Part II(B)(3) (discussing the obstacles trans\* communities face in states with laws that fail to recognize a person's gender identity on government identification and the low representation of trans\* communities in government and as a voting bloc).

360. *Id.*

361. *Evancho*, 237 F. Supp. 3d at 288 (declaring that “generally as to transgender individuals as a class, that characteristic bears no relationship to their ability to contribute to our society.”); *see also* Sharita, *supra* note 277.

362. *See supra* Part II(B)(2) (providing a review of the difficulties in voting trans\* communities have when government identification is needed to register to vote, but there are medical and financial barriers to obtaining government identification for registration).

363. *Id.*

364. *Id.*

365. *City of Cleburne*, 473 U.S. at 440 (ruling laws subject to strict scrutiny “will be sustained only if they are suitably tailored to serve a compelling state interest”) (citations omitted).

express their gender and take on jobs that allow for thriving communities. The legal system will provide support in protecting trans\* individuals from many ongoing systemic injustices.<sup>366</sup>

Simply because the judiciary holds the government to a higher standard does not wholly eradicate the systemic injustices that trans\* communities face. Along with this built-in judicial protection will come the freedom for social movements and politicians to work on positive rights-based legislation. Without having to constantly work to enforce and protect what few rights are regularly granted and revoked, activists can spend more time fighting for racial justice, health justice, economic justice, and environmental justice. Just over one year into the Biden Administration, the President has issued orders reversing the Trump Administration's memorandum limiting the scope of the *Bostock* decision, repealed the ban on transgender military service, and directed HUD to apply the Fair Housing Act's protections to apply to LGBTQ individuals.<sup>367</sup> While this is certainly a movement in the right direction, the Equality Act remains stalled in Congress.<sup>368</sup> Plus, the true test comes each time a judge rules in a case attempting to fit trans\* communities into the category of sex, limited by anti-discrimination laws that do not even acknowledge trans\* existence.

## V. CONCLUSION

It has been nearly four hundred years since Thomas/Thomasine was brutally assaulted in the name of the law. In that time, the world's understanding of gender has significantly advanced, yet the physical abuse from 1629 has only been replaced with other abysmal treatment for trans\* communities in the justice system. As the notion of gender identity as a spectrum has re-

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366. Goldberg, *supra* note 271, at 494.

367. Sydney Bauer, *Trans Americans Hopeful Biden Admin Will Stem High Levels of Violence*, NBC NEWS (Nov. 20, 2020), [www.nbcnews.com/feature/nbc-out/trans-americans-hopeful-biden-admin-will-stem-high-levels-violence-n1248403](http://www.nbcnews.com/feature/nbc-out/trans-americans-hopeful-biden-admin-will-stem-high-levels-violence-n1248403) [perma.cc/56GJ-5EMC] (interviewing trans woman Alexia Núñez, who is hopeful about the Biden Administration); *see also, e.g.*, Jacqueline Feldscher & Lara Seligman, *Biden Repeals Trump-era Ban on Transgender Military Service*, POLITICO (Jan. 25, 2021), [www.politico.com/news/2021/01/25/biden-repeals-transgender-military-service-ban-462186](http://www.politico.com/news/2021/01/25/biden-repeals-transgender-military-service-ban-462186) [perma.cc/ZRE3-WT83] (describing one of many steps the Biden Administration plans to take in striking down harmful policies such as the transgender military ban); *Biden Accountability Tracker*, GLAAD, [www.glaad.org/biden-harris](http://www.glaad.org/biden-harris) [perma.cc/UF5U-ARX4] (last visited Feb. 2, 2022).

368. Dawn Ennis, *What Joe Biden Said to Congress Vs. What Trans Americans Want To Hear*, FORBES (Apr. 29, 2021), [www.forbes.com/sites/dawnstaceyennis/2021/04/29/what-joe-biden-said-to-congress-vs-what-trans-americans-want-to-hear/?sh=5f65ccdf7c72](http://www.forbes.com/sites/dawnstaceyennis/2021/04/29/what-joe-biden-said-to-congress-vs-what-trans-americans-want-to-hear/?sh=5f65ccdf7c72).

emerged from the dark box it was buried in centuries ago, it is time for the legal and social to match in how they address gender. From the time that colonizers massacred Two-Spirit identifying individuals, to the exclusion of trans\* existence throughout organizing in the 1900s, gender identity has always been ingrained in our society. Queer theory and intersectional activists have aligned for a coordinated effort to redress the nation's past wrongdoings and allow for a platform for trans\* futures. While the legal system is not equipped to provide all encompassing equality to those identifying outside the gender binary, there is an ethical obligation on members of the legal community to fight for suspect classification for gender identity. We must engage in harm reduction and provide an easier path ahead for communities to build a society in which people of all gender identities can equally participate and be protected, starting with providing suspect classification for trans\* communities.

The legal system can support the larger movement by heightening the level of scrutiny applied to gender identity. This will help reconcile many injustices against trans\* communities. The Constitution was not written in order to provide life, liberty, and the pursuit of happiness for everyone in the country in 1787.<sup>369</sup> It is through years of activism, politicking, and litigation that the United States has moved to recognize the rights of people of different races, socioeconomic classes, sexual orientations, women, disabilities, and other identities.<sup>370</sup> Stopping short of full gender identity protections is not, and cannot be, an option.

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369. David Hall, *The Constitution and Race: A Critical Perspective*, 5 N.Y. J. HUM. RIGHTS 229, 252 (1988) (explaining the contradictions and exclusionary practices on the basis of race, gender, and class within the U.S. Constitution).

370. *United States of America 2020*, AMNESTY INT'L, [www.amnesty.org/en/countries/americas/united-states-of-america/report-united-states-of-america/](https://www.amnesty.org/en/countries/americas/united-states-of-america/report-united-states-of-america/) [perma.cc/5AV8-PEV2] (last visited Feb. 20, 2022) (describing the Trump Administration's attempts to dismantle advances for LGBTI communities, people with disabilities, people of color, and other marginalized identities, and the efforts made to initially secure those advances).