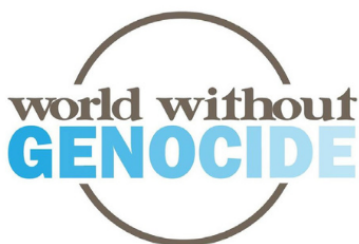




TRANSGENDER IDENTITY:

RIGHTS AND CHALLENGES LOCALLY AND GLOBALLY

Teaching and Learning Materials



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Transgender Identity: Rights and Challenges Locally and Globally

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Introduction

Since spring 2021, we have offered a course titled ***Transgender Identity: Rights and Challenges Locally and Globally*** at Mitchell Hamline School of Law in Minnesota. Students study efforts to preserve essential human rights for transgender people in countries around the world, including in the United States, and simultaneous attempts to deny those rights in state legislatures, courts, federal governments, and civil society organizations.

We bring people to speak to the class who identify as transgender and transgender rights supporters. Students learn about individuals and organizations who use the law, policies, and social action to bring about positive changes.

Our goal is that the students, the future generation of lawyers, will advocate for transgender people and others who are targeted with discrimination, hate, and violence.

This handbook includes the course syllabus and related teaching materials. We invite you to use the case studies, articles, debates, and suggested topics for teaching and learning in schools and universities; in faith communities; in civic organizations; and in informal discussions about these issues.

We believe that people should never be marginalized based on who they are: their race, religion, ethnicity, national origin, sexual orientation, gender identity, abilities, or any other characteristics.

Killings of transgender people in the US doubled between 2019 and 2021, as anti-transgender legislation and rhetoric accelerated. Join us in standing up to support human rights for people in LGBTQ communities, from small steps in your own neighborhood to action on a global scale. The time is now.



Ellen J. Kennedy, Ph.D., Executive Director

I. Syllabus

Transgender Identity: Rights and Challenges Locally and Globally

Mitchell Hamline School of Law

Judge Tara Kalar and Dr. Ellen J. Kennedy

Introduction

There are many under-represented, targeted, or marginalized groups in our communities that face challenges of discrimination and inequity in various areas of public life, among them the transgender community. Although an increasing number of U.S. law schools offer courses on LGBTQ issues or on the intersection of law, sexuality, and identity more generally, very few schools offer courses that focus specifically on the rights and challenges to transgender people.

In 1975, Minneapolis became the first city in the United States to pass trans-inclusive civil rights protection legislation. In the nearly half-century since that landmark legislation, transgender rights have moved forward but have also faced a significant backlash both locally and globally. This course examines these two competing trajectories.

We will examine global, national, state, and municipal legislation and policies that affect all areas of a transgender person's life.

This course will be offered fully online in a synchronous format.

This course is presented in partnership with World Without Genocide, a human rights organization headquartered at Mitchell Hamline School of Law since 2010.

Judge Kalar serves as a Human Services Judge with the Minnesota Department of Human Services.

Dr. Kennedy is the founder and executive director of World Without Genocide.

Judge Kalar and Dr. Kennedy have published articles, submitted an amicus brief, and given talks to state, national, and international audiences on transgender rights.

Learning Outcomes

Students will develop the following:

- Knowledge about legal and legislative challenges and changes in transgender rights.
- Skills and insight in identifying and advocating for appropriate legislation and policies.
- Connections to local and state resources in human rights and civil rights.
- Knowledge about the connections between national and global policies and current changes in customary law in this field.

Class Activities

Classes will begin with brief discussions of current international, national, or state events and issues related to our topic. You're encouraged to read the *New York Times*, *Washington Post*, BBC, CNN, NPR, and other news sites regularly.

Please follow events at the 2023 Minnesota legislative session, which begins January 3 and ends May 22. You can listen to news on Minnesota Public Radio (91.1 FM) on the hour; watch Almanac Public Affairs Program, channel 2 (KTCA) on Fridays, 7-8 pm CT, repeated Sunday mornings, 9:30 – 10:30 am CT, or read *MinnPost*, the *St. Paul Pioneer Press*, or the *Minneapolis Star Tribune* for coverage of state issues.

The first hour will typically include lectures, discussions, and in-class exercises; the second hour will include guest speakers and other special activities. You may invite guests to attend a particular class or speakers' presentations; please check with us at least a week in advance so that we can arrange your guests' online access. **Filming and recording of the course are not permitted.**

Out-of-class work including reading and other preparation for in-class work is required. Students will submit a final paper, with the subject to be chosen from the topics included in the syllabus. Details are provided at the end of the syllabus.

We also ask that you **schedule an appointment with us on Zoom during the first three weeks of the course.** This is for an informal conversation about your interest in the course, careers in human rights, etc. You don't have to prepare anything; this is in lieu of casual in-person interactions that typically occur before or after class, in the hallways, etc. We truly enjoy getting to know our students and we look forward to chatting with each of you.

Class Materials:

Electronic materials will be posted on Canvas and are accessible on the web. There is no textbook.

Course Evaluation:

- Regular and meaningful contributions to class discussions. This is 22% of your grade. Participation encourages your timely and thoughtful reading, your active engagement with the material, and it leads to a lively and interesting class. We especially encourage and value questions and comments for our guest speakers. Their organizational affiliations and websites are included on the syllabus for your pre-class review.
- Statement of your paper topic.
- Rough draft of the paper.
- Final paper.
- One written debate response and two written case studies (800 words each).
- Final open-book exam covering the readings, lectures, speakers, and in-class activities.

Evaluation Points:

Class participation	200
Debate and 2 case papers (50 points each)	150
Statement of paper topic	50
Rough draft, paper	100
Final paper	200
Exam	200
Total:	900 points

Assignment details follow the weekly schedule.

Course management Issues

Your prompt, regular, and well-prepared **attendance** is expected, with your camera on and your full engagement in the sessions. More than two absences will result in your grade being lowered one letter grade or more, based on the number of absences, unless there is approval from the Dean of Students.

Assignments are due on the due date; extensions are granted with advance permission from the professors. Please submit your assignments on Canvas.

Special accommodation: Please contact the Dean of Students to arrange special accommodation.

Plagiarism or cheating will result in college consequences.

All work must be completed to receive a course grade. Incompletes are given only with administration approval. Please see us if you have issues with assignments, classroom management, etc.

Workload: The average time that students are expected to spend in preparation is two hours outside of class for every hour in class. This doesn't account for different reading speeds, study styles, etc. The reading for this course is not difficult and the reading amount varies over the semester, with some weeks lighter than others. Please feel free to speak to us if you have any difficulties.

Course Outline

- Session 1. January 18
Introduction to the course and to universal human rights
 Course mechanics; definitions; overview of global, regional, and state laws, policies, and procedures; intersectionality and the paradox of intolerance.
Reading: *Putting Dignity in Practice: Implementing the ABA's Resolution of Human Dignity as Foundational to the Rule of Law*, James May and Erin Daly, 2020 (15 pages)
Reading: *Universal Declaration of Human Rights* (1 page)
Reading: *Yogyakarta Principles* (38 pages)
Reading: Title VII of the 1964 Civil Rights Act
- Session 2. January 25
Transgender Rights and Existing U.S. Legal Protections
Guest speaker: Transgender Rights Activist.
 Sources of human rights law, Laws addressing rights for transgender people: State human rights acts, U.S. Constitutional protections, FERPA, other U.S. laws
Globalization, 'moral panic,' and transgender rights.
Case Study 1: Globalization- does globalization lead to more freedom or more backlash?
Reading: "The Global Transgender Population and the International Criminal Court," Brian Kritz, *Yale Human Rights and Development Journal*, Volume 17, Issue 1, pages 1-38, (37 pages) 2014.
Reading: [2019 UN report, Protection against violence and discrimination based on sexual orientation and gender identity](#) (25 pages)
- Session 3. February 1
Transgender Identities Around the World

Speaker: Scholar, Intersexuality and the Law.

Reading: "The Transnational Anti-Gender Movement," *Observatory for Socio-Political Movements in Europe*, Vol. 2, 2021, pages 1015 (15 pages).

Reading: "Rural Resentment and LGBTQ Equality," Luke A. Boso, *Florida Law Review*, 71: 4, 2019, pages 1-61 (60 pages)

In-class discussion: sources of identity: binary definitions; heteronormativity

Session 4. February 8

Transgender Emergence: 1800s - early 1900s

Sex reassignment surgery; Nazi persecution of transgender or gender nonconformance. Gender identity and mental health; conversion therapy.

Guest speakers: Transgender healthcare providers.

Case study 2: Accessibility of hormones and other medical treatments during adolescence and during adult incarceration.

Reading: "Transsexuality: Legal and Ethical Challenges," Bernard Dickens, *International Journal of Gynecology and Obstetrics*, 2020; 151: 163–167 (5 pages)

Reading: "Transgender Health Care: Policy, Law, and Medical Frameworks," Daphna Stroumsa, MD, MPH, *American Journal of Public Health*, March 2014, Vol. 104, No. 3, pages 31-38 (7 pages).

Reading: "Outlawing Trans Youth: State Legislatures and the Battle Over Gender-Affirming Healthcare for Minors," *Harvard Law Review*, 2021, 134:2163, pages 2163-2186 (22 pages)

Session 5 February 15

Civil Rights and Discrimination in the Stonewall Era: What about the T?

Guest speaker: Transgender City Council member.

The 1950s - 1970s: civil rights struggles based on race, religion, and LGBTQ identity.

Reading: "Framing Trans Rights," Marie-Amélie George, *Northwestern University Law Review*, 2019, Vol. 114, No. 3, pages 555-632 (78 pages)

Reading: *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), <https://supreme.justia.com/cases/federal/us/490/228/>

Session 6. February 22

Early 2000s: Identifying and responding to discrimination

Bathrooms: the new frontier in transgender rights. Third parties in the LGBT movement. The right to privacy? Or the right to be free from discrimination?

Reading: *Romer v. Evans* (1996) <https://supreme.justia.com/cases/federal/us/517/620/>

Reading: *Gavin Grimm v. Gloucester County School Board* (36 pages)

Guest Speakers: representatives from the Minnesota Dept. of Human Rights and Office of the Minnesota Attorney General.

Session 7. March 1

Transgender Rights in the Obama Era

Guest Speaker: Christian leader against Christian Nationalism.

Religion as a backlash to transgender rights in US, globally; in ‘political Islam.’ The role of evangelical Christians in the export of hate. Third party involvement in litigation.

Reading: United States v. Windsor, 570 U.S. 744 (2013)

<https://supreme.justia.com/cases/federal/us/570/744/>

Reading: Obergefell v. Hodges, 576 U.S. 644 (2015)

<https://supreme.justia.com/cases/federal/us/576/14-556/#:~:text=Held%3A%20The%20Fourteenth%20Amendment%20requires,performed%20out%2Dof%2DState.>

Reading: “Countering Islamic Conservatism on Being Transgender,” Aisya Aymanee M. Zaharin and Maria Pallotta-Chiarolli, *International Journal of Transgender Health*, 2020, Vol. 21:3, 235-241 (7 pages).

Reading: “The Multimillion Dollar Christian Group attacking LGBTQ+ Rights,” Jessica Glenza, *The Guardian*, February 21, 2020 (4 pages)

Reading: “The Broader Implications of Masterpiece Cakeshop,” *BYU Law Review*, 2019, 167 (54 pages)

Paper Topic statements due

March 8 **Spring break, no class**

Session 8.

March 15

“Transmisogyny” – Discrimination against transgender women of color.

Examining the intersection of race, misogyny, and gender identity.

Guest Speaker: Legal Director for LGBTQ Justice.

Reading: “America’s War on Black Trans Women,” Annamarie Forestiere, *Harvard Civil Rights – Civil Liberties Law Review*, September 23, 2020 (1 page)

Reading: Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, 548 U.S. (2018)

<https://supreme.justia.com/cases/federal/us/584/16-111/>

Session 9.

March 22

Transgender Rights in the Trump Era – the ‘moral panic’ in the threat to normative masculinity.

Guest speaker: Transgender military activist.

Reading: R.G. and G.B. Harris Funeral Home, Inc. v. Equal Employment Opportunity Commission (2018)

<https://law.justia.com/cases/federal/appellate-courts/ca6/16-2424/16-2424-2018-03-07.html>

Reading: *Bostock v. Clayton County*, pages 5-37.

Reading: “The Transgender Military Ban in “Sex” and “Gender Identity” under United States and New Zealand Law,” Matthew Treiber, *Fordham International Law Journal*, Vol. 44:1, 2020, pages 261-305 (46 pages) **OR** “Trump, Gender Rebels, and Masculinities” Dara Purvis, 54, *Penn State Law, Wake Forest Law Review*, 2019, 423 -450 (41 pages)

- Session 10. March 29
Transgender Rights in the Biden Era: States v. the Federal Government. Rights on the sports field.
 Current legislative efforts. Gay panic defense.
Guest Speaker: ACLU-MN attorney.
Debate: Transgender women and men should be allowed to play on the respective women's and men's sports teams.
Reading: "The New Wave of Anti-Trans Legislation," Shay Ryan Olmstead *Washington Post*, June 14, 2021 (3 pages)
 Reading: "Sports, Transgender Rights and the Bodily Politics of Cisgender Supremacy," Elizabeth A. Sharrow, *Laws*, 2021, 10:63, pages 1-29 (29 pages)
Reading: Dobbs v. Jackson, 597 U.S. (2022)
<https://supreme.justia.com/cases/federal/us/597/19-1392/>
- Session 11. April 5
Transgender Rights in the Criminal Justice System
Guest speakers: Minnesota Pro-LGBTQ Legislators.
Case study 3: The Gay and Trans Panic Defense
Reading: "Living Freely Behind Bars: Reframing The Due Process Rights Of Transgender Prisoners," Sarah Ortlip-Sommers, *Columbia Journal of Gender and the Law*, 2021, 40:3, pages 355- 407 (53 pages)
Reading: "Banning the Use of Gay and Trans Panic Defenses," Christy Mallory, Brad Sears, Luis A. Vasque, *Research that Matters, UCLA School of Law Williams Institute*, April 2021, pages 1-48 (48 pages).
- Session 12. April 12- selected topics
 Fetishization of transgender people; necropolitics.
Guest speaker: Trans Rights pro bono attorneys.
Case Study 4: Document changes (birth certificates, drivers' licenses, and passports).
Reading: "Biopolitical and Necropolitical Constructions of the Incarcerated Trans Body," Christoph M. Zhang, *Columbia Journal Of Gender and the Law*, 2019, 37:2, 257 (43 pages)
Reading: "Factors Leading to "Detransition" Among Transgender and Gender Diverse People in the United States: A Mixed-Methods Analysis," Jack L. Turban, MD, MHS, Stephanie S. Loo, MSc, Anthony N. Almazan, and Alex S. Keuroghlian, MD, MPH, *LGBT Health*, 8: 4, 2021, pages 273- 280 (6 pages)
Paper: rough drafts due
- Session 13. April 19
Guest speaker: Law school dean.
Final exam review- Jeopardy!
Final papers due: May 17

Final Papers

Transgender rights are guaranteed by the Universal Declaration of Human Rights and other international and domestic documents. However, these rights are contested in many places around the world as apparent legitimization of neo-colonialism, liberalism, globalization, urbanization, and other charges to create or preserve male hegemony, female subservience, religious traditions, and a certain definition of a community or state social and sexual order.

The research paper encourages you to examine a specific challenge to transgender rights on the following dimensions: **its origin; manifestation; support; legal or policy response; subsequent backlash or change; and your recommendations.** Limit the scope of your topic to a global region, country, state, or community, as your subject suggests.

The topics include, but are not limited to, the following:

1. Restrictions on bathroom use
2. Restrictions on sports participation
3. Limits to medical transition treatment for youth
4. Incarceration of trans women in men's prisons
5. Forced sterilizations of trans women
6. Exclusion from shelter access and housing
7. Homelessness of trans youth
8. Employment discrimination
9. Youth bullying
10. Student housing at universities
11. Trans admission to single-sex colleges and universities
12. Documentation changes
13. Limits to medical care, transition treatment
14. Discrimination in the criminal justice system
15. "Transmisogyny" – discrimination and violence against black trans women
16. Adoption, parenting, and foster care by transgender parents
17. Homelessness
18. Transgender persons as victims of genocidal sexual violence
19. "Detransitioning"
20. Fetishization of transgender identity
21. Exclusion based on religious freedom
22. Military service
23. Homonormativity and transgender discrimination
24. Criminalization of transgender persons
25. International and regional policies: the UN, European Court of Human Rights, African Commission on Human and Peoples' Rights, etc.
26. Conversion therapy
27. Non-binary designations and legal implications
28. The 'anti-gender' movement
29. Two-spirit people and federal law

Please talk with us if you have another topic you would like to pursue or if your topic would be best addressed with a different outline. You may work with a classmate if you wish; you will both receive the same grade.

Details for the Statement of Paper Topic

- Topic
- Thesis statement
- 150-300-word summary of the scope of your paper as noted in the paper outline above.

Details for the Paper:

Length: 4,000 words.

Format: Please use Calibri 12-point font, 1.5 spacing, indented paragraphs, centered headings, and underlined sub-headings at the beginning of a paragraph as appropriate. Include complete **footnotes, not end-notes, numbered with Arabic, not Roman, numerals. Page numbers should appear in the upper-right-hand corner.** Do not use a cover sheet; put your name, paper title, and word count on the first page.

Citations:

Book: Author last name, first name. *Title*. Publication date. Publisher. Page number(s) if relevant.

Article: Author last name, first name, "Article Title," *Journal*, volume, date, pages.

Web citations: complete URL.

Submission: All papers should be uploaded to Canvas as Word documents.

You will first submit a **paper topic proposal** that specifies your topic and the areas you expect to address. It should be **150-300 words**.

Sources: You may use legal articles, academic papers, media accounts, and archival sites such as those of the United Nations, Human Rights Campaign, Human Rights Watch, etc. **You must give complete citations for all sources.**

Due dates: Rough draft April 12; final draft May 17. Outstanding papers will be considered for publication on the World website.

Details for the Case Study: Respond to each of the questions that are presented. Limit for the total paper: 800 words.

Details for the Debate: Defend ONE side of the debate. Limit: 800 words.

II. Case Studies

1. Case Study 1: Globalization and Transgender Rights – Equality or Backlash?

Overview

Some say that sexual orientation and gender identity are sensitive issues. I understand. Like many of my generation, I did not grow up talking about these issues. But I learned to speak out because lives are at stake, and because it is our duty under the United Nations Charter and the Universal Declaration of Human Rights, to protect the rights of everyone, everywhere.

- UN Secretary-General Ban Ki-moon to the Human Rights Council, March 7, 2012.

The legal obligations of states to safeguard the human rights of LGBT people are established in international human rights law based on the Universal Declaration of Human Rights and international human rights treaties. All people, irrespective of sex, sexual orientation, or gender identity, are entitled to the protections provided by international human rights law, including rights to life; security of person and privacy; the right to be free from torture, arbitrary arrest and detention; the right to be free from discrimination; and the right to freedom of expression, association, and peaceful assembly.¹

Violence against transgender people. Despite these global statements of equality and protection, 350 trans people were killed around the world in 2020, a record number, and this year is likely to be the deadliest ever in the US for transgender and gender non-conforming people, [according to the Human Rights Campaign](#). Around the world, unemployment, poverty, and homelessness put trans people at risk for greater violence.² Human Rights Watch reports that the pandemic has worsened the life situations for transgender people in all regions of the world and they have been scapegoated, denied care, tortured, and incarcerated.³

Trans people are persecuted everywhere, with laws designed to preserve public order used in at least 26 countries, two of them in Eastern Europe, according to the Human Dignity Trust, a global LGBT+ rights advocacy group.

At least 15 countries criminalize people whose gender expression is perceived to be at odds with their birth sex. In at least nine countries in Africa, the Middle East, and Asia this is through outlawing cross-dressing.

Trans people “are targeted simply because they are different, because they are not conforming to (how) society or the church or the mosque tells people how they should behave,” Tea Braun, the director of the Human Dignity Trust, said.⁴

Same-sex relationships are currently illegal in 72 countries and punishable by death in eight.⁵ At least [nine countries](#) have national laws criminalizing forms of gender expression that target transgender and gender nonconforming people. Among countries that expressly forbid expression of transgender

¹ <https://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx>

² <https://www.theguardian.com/world/2021/jun/14/us-trans-transgender-deaths-2021>

³ <https://www.hrw.org/news/2021/02/24/global-trends-lgbt-rights-during-covid-19-pandemic#>

⁴ <https://www.reuters.com/article/us-britain-lgbt-crime/transgender-people-criminalized-in-every-part-of-world-study-idUSKCN1SN25K>

⁵ https://en.wikipedia.org/wiki/LGBT_rights_at_the_United_Nations

identities, at least three, Brunei, Oman, and Kuwait, have laws that criminalize “posing as” a person of a different sex. In Saudi Arabia, police routinely arrest people based on their gender expression. Malaysia also criminalizes “posing as” a different sex in the Sharia codes of each of its states and its federal territory. Nigeria criminalizes transgender and gender-nonconforming people in its northern states under Sharia.

In South Sudan, such laws only apply to men who “dress as women” and in Malawi, men who wear their hair long. Tonga prohibits any “male person” from presenting as a female while “soliciting for an immoral purpose, in a public place with intent to deceive any other person as to his true sex.”

In the United Arab Emirates, laws prohibit men “posing as” women in order to enter women-only spaces. The UAE uses this law to prosecute gay and transgender people even in mixed-gender spaces.⁶

The Colonial Legacy. British colonial laws criminalized same-sex relationships and gender identity and expression. These laws became institutionalized around the world. Today, the universal imposition of Western standards for gay rights upon non-Western countries is viewed in many places as constituting a new type of imperialism and subordination.⁷ Some legal scholars suggest that within the discourse of modernity and progress that is evoked in human rights debates, those countries that recognize the rights of sexual minorities are considered modern, which by implication labels those countries that do not recognize such rights as un-modern or pre-modern.⁸

The United Nations and Transgender Rights. UN political bodies did not discuss [rights](#) regarding equality regardless of sexual orientation or gender identity until 1994. Discussion arose then through the favorable resolution of the [Toonen v. Australia](#) case by the UN Human Rights Committee, which resolved that the International Covenant on Civil and Political Rights affirms that laws against homosexuality violate human rights.

Subsequently, in September 1995, sexual orientation became a topic of debate in the *Draft of the 1995 Beijing Platform for Action* at the 4th World Conference on Women. While the proposed language on “sexual orientation” was eventually dropped from the text, it was the first time that governments took a public stance for or against the inclusion and recognition of sexual orientation as part of women's right to control their sexuality.⁹

And then discussions were postponed for more than a decade.

In December 2006, Norway presented a joint statement, on behalf of 54 states, on human rights violations based on sexual orientation and gender identity at the Commission on Human Rights. This was followed in December 2008 by a joint statement presented at the General Assembly by Argentina on behalf of 66 states. This statement **in support** of LGBT rights prompted a statement by the Arab League and the Organization of Islamic Cooperation **in opposition** to LGBT rights. Both statements remain open for signature, and neither has been officially adopted by the General Assembly.¹⁰

On June 17, 2011, South Africa led a resolution at the UNHRC requesting that the UN High Commissioner for Human Rights draft a report “documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity” to follow up implementation

⁶ http://internap.hrw.org/features/features/lgbt_laws/

⁷ <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2133&context=facpub>

⁸ Ibid.

⁹ https://en.wikipedia.org/wiki/LGBT_rights_at_the_United_Nations

¹⁰ Ibid.

of the **Vienna Declaration and Program of Action**, a human rights declaration adopted in 1993 at the World Congress on Human Rights in Vienna. The resolution passed with 23 votes in favor to 19 against, with 3 abstentions. It was the first such resolution and was hailed as "historic."¹¹

In September 2014, Brazil, Chile, Colombia, and Uruguay led a follow-up resolution at the UNHRC. This second resolution on "human rights, sexual orientation, and gender identity" passed with an increased vote margin (25 to 14, 7 abstentions). It requested the UN High Commissioner for Human Rights to update the 2011 report "with a view to sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards." The update was presented to the Human Rights Council in June 2015.

In 2016, the UNHRC passed a resolution to appoint an Independent Expert to find the causes of violence and discrimination against people due to their gender identity and sexual orientation, and to discuss with governments how to protect those people. This OHCHR-based mandate is seen as the UN's "most overt expression of gay rights as human rights."¹²

It is clear, that at a global level, there is increasing support for the rights of LGBTQ people and for ensuring that sexual orientation and gender identity are fully included within those rights.

UN Free & Equal Program. In 2013 the UN launched the *UN Free & Equal Program* by the UN Human Rights Office under the leadership of then-UN High Commissioner for Human Rights Navi Pillay. Based on the foundational assumptions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the campaign urges equal rights and fair treatment for LGBTI individuals around the world, in association with UN offices and civil society organizations. The campaign is financed by governments and businesses, including H&M, Gap Inc., and Kenneth Cole. It reaches nearly 2 billion people annually with social media messaging, videos, and public campaigns.¹³

The program goals encourage states to adopt comprehensive anti-discrimination laws and policies that prohibit discrimination based on gender identity and gender expression, including in employment, education, health care, housing, and access to bathrooms and public services.

States are specifically urged to do the following:

- Repeal laws used to arrest, detain, or harass trans people based on their gender identity or expression.
- Include gender identity and expression as protected characteristics in hate crime and hate speech laws.
- Legally recognize the gender identity of trans people in official documents through a simple administrative process based on self-identification without requirements such as forced medical diagnosis, sterilization, or divorce.
- Ensure effective recording, reporting, investigation, and prosecution of violence and torture against trans people, and remedy for victims.
- Ensure access to health services including gender-affirming procedures for trans people without stigma, discrimination, or abusive requirements.
- Reform international and national medical classifications that treat being trans as an illness.

¹¹ Ibid.

¹² Ibid.

¹³https://en.wikipedia.org/wiki/United_Nations_Free_%26_Equal#:~:text=The%20first%20UN%20Free%20%26%20Equal,global%20launch%20in%20July%202013.

- Protect trans and gender non-conforming children and youth from violence and discrimination and allow for recognition of their gender identity.
- Train police officers, healthcare workers, teachers, judges, prison officials, immigration officers, and other officials on respect and equal treatment of trans people.
- Ensure that trans people and organizations are consulted and participate when developing research, legislation, and policies that impact on their rights.
- Take specific measures to respect the gender identity of trans people in detention and protect them from violence and discrimination.

For the media:

- Include the voices of trans people in newspapers, TV, and radio.
- Feature trans people and their concerns in an objective, balanced, and nondiscriminatory manner.
- Do not propagate negative and harmful stereotypes about trans people.¹⁴

Progress on transgender rights. A significant change is the movement to end conversion therapy, the practice of attempting to change an individual's sexual orientation or gender identity. Countries including Albania, Australia, Canada, France, Germany, Malta, Ireland, New Zealand, Spain, and the United Kingdom have either enacted some form of ban or taken steps towards doing so. The EU has also called on states to ban the practice. The UN Independent Expert on Combating Violence and Discrimination based on Sexual Orientation and Gender Identity presented a report to the UN on the topic. Conversion therapy is regarded as a form of torture or cruel, inhuman, and degrading treatment. Conversion therapy remains legal in 30 states in the US.¹⁵

The Backlash. LGBTQ rights advocate Mark Gevisser has written extensively about the 'pink line,' the demarcation between places that are "increasingly integrating queer people into their societies as full citizens, and those finding new ways to shut them out."¹⁶ He uses as illustration a 2013 press conference in Senegal at which President Obama spoke about LGBTQ rights globally and about LGBTQ discrimination in Senegal. Obama "drew a line between personal beliefs and traditions, which had to be "respected," and the state's responsibility, which was to treat all people equally. When it was his turn to speak, the Senegalese president Macky Sall made the point by those who set traditional values against the notion of universal human rights. "We cannot have a standard model which is applicable to all nations," President Sall said. "We have different traditions."

Sall was under pressure from Senegal's Islamist lobby to stand against LGBTQ rights. Support for LGBTQ rights is seen in some countries as pandering to, and being influenced by, the West. President Sall said in an interview with the German magazine *Zeit*, "You have only had same-sex partnerships in Europe since yesterday and now you ask it today from Africans? This is all happening too fast! We live in a world that is changing slowly."¹⁷

There is resistance in Europe as well, notably in Hungary and Poland, countries led by right-wing nationalists who perceive increasing recognition of human rights as tools to destroy religious and traditional cultures and to harm the roles of women and men. The polarization becomes defined as

¹⁴ <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Transgender.pdf>

¹⁵ <https://www.hrw.org/news/2021/02/24/global-trends-lgbt-rights-during-covid-19-pandemic#>

¹⁶ <https://www.theguardian.com/world/2020/jun/16/how-globalisation-has-transformed-the-fight-for-lgbtq-rights>

¹⁷ Ibid.

‘globalists’ versus ‘patriots,’ and those who choose globalism are viewed as enemies of the state, bent on its cultural and political destruction through changes in core values. In both countries, this focus on sexual orientation and gender identity has become a screen that obscures the states’ increasing power in the judiciaries, in the suppression of opposition, and in a free press.

Gevisser writes,

In western Europe, the issue of LGBTQ+ rights was being staked as a pink line against the influx of new migrants. At the same time, in eastern Europe, it was being staked as a pink line against decadent western liberalism. In both instances, queer people themselves came to be instrumentalized politically as never before. They acquired political meaning far beyond their own claims to equality and dignity. They became embodiments of progress and worldliness to some, but signs of moral and social decay to others.¹⁸

Questions for Discussion

1. How do you define the tension between ‘tradition’ and human rights? How would you attempt to resolve this tension?
2. The movement for equality based on sexual orientation and gender identity is perceived in many places as neo-colonialism and as the imposition of Western values. How can sexual orientation and gender identity (SOGI) rights be framed to counter this opposition?
3. How would you evaluate the likely success of the *UN Free & Equal Program*? What else can be done internationally, at the UN or by other global bodies, to advance trans rights at the level of states?
4. Gevisser writes about trans people becoming “politically instrumentalized ... embodiments of progress and worldliness to some, but signs of moral and social decay to others.” Give examples that you have observed in the media, in films, etc. of both types of portrayals. What are the implications for the individuals of these forms of objectification?
5. How would you respond to the charge that imposing SOGI rights in some countries would represent a form of neo-colonialism?

¹⁸ Ibid.

2. Case Study 2: Accessibility of Hormones and Other Medical Treatments during Adolescence

Overview

Transgender (or ‘trans’) individuals are those whose gender identity, expression, or behavior does not align with what is socio-culturally accepted as their sex at birth.¹ Some transgender individuals experience *gender dysphoria*, distress from an incongruence between their sex and gender identity.²

Transgender youth –trans individuals under the legal age of majority—are a particularly marginalized group. They face disproportionately high rates of homelessness, discrimination, violence at home, substance abuse, and mental illness. Around one-third of trans youth have attempted suicide.³

The UCLA Williams Institute estimates that 150,000 youth in the United States identify as transgender.⁴

What is gender-affirming care? Gender-affirming care is medical care designed to adjust a person’s primary and secondary sex characteristics so that they align with one’s gender identity. Parental consent is generally required for gender-affirming care for minors.⁵ Candidates for such care are carefully selected to ensure low rates of re-transition.⁶ While there is no universal set of rules to dictate when and how trans youth are eligible to receive care, clinicians conduct mental health evaluations to assess an individual’s understanding of themselves, to confirm that medical intervention is appropriate.⁷

A variety of organizations recommend gender-affirming medical care for transgender youth as evidence-based patient care. These include the American Academy of Pediatricians, the Endocrine Society, the American Academy of Child and Adolescent Psychiatry, and the American Psychiatric Association.⁸ Studies show that gender-affirming care can mitigate gender dysphoria, increase mental health, and decrease the risk of suicidal ideation among transgender adolescents.⁹

¹ “The State of Transgender Health Care: Policy, Law, and Medical Frameworks” <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953767/>

² “What Is Gender Dysphoria?” <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>

³ “Ethical Issues in Gender-Affirming Care for Youth” <https://pubmed.ncbi.nlm.nih.gov/30401789/>; “Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors” <https://harvardlawreview.org/2021/04/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors/>

⁴ “Age of Individuals Who Identify as Transgender in the United States” <https://williamsinstitute.law.ucla.edu/publications/age-trans-individuals-us/>

⁵ “Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors” <https://harvardlawreview.org/2021/04/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors/>

⁶ “Addressing Legislation That Restricts Access to Care for Transgender Youth” <https://publications.aap.org/pediatrics/article-abstract/147/5/e2021049940/180865/Addressing-Legislation-That-Restricts-Access-to?redirectedFrom=fulltext>

⁷ “Youth and Caregiver Perspectives on Barriers to Gender-Affirming Health Care for Transgender Youth” https://www.sciencedirect.com/science/article/abs/pii/S1054139X16000963?casa_token=3R44tNGSB3UAAAAA:ha_7kMoni5_GCKlhmiTPfBetyMKAwY1UJ6L5aWnm90KooKtt9jYudpLnxJ-wp4dmSmoiuezvaVi

⁸ “Prohibiting Gender Affirming Medical Care for Youth” <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Feb-2020.pdf>

⁹ “Prohibiting Gender Affirming Medical Care for Youth” <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Feb-2020.pdf>; “Ethical Issues in Gender-Affirming Care for Youth” <https://pubmed.ncbi.nlm.nih.gov/30401789/>; “Youth and Caregiver Perspectives on Barriers to Gender-Affirming Health Care for Transgender Youth”

There are a variety of forms of gender-affirming care, including puberty suppression, hormone therapy, and surgical therapy.¹⁰

- **Puberty suppression.** This is the general first step in gender-affirming medical care for transgender youth and it is reversible.¹¹ Gonadotropin-releasing hormone (GnRH) agonists are used to delay the onset of puberty. This provides additional time for an adolescent to explore their gender identity without developing misaligned secondary sex characteristics.¹² Secondary sex characteristics include manifestations of puberty that are not essential to reproduction, such as facial hair, breasts, muscularity, and voice pitch.¹³
- **Gender-affirming hormone treatment.** Hormone treatment can help individuals who have already entered puberty to develop secondary sex characteristics that are in line with their gender identity. It is often called hormone replacement therapy (HRT), and it can be offered during later adolescence.¹⁴
- **Surgical interventions.** Surgery is often the final, irreversible step in medical gender affirmation. The Endocrine Society and other experts recommend delaying this surgery until individuals reach 18 or the age of majority.¹⁵ Consequently, it is not generally the main concern of laws limiting gender-affirmation treatment for youth. These procedures may include breast or chest surgery, genital reconstruction, hysterectomy, hair removal, and more.¹⁶

Access Barriers. Transgender youth in America face a variety of obstacles to access gender-affirming care. First, there is a significant lack of qualified and willing healthcare providers to assist with such treatment. Doctors emerging from most medical schools display a deficit in knowledge of treating gender dysphoria.¹⁷ Some clinicians offer vague or uncertain information to their patients.¹⁸ Inequalities

https://www.sciencedirect.com/science/article/abs/pii/S1054139X16000963?casa_token=3R44tNGSB3UAAAAA:ha_7kMoni5GCKlhjTPfBetyMKAwy1UJ6L5aWnm90KooKt9jYudpLnXJ-wp4dmSmoiieuzvaVj

¹⁰ “The State of Transgender Health Care: Policy, Law, and Medical Frameworks”

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953767/>

¹¹ “Addressing Legislation That Restricts Access to Care for Transgender Youth” <https://publications.aap.org/pediatrics/article-abstract/147/5/e2021049940/180865/Addressing-Legislation-That-Restricts-Access-to?redirectedFrom=fulltext>

¹² “Ethical Issues in Gender-Affirming Care for Youth” <https://pubmed.ncbi.nlm.nih.gov/30401789/>

¹³ <https://www.dictionary.com/browse/secondary-sex-characteristic>

¹⁴ “Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors”

<https://harvardlawreview.org/2021/04/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors/>

¹⁵ “Ethical Issues in Gender-Affirming Care for Youth” <https://pubmed.ncbi.nlm.nih.gov/30401789/> ; “Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors”

<https://harvardlawreview.org/2021/04/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors/>

¹⁶ “The State of Transgender Health Care: Policy, Law, and Medical Frameworks”

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953767/>

¹⁷ “Ethical Issues in Gender-Affirming Care for Youth” <https://pubmed.ncbi.nlm.nih.gov/30401789/> ; “Youth and Caregiver Perspectives on Barriers to Gender-Affirming Health Care for Transgender Youth”

https://www.sciencedirect.com/science/article/abs/pii/S1054139X16000963?casa_token=3R44tNGSB3UAAAAA:ha_7kMoni5GCKlhjTPfBetyMKAwy1UJ6L5aWnm90KooKt9jYudpLnXJ-wp4dmSmoiieuzvaVj

¹⁸ “Experiences and Perspectives of Transgender Youths in Accessing Health Care: A Systematic Review”

<https://jamanetwork.com/journals/jamapediatrics/article-abstract/2782148?guestAccessKey=3c2adf6f-1efe-4613-a27c-122c9a986bf1&utm>

in the geographic distribution of qualified healthcare providers compounds this lack of available expertise¹⁹ and waitlists to see qualified professionals can be months long.²⁰

Second, the cost of treatment can be an access barrier. While the cost of gender-affirming care varies regionally, it is often prohibitively high. This problem is exacerbated when insurance providers or healthcare plans cannot cover gender-affirming care. In the US, for example, annual cost of GnRH agonists can range from \$12,000 to upwards of \$20,000.²¹

Third, trans youth face the barrier of stigma and discrimination, both outside and inside the healthcare system.²² Discrimination often manifests itself through the words, suggestions, or attitudes of healthcare providers. Youths have described feeling invalidated or stripped of personal dignity by insensitive clinicians.²³ One trans adolescent reported, “I don’t really want to go to the doctor because they’re gonna mistreat me.”²⁴ Another remembered:

“When you get to a healthcare facility, [the clinician] first calls her colleagues saying; “come and see this abomination.” They make you sit and wait for drugs so that her colleagues can come and look at your appearance. Sometimes you feel out of place and just decide to leave without getting the service you want.”²⁵

Increasing Legal Barriers. There are also increasing legal barriers and threats against access to gender-affirming care for transgender youth in the United States. In 2020, 15 bills that would have limited youth access to such care were introduced in state legislatures. While none passed, they were perceived by advocates as an attack on the rights and identities of trans youth.²⁶

¹⁹ “Ethical Issues in Gender-Affirming Care for Youth” <https://pubmed.ncbi.nlm.nih.gov/30401789/>; “Youth and Caregiver Perspectives on Barriers to Gender-Affirming Health Care for Transgender Youth” https://www.sciencedirect.com/science/article/abs/pii/S1054139X16000963?casa_token=3R44tNGSB3UAAAAA:ha_7kMoni5_GCKlhmjTPfBetyMKAwy1UJ6L5aWnm90KooKtt9jYudpLnxJ-wp4dmSmoiiuezvaVj

²⁰ “For Transgender Youth, Stigma Is Just One Barrier to Health Care” <https://www.nytimes.com/2021/09/28/health/transgender-health-care.html>

²¹ “Ethical Issues in Gender-Affirming Care for Youth” <https://pubmed.ncbi.nlm.nih.gov/30401789/>; “Youth and Caregiver Perspectives on Barriers to Gender-Affirming Health Care for Transgender Youth” https://www.sciencedirect.com/science/article/abs/pii/S1054139X16000963?casa_token=3R44tNGSB3UAAAAA:ha_7kMoni5_GCKlhmjTPfBetyMKAwy1UJ6L5aWnm90KooKtt9jYudpLnxJ-wp4dmSmoiiuezvaVj

²² “For Transgender Youth, Stigma Is Just One Barrier to Health Care” <https://www.nytimes.com/2021/09/28/health/transgender-health-care.html>; “Youth and Caregiver Perspectives on Barriers to Gender-Affirming Health Care for Transgender Youth” https://www.sciencedirect.com/science/article/abs/pii/S1054139X16000963?casa_token=3R44tNGSB3UAAAAA:ha_7kMoni5_GCKlhmjTPfBetyMKAwy1UJ6L5aWnm90KooKtt9jYudpLnxJ-wp4dmSmoiiuezvaVj

²³ “Experiences and Perspectives of Transgender Youths in Accessing Health Care: A Systematic Review” <https://jamanetwork.com/journals/jamapediatrics/article-abstract/2782148?guestAccessKey=3c2adf6f-1efe-4613-a27c-122c9a986bf1&utm>

²⁴ p.1163, “Experiences and Perspectives of Transgender Youths in Accessing Health Care: A Systematic Review” <https://jamanetwork.com/journals/jamapediatrics/article-abstract/2782148?guestAccessKey=3c2adf6f-1efe-4613-a27c-122c9a986bf1&utm>

²⁵ p.1163, “Experiences and Perspectives of Transgender Youths in Accessing Health Care: A Systematic Review” <https://jamanetwork.com/journals/jamapediatrics/article-abstract/2782148?guestAccessKey=3c2adf6f-1efe-4613-a27c-122c9a986bf1&utm>

²⁶ “Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors” <https://harvardlawreview.org/2021/04/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors/>

In 2021, similar bills were introduced in over 20 states. Some bills would have criminalized health-care professionals who provided gender-affirming care. Others proposed to penalize parents or school staff who encourage or support gender-affirming care. Others have provisions related to insurance.²⁷ Two states signed their bills into law: Arkansas and Tennessee.²⁸ The measures have received ample criticism from medical and child welfare groups.²⁹

The Arkansas Law

In April 2021, Arkansas passed legislation to ban gender-affirming medical care for trans youth under the age of 18 years, even with parental consent.³⁰ The ACLU estimates that there are approximately 1,450 transgender youth in Arkansas who are at risk of being denied care because of this legislation.³¹

In response to the law, the American Medical Association publicly noted that “Every major medical association in the United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people.”³²

A federal Court temporarily blocked the law in July 2021 following the filing of an ACLU lawsuit.³³

The Tennessee Law

In May 2021, Tennessee passed legislation to ban gender-affirming treatment for pre-pubescent minors. The ban is less restrictive than that in Arkansas, but it has been perceived by activists as blatant anti-trans discrimination.³⁴ Advocates argue that no Tennessee doctor provides hormone therapy to pre-pubescent youth, so the law’s only function is to attack the identity of trans youth.³⁵

Bell v. Tavistock

While this case did not take place in the United States, it attracted worldwide attention. In December 2020, the United Kingdom’s High Court of Justice of England and Wales mandated that transgender youth under 16 years old obtain court approval before initiating gender-affirming medical treatment. The ruling denied the capacity of youth or their parents to consent to such treatments, including

²⁷ “Prohibiting Gender Affirming Medical Care for Youth” <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Feb-2020.pdf>

²⁸ “At least 7 states proposed anti-trans bills in first week of 2022” <https://www.nbcnews.com/nbc-out/out-politics-and-policy/least-7-states-proposed-anti-trans-bills-first-week-2022-rcna11205> ; “Prohibiting Gender Affirming Medical Care for Youth” <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Feb-2020.pdf>

²⁹ “At least 7 states proposed anti-trans bills in first week of 2022” <https://www.nbcnews.com/nbc-out/out-politics-and-policy/least-7-states-proposed-anti-trans-bills-first-week-2022-rcna11205>

³⁰ “Arkansas Gov. Asa Hutchinson On Transgender Health Care Bill: ‘Step Way Too Far’ “ <https://www.npr.org/2021/04/06/984884294/arkansas-gov-asa-hutchinson-on-transgender-health-care-bill-step-way-too-far>

³¹ “Prohibiting Gender Affirming Medical Care for Youth” <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Feb-2020.pdf>

³² “AMA to states: Stop interfering in health care of transgender children” <https://www.ama-assn.org/press-center/press-releases/ama-states-stop-interfering-health-care-transgender-children>

³³ “Judge blocks Arkansas’ ban on gender-affirming care for transgender minors” <https://www.nbcnews.com/nbc-out/out-politics-and-policy/judge-blocks-arkansas-ban-gender-affirming-care-transgender-minors-rcna1477>

³⁴ “Tennessee governor OKs transgender youth treatment ban” <https://www.nbcnews.com/nbc-out/out-politics-and-policy/tennessee-governor-oks-transgender-youth-treatment-ban-rcna985>

³⁵ “Tennessee governor OKs transgender youth treatment ban” <https://www.nbcnews.com/nbc-out/out-politics-and-policy/tennessee-governor-oks-transgender-youth-treatment-ban-rcna985> ; “Tennessee Bans Hormone Treatments for Transgender Children” <https://www.nytimes.com/2021/05/20/us/tennessee-transgender-hormone-treatment.html>

patients who were already approved to begin.³⁶ In practice, this controversial judgment meant that it would be almost impossible to access treatment, due to the resources required to make an application and court-related delays.³⁷ The ruling was subsequently overturned on appeal.

The Debate: Arguments in Favor of Gender-Affirming Care. As noted above, gender-affirming care is known to improve mental health outcomes for trans youth and to reduce gender dysphoria. Untreated gender dysphoria has been found to increase depression, social anxiety, and suicidal ideation.³⁸

Without access to treatment, transgender youth may also turn to self-administration of gender-affirming care. This can be extremely dangerous. Hormones can be purchased illicitly, with the risk of acquiring poor quality or toxic hormones. There are other risks, including a lack of medical monitoring and risks of transmitting HIV or Hepatitis C through needle sharing in administering drugs. Although there is little data on the practice, self-treatment is a widely-reported practice among trans youth without alternatives for care.³⁹

In the status quo, children typically require parental consent for gender-affirming care.⁴⁰ Parents have the constitutional right to provide consent on their child's behalf.⁴¹

Legally speaking, gender-affirming care is also valuable. It often allows trans youth to access the legal rights and protections specific to transgender individuals, since many states require medical evidence to change a person's gender identity documents such as driver's licenses. This evidence can include a diagnosis of gender dysphoria, hormone replacement therapy, or gender confirmation surgery.⁴²

The Debate: Arguments Against Gender-Affirming Care. Proponents of legislation limiting the access of trans youth to gender-affirming medical care often raise the issue of informed consent. The requirement of informed consent protects an individual's autonomy by ensuring that they understand both the benefits and the risks associated with certain medical treatments. Hence, there is contention as to whether and at what age children can provide fully informed consent over their own medical procedures.⁴³

³⁶ "Addressing Legislation That Restricts Access to Care for Transgender Youth" <https://publications.aap.org/pediatrics/article-abstract/147/5/e2021049940/180865/Addressing-Legislation-That-Restricts-Access-to?redirectedFrom=fulltext>

³⁷ <https://www.bailii.org/ew/cases/EWHC/Admin/2020/3274.html>

³⁸ "Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors" <https://harvardlawreview.org/2021/04/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors/>

³⁹ "Ethical Issues in Gender-Affirming Care for Youth" <https://pubmed.ncbi.nlm.nih.gov/30401789/>

⁴⁰ "Ethical Issues in Gender-Affirming Care for Youth" <https://pubmed.ncbi.nlm.nih.gov/30401789/>

⁴¹ "Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors" <https://harvardlawreview.org/2021/04/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors/>

⁴² "Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors" <https://harvardlawreview.org/2021/04/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors/>

⁴³ "Ethical Issues in Gender-Affirming Care for Youth" <https://pubmed.ncbi.nlm.nih.gov/30401789/>

Although research on gender-affirming treatment options and their long-term health effects has grown in recent years,⁴⁴ it remains somewhat inconclusive. Concerns over ‘medical risks’ are often used as a reason to oppose gender affirming care.⁴⁵

Arguments to deny gender-affirming care also maintain that, due to the inconclusive nature of the longitudinal research to date, both the child’s and the parent’s ability to consent is inadequate and should therefore be limited by law.

Another reason to oppose treatment for youth is the risk of trans youth regretting their transition. However, it is important to note that the number of those who ‘de-transition’ remains dwarfed by those for whom transition is appropriate and necessary.⁴⁶

The US today. The push for legislation limiting the rights of transgender youth remains a salient issue in the US today. Within the first week of 2022, lawmakers in at least seven states proposed laws that would limit the rights of transgender and nonbinary youths, targeting participation in sports, access to gender-affirming care, use of bathrooms, and more.⁴⁷ These issues may dominate human rights discussions in the legal profession and in legislatures for years to come.

Questions for Discussion

1. Consider the various access barriers to gender-affirming care for transgender youth in the United States. *What do you perceive as the most salient barrier in access?*
2. What implications do laws like that in Arkansas and Tennessee have for other states?
 - a. Do you believe that this represents a long-term trend toward limiting access to gender affirming care for transgender teens?
 - b. If Tennessee’s law does not change any existing state practices, what purpose does the law serve?
3. In your view, at what age or point are youth able to provide consent to their own medical procedures?
 - a. Should the threshold be determined by a certain age? A level of competence?
4. Do you find the argument that there are ‘medical risks’ to gender-affirming care to be convincing?
 - a. Why or why not?
5. How might lawyers in the US prevent the progression of anti-trans laws in 2023?

Suggested Reading (Optional):

- [Arkansas House Bill 1570.](#)
- [Tennessee House Bill 2576.](#)

Consider the differences between these bills. What justifications are given for limiting the access of trans youth to gender-affirming care? What possible counterarguments could be made?

Prepared by Amalie Wilkinson, 2022

⁴⁴ “Ethical Issues in Gender-Affirming Care for Youth” <https://pubmed.ncbi.nlm.nih.gov/30401789/>

⁴⁵ “Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors” <https://harvardlawreview.org/2021/04/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors/>

⁴⁶ “Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors” <https://harvardlawreview.org/2021/04/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors/>

⁴⁷ “At least 7 states proposed anti-trans bills in first week of 2022” <https://www.nbcnews.com/nbc-out/out-politics-and-policy/least-7-states-proposed-anti-trans-bills-first-week-2022-rcna11205>

3. Case Study 3: The ‘Gay and Trans Panic Defense’: Legality and Use

Overview

What is the ‘Gay and Trans Panic Defense’? The ‘Gay and Trans Panic Defense’ is defined by the LGBTQ+ Bar Association as “a legal strategy that asks a jury to find that a victim’s sexual orientation or gender identity/expression is to blame for a defendant’s violent reaction, including murder.”¹ It is not a freestanding defense against murder. Rather, it is employed to reduce severe charges, like murder, to manslaughter or another lesser offense.²

How is it used? The defense can be used in three variations to reduce a murder charge.

#1: **Provocation.**

A defendant uses the Gay and Trans Panic Defense to support their claim of provocation. This argues that the discovery of the victim’s gender identity or sexual orientation was enough to **provoke** a violent response in the heat of passion.³

Such a claim can imply that a non-violent sexual advance would be sufficient provocation to induce murder. It is notable, however, that a sexual advance is only considered ‘provocative’ when coming from an LGBTQ2IA+ individual; it is neither illegal nor harmful on its own.⁴

#2: **Diminished Capacity (or Insanity).**

A defendant uses the Gay and Trans Panic Defense to support their claim of diminished capacity. In other words, their discovery or knowledge of the victim’s sexuality or gender was sufficient to cause a **temporary mental breakdown**, which in turn led to deadly violence.⁵

#3: **Self-Defense.**

A defendant claims that they reasonably believed themselves to be in **serious bodily danger** because of the victim’s sexual orientation or gender identity.⁶ Such a defense can be linked to the antiquated and harmful idea that homosexuality is a ‘disorder.’⁷ Indeed, the American Psychiatric Association included homosexuality in their Diagnostic and Statistical Manual of Mental Disorders until 1973. Homosexuality was then removed, but ‘gender identity disorders’ continued to be included for an additional 30 years.⁸

¹ “LGBTQ+ ‘Panic’ Defense.” <https://lgbtqbar.org/programs/advocacy/gay-trans-panic-defense>

² Mallory et al. “Banning the Use of Gay and Trans Panic Defenses.” *UCLA School of Law Williams Institute*, 2021. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gay-Trans-Panic-Apr-2021.pdf>

³ Ibid.

⁴ “The LGBTQ+ Panic Defense.” <http://worldwithoutgenocide.org/toolkits/transgender-rights/ban-the-lgbtq-panic-defense>

⁵ Mallory et al. “Banning the Use of Gay and Trans Panic Defenses.” *UCLA School of Law Williams Institute*, 2021. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gay-Trans-Panic-Apr-2021.pdf> ; “The LGBTQ+ Panic Defense.” <http://worldwithoutgenocide.org/toolkits/transgender-rights/ban-the-lgbtq-panic-defense>

⁶ Mallory et al. “Banning the Use of Gay and Trans Panic Defenses.” *UCLA School of Law Williams Institute*, 2021. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gay-Trans-Panic-Apr-2021.pdf>

⁷ “The LGBTQ+ Panic Defense.” <http://worldwithoutgenocide.org/toolkits/transgender-rights/ban-the-lgbtq-panic-defense>

⁸ Mallory et al. “Banning the Use of Gay and Trans Panic Defenses.” *UCLA School of Law Williams Institute*, 2021. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gay-Trans-Panic-Apr-2021.pdf>

History of the Defense. The Gay and Trans Panic Defense has been used in the US since the 1960s. It rose to national prominence with the case of Matthew Shepard.

Matthew Shepard was an openly gay undergraduate student in Laramie, Wyoming. He was killed in October 1998, by Russell Henderson and Aaron McKinney. Both the victim and perpetrators were 21 years old. The perpetrators tortured Shepard, tied him to a fence, and abandoned him.⁹ He was found by rescuers and rushed to a hospital, but he died six days later from his injuries.¹⁰

In court, McKinney's lawyers argued that Shepard had provoked McKinney into temporary insanity through his homosexual advances. They claimed that Shepard had grabbed McKinney's crotch and tried to lick his ear. While the jury rejected this attempt to mitigate the murder charge, the case popularized this defense strategy across the US.¹¹

Today, it remains difficult to calculate the number of times that the Gay and Trans Panic Defense has been used in court. Research by Professor Carsten Andresen in 2020 identified at least 104 such cases between 1970 and 2020. However, Andresen conceded that there were likely hundreds more cases that he had been unable to identify. According to Andresen, charges were reduced in about 50% of the cases in which defendants utilized the defense.¹²

Examples of the Defense in Practice.

The Murder of Larry King, Oxnard, California

In 2008, 14-year-old Brandon McInerney killed his classmate, Larry King. King was a gender-nonconforming student who had recently come out as gay and had begun wearing lipstick and high heels to school. A few days prior to the killing, King had asked McInerney to be their Valentine in front of McInerney's friends. King had allegedly also made sexual advances to McInerney.¹³

On February 12, McInerney brought a .22 caliber handgun to school and shot King twice in the back of the head. In court, the defendant claimed to have been provoked by King's repeated sexual taunts. The defense asked for a reduced conviction of manslaughter. McInerney's first trial ended in a hung jury, with seven jurors supporting a voluntary manslaughter conviction and five favoring a charge of murder.

⁹ "Matthew Shepard: The murder that changed America." <https://www.bbc.com/news/world-us-canada-45968606>

¹⁰ "The LGBTQ+ Panic Defense." <http://worldwithoutgenocide.org/toolkits/transgender-rights/ban-the-lgbtq-panic-defense>

¹¹ Lee & Kwan. "The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women." 66 *Hastings L.J.* 77, 2014.

https://heinonline.org/HOL/Page?handle=hein.journals/hastlj66&div=6&g_sent=1&casa_token=cPPgW_IGID8AAAAA:C8o4rO8_TtleAkpzw26avzrN_WZmtDzE3elmJW3LkS_ZG3IkEm7eveh_WL7pOwcb5O4ZutzM6Mc&collection=journals ; "The LGBTQ+ Panic Defense." <http://worldwithoutgenocide.org/toolkits/transgender-rights/ban-the-lgbtq-panic-defense>

¹² Mallory et al. "Banning the Use of Gay and Trans Panic Defenses." *UCLA School of Law Williams Institute*, 2021.

<https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gay-Trans-Panic-Apr-2021.pdf>

¹³ Lee & Kwan. "The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women." 66 *Hastings L.J.* 77, 2014.

https://heinonline.org/HOL/Page?handle=hein.journals/hastlj66&div=6&g_sent=1&casa_token=cPPgW_IGID8AAAAA:C8o4rO8_TtleAkpzw26avzrN_WZmtDzE3elmJW3LkS_ZG3IkEm7eveh_WL7pOwcb5O4ZutzM6Mc&collection=journals ; Mallory et al.

"Banning the Use of Gay and Trans Panic Defenses." *UCLA School of Law Williams Institute*, 2021.

<https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gay-Trans-Panic-Apr-2021.pdf>

Some jurors expressed their will to avoid a life sentence and alleged that the victim had contributed to his own death by sexually harassing the defendant.¹⁴

A majority of jurors sympathized with the defense despite ample evidence of premeditation. Not only did McInerney bring a gun to school in preparation; he also confided to a psychiatrist that he had thought about murdering King beforehand. Upon his second trial, the defendant was sentenced to 21 years for second-degree murder and voluntary manslaughter.¹⁵

People v. Merel, Newark, California

In October 2003, a group of four male teenagers killed Gwen Araujo, a 17-years old transgender woman. Araujo had been friends with the men, and allegedly engaged in sexual acts with two of them, Jose Merel and Michael Magidson. They became suspicious about her biological sex after she refused to have vaginal intercourse. One evening, they coerced her into a bathroom and beat her to death upon discovering that she was transgender.¹⁶

In court, the defendants claimed provocation because of Araujo's gender identity and asked for a conviction of voluntary manslaughter. They alleged that upon discovering Araujo was anatomically male, the men were so upset that it provoked them to murder. The defendants' first trial was declared a mistrial, but they were both eventually convicted of second-degree murder. While their claim of provocation was rejected, they were convicted of neither first-degree murder nor of a hate crime.¹⁷

The Movement to Ban the Defense. In recent years, there has been growing opposition to the Gay and Trans Panic Defense. Many argue that banning the defense is one way to combat the epidemic of anti-LGBTQIA+ hate and violence in the United States.¹⁸ In 2007, sexual orientation was the third most common motivator of hate incidents in the country, accounting for 17% of attacks.¹⁹ Today, sexual and gender minorities continue to face disproportionate levels of intimate partner violence, discrimination, murder, and hate. This violence is particularly severe against transgender women of color.²⁰

The Gay and Trans Panic Defense is one example of this pervasive discrimination. As a result, the American Bar Association approved a resolution in 2013 that called for state legislatures to outlaw the

¹⁴ Ibid.

¹⁵ Lee & Kwan. "The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women." 66 *Hastings L.J.* 77, 2014.

https://heinonline.org/HOL/Page?handle=hein.journals/hastlj66&div=6&g_sent=1&casa_token=cPPgW_IGID8AAAAA:C8o4rO8_TtleAkpzw26avzrN_WZmtDzE3elmJW3LkS_ZG3IkEm7eveh_WL7pOwcb5O4ZutzM6Mc&collection=journals

¹⁶ Lee & Kwan. "The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women." 66 *Hastings L.J.* 77, 2014.

https://heinonline.org/HOL/Page?handle=hein.journals/hastlj66&div=6&g_sent=1&casa_token=cPPgW_IGID8AAAAA:C8o4rO8_TtleAkpzw26avzrN_WZmtDzE3elmJW3LkS_ZG3IkEm7eveh_WL7pOwcb5O4ZutzM6Mc&collection=journals ; Mallory et al.

"Banning the Use of Gay and Trans Panic Defenses." *UCLA School of Law Williams Institute*, 2021.

<https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gay-Trans-Panic-Apr-2021.pdf>

¹⁷ Ibid.

¹⁸ Mallory et al. "Banning the Use of Gay and Trans Panic Defenses." *UCLA School of Law Williams Institute*, 2021.

<https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gay-Trans-Panic-Apr-2021.pdf>

¹⁹ "The Gay/Trans Panic Defense: What It is, and How to End It."

<https://www.americanbar.org/groups/crsj/publications/member-features/gay-trans-panic-defense/>

²⁰ Mallory et al. "Banning the Use of Gay and Trans Panic Defenses." *UCLA School of Law Williams Institute*, 2021.

<https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gay-Trans-Panic-Apr-2021.pdf>

defense. The following year, California became the first state to pass such legislation, and others soon followed.²¹

As of December 2022, 16 states²² and Washington, D.C., have banned the Gay and Trans Panic Defense. However, it remains legal in 34 states and five U.S. territories.²³

At the federal level, legislation was introduced in both the U.S. Senate and House to ban the Gay and Trans Panic Defense in April 2021 (S.1137 and H.R.2629). Both were referred to their respective Committee on the Judiciary. In October 2021, the House Bill was referred to the Subcommittee on Crime, Terrorism, and Homeland Security.²⁴ To date, no federal action has been taken.

The Victimization of Transgender Women. The Gay and Trans Panic Defense is applicable to cases of violence against all LGBTQ2IA+ individuals. However, transgender women of color are disproportionately targeted with deadly violence. Scholars Cynthia Lee and Peter Kwan (2014) argue that violence against transgender individuals should not be grouped in with homophobic violence, which is based on aggression towards a victim based on issues of sexual orientation.²⁵

They suggest that violence against transgender women can be explained through norms of masculinity and, therefore, on gender identity rather than sexual orientation. When a cisgender man engages in sexual acts with a transgender woman, he may feel uncomfortable with gender nonconformity, and/or be angry about alleged deceit regarding the woman's gender identity, or fear that being attracted to a transgender woman undermines his masculinity. This can lead him to display his masculinity through acts of violence.²⁶

Lee and Kwan (2014) suggest that blanket bans on the Gay and Trans Panic Defense may not be the best or only way to dismantle these negative norms. They advocate raising public awareness about the definitions of 'masculinity' that lead to anti-trans violence and that use of Trans Panic Defenses. For example, prosecutors should humanize the victims of anti-transgender killing by bringing witnesses to talk about the victim, or by educating jurors about what it means to be transgender. The goal is to inform about hegemonic, dominance-based masculinity as a potential contributing factor in anti-trans violence.

Conclusion. Use of the Gay and Trans Panic Defense sends a message that being LGBTQ2IA+ is wrong, and that violence against these individuals is justified. It is premised on the assumption that the discovery of a victim's sexual orientation or gender identity is sufficient justification for a perpetrator to lash out violently against an LGBTQ2IA+ victim.

²¹ Ibid.

²²<https://lgbtqbar.org/programs/advocacy/gay-trans-panic-defense/>

The 16 states are California, Illinois, Rhode Island, Nevada, Connecticut, Maine, Hawaii, New York, New Jersey, Washington, Colorado, Virginia, Vermont, Oregon, Maryland, and New Mexico.

²³ "Gay and Trans Panic Defense Bans." https://www.lgbtmap.org/equality-maps/panic_defense_bans

²⁴ "S.1137 - Gay and Trans Panic Defense Prohibition Act of 2021." <https://www.congress.gov/bill/117th-congress/senate-bill/1137/text>; "H.R.2629 - Gay and Trans Panic Defense Prohibition Act of 2021." <https://www.congress.gov/bill/117th-congress/house-bill/2629>

²⁵ Lee & Kwan. "The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women." 66 *Hastings L.J.* 77, 2014.

https://heinonline.org/HOL/Page?handle=hein.journals/hastlj66&div=6&g_sent=1&casa_token=cPPgW_IGID8AAAAA:C8o4rO8_TtleAkpzw26avzrN_WZmtDzE3elmJW3LkS_ZG3IkEm7eveh_WL7pOwcb5O4ZutzM6Mc&collection=journals

²⁶ Ibid.

Supporters of banning the defense believe that outlawing the defense would: deter crimes committed specifically due to alleged gay or trans panic; prevent the exploitation of homophobic or transphobic jurors by defense teams; and preclude harmful testimony at trial about a victim's sex. Some supporters also suggest that outlawing this defense could serve to deter anti-LGBTQIA+ violence.²⁷

Questions for Discussion

1. Which of the above cases (*Larry King and People v. Merel*) illustrates the most convincing use of the 'Gay and Trans Panic Defense'?
 - a. Is it justified for a defendant to receive a reduced sentence on those grounds?
 - b. Would the defense still be convincing if the victim had been cisgender and heterosexual, and had engaged in sexual advances or sex-by-deception?
 - c. Could these cases also qualify as a hate crime in states where gender identity and sexual orientation are included in hate crime statutes?
2. Why might certain states and politicians oppose legislation to ban the Gay and Trans Panic Defense?
3. Consider the perspective of a prosecutor in a state where the defense is legal. What tactics might be available to prosecutors to argue against the defense's claim?
4. Should there be a federal ban on the Gay and Trans Panic Defense?
5. Consider Lee and Kwan's proposal about raising awareness to change norms of masculinity. Is this a productive strategy to reduce anti-transgender violence?
6. What are other potential legal means of tackling deadly anti-LGBTQ2IA+ violence?

Prepared by Amalie Wilkinson, 2022

²⁷ Mallory et al. "Banning the Use of Gay and Trans Panic Defenses." *UCLA School of Law Williams Institute*, 2021. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gay-Trans-Panic-Apr-2021.pdf>

4. Case Study 4: Document Changes: Birth Certificates, Driver's Licenses, and Passports

Overview

Name and gender changes on ID documents. Gender non-conforming and transgender individuals often hold legal identity documents that are incongruent with their lived identities. In such cases, individuals may consider **document changes** to legally alter the name or gender marker on their birth certificates, driver's licenses, passports, and other government documents.¹

Legal name change can be part of one's gender transition. To make a legal name change, the individual must often do this in court. Changing the gender marker on an ID is a slightly different process. It typically involves getting documentation of gender transition from a health provider; however, the requirements vary by state and by the type of ID.²

Why are document changes important? ID presentation is required for many regular activities, including job applications, opening a bank account, interacting with the police, voting, or air travel. Without documentation that accurately reflects one's gender identity, these activities can be very difficult.³

Voting

For example, when U.S. citizens register to vote and go to the polls, they are required to verify their identity. The requirements for this vary by state, with some states being more restrictive than others. State laws often restrict transgender voters from participating in elections based on documentation issues.

According to research by the Williams Institute at the University of California School of Law (UCLA), there were approximately 965,350 eligible transgender voters in the 2020 U.S. general election. Over 378,000 of these individuals may have faced barriers to voting, as they had no identification documents to reflect their correct name and/or gender. This means they were at risk of being turned away from polls because voter registration rolls had a different name from what was shown on their ID, or because the voter's ID, gender marker, and appearance did not match.⁴

Additionally, 32% of surveyed transgender voters said they were harassed, denied services or benefits, asked to leave the polling place, or directly attacked after presenting an ID that did not match their gender presentation.⁵

¹ James et al. "The Report of the 2015 U.S. Transgender Survey." *National Center for Transgender Equality*, 2016. <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

² James et al. "The Report of the 2015 U.S. Transgender Survey." *National Center for Transgender Equality*, 2016. <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

³ Hussey, Hannah. "Expanding ID Card Access for LGBT Homeless Youth." *Center for American Progress*, 2015. <https://cdn.americanprogress.org/wp-content/uploads/2015/10/01071118/IDhomelessLGBT.pdf>; O'Neill & Herman. "The Potential Impact of Voter Identification Laws on Transgender Voters: 2020 General Election." *UCLA School of Law Williams Institute*, 2020. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Voter-ID-Feb-2020.pdf>

⁴ O'Neill & Herman. "The Potential Impact of Voter Identification Laws on Transgender Voters: 2020 General Election." *UCLA School of Law Williams Institute*, 2020. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Voter-ID-Feb-2020.pdf>

⁵ O'Neill & Herman. "The Potential Impact of Voter Identification Laws on Transgender Voters: 2020 General Election." *UCLA School of Law Williams Institute*, 2020. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Voter-ID-Feb-2020.pdf>

Mental Health

Mental health outcomes are another example of why gender-affirming document changes are important. While research on this topic is new and scarce, preliminary studies find that legal affirmation of one's gender can help transgender individuals to cope with the occurrence of mistreatment, transphobia, and discrimination.⁶

Accessibility in the US.

The 2015 U.S. Transgender Survey

The National Center for Transgender Equality (NCTE), a social justice advocacy organization in the US, conducted the "2015 U.S. Transgender Survey" to examine the experiences of transgender individuals across the country. It included 27,715 respondents across all U.S. states, as well as DC, American Samoa, Guam, Puerto Rico, and U.S. military bases overseas. The survey looked specifically at access to IDs with the correct name and gender of transgender individuals.⁷

Results found that only 11% of respondents had their lived name and gender on all of their ID documents. A full 68% of respondents reported having no IDs with their correct name and gender. The study looked at access to driver's licenses, social security records, student records, passports, and birth certificates. Out of these documents, name and gender changes on birth certificates were the most inaccessible.⁸ Birth certificates are necessary for applying for other documents, such as a passport, and for registering for social security.

Current Laws

Policies regarding name and gender marker changes on government documentation vary by state and by type of ID.

Lgbtmap.org identifies 22 states and the District of Columbia with easily understandable and accessible processes for changing gender on one's driver's license. Other states vary, but the most inaccessible policies exist in eight states and two territories where individuals must provide proof of surgery, court order, or amended birth certificates in order to change their driver's license. These are: Texas, Oklahoma, Iowa, Kentucky, Tennessee, Georgia, South Carolina, Louisiana, Guam, and the Mariana Islands.⁹

As of December 2022, there are 22 states and the District of Columbia that allow residents to mark M, F, or X on their drivers' licenses. This allows non-binary and agender individuals to select the 'X' category, apart from male or female. The remaining 28 states do not allow this option.¹⁰

⁶ Restar et al. "Legal gender marker and name change is associated with lower negative emotional response to gender-based mistreatment and improve mental health outcomes among trans populations." *SSM Population Health*, 2020. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7229467/>

⁷ James et al. "The Report of the 2015 U.S. Transgender Survey." *National Center for Transgender Equality*, 2016. <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

⁸ James et al. "The Report of the 2015 U.S. Transgender Survey." *National Center for Transgender Equality*, 2016. <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

⁹ "Identity Document Laws and Policies." https://www.lgbtmap.org/equality-maps/identity_document_laws

¹⁰ "Identity Document Laws and Policies." https://www.lgbtmap.org/equality-maps/identity_document_laws

For birth certificates, only 16 states allow a gender marker 'X.' Clear and easy policies to change gender on one's birth certificate exist in 27 states, DC, and one U.S. territory. In the remaining states, laws vary. However, three states currently do not allow any amending whatsoever of the gender marker on a birth certificate: Oklahoma, Montana, and Tennessee.¹¹

Barriers to access. Apart from direct legislative barriers, a plethora of factors make changing one's gender or name on identity documents more difficult. Two main barriers are cost and compounded vulnerabilities.

Cost Barriers

Cost barriers may include administrative fees, costs of gender-affirming medical care to be eligible for document changes, costs of going to court, and more. The NCTE's "2015 U.S. Transgender Survey" found that 35% of respondents who did not legally change their name were prevented from doing so because they could not afford it. Cost barriers were also important for 32% of the respondents who did not update their gender on ID documents.

Compounded Vulnerabilities

Other vulnerabilities and structural discrimination that are tied to gender non-conformity can present additional barriers. This is particularly true for homeless transgender youth.

LGBTQ+ youth are significantly over-represented among homeless youth. The experience of homelessness for these youth can make ID changes very difficult for several reasons. First, many states require parental consent to issue an ID card to minors. Homeless youth, especially LGBTQ+ homeless youth, are likely to have strained or absent relationships with their parents. Second, there are 12 states with no protocols for assisting homeless ID card applicants, and many other states have unclear protocols. Third, youth kicked out of their homes may be denied access to their previous ID documents by their parents, and hence may be unable to prove their identity. For these reasons, the disproportionate homelessness experienced by transgender youth contributes to additional barriers in changing their gender and name on official documentation.¹²

Recent developments.

'X' Gender Marker on Passports

In October 2021, the US issued its first passport with the gender designation 'X,' to accommodate those individuals who identify as neither female nor male, including non-binary, genderqueer, agender, and other individuals. In March 2022, the U.S. State Department announced that U.S. citizens would be able to select an X as their gender marker on their U.S. passport application starting April 11, 2022, and the option will become available for other forms of documentation in 2023.¹³

'No Match' Letters

¹¹ "Identity Document Laws and Policies." https://www.lgbtmap.org/equality-maps/identity_document_laws

¹² Hussey, Hannah. "Expanding ID Card Access for LGBT Homeless Youth." *Center for American Progress*, 2015. <https://cdn.americanprogress.org/wp-content/uploads/2015/10/01071118/IDhomelessLGBT.pdf>

¹³ <https://www.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11/>

Another relevant issue regards the discontinuation of the ‘no match’ letters, a Social Security Administration policy that began in 1994. The Administration sent ‘no match’ letters to employers in cases where their employee’s information with the SSA was inconsistent with their hiring paperwork. It was aimed at alerting employers when they were unwittingly hiring undocumented immigrants.¹⁴

However, this policy also, and perhaps inadvertently, targeted transgender individuals who had mismatching ID cards (different gender designations on different IDs) or mismatching previous documentation (older records reflecting a different gender identity). Many states have internally inconsistent document change policies, so transgender individuals are only able to change some of their IDs. As a result, the National Center for Transgender Equality reports receiving regular calls from transgender Americans who have been ‘outed’ to their employers by the SSA’s discriminatory ‘no match’ letters.¹⁵

Questions for Discussion

In April 2021, the Social Security Administration discontinued its ‘no match’ letters. As of February 2022, the discontinuation remains in place. However, it is unclear whether this is simply temporary and part of a shift to other mechanisms of delivering the same policy.¹⁶

- 1) Voting processes can be restrictive for transgender voters due to barriers around changing name and gender in ID documents. *How might voter registration and ID requirements be amended to better accommodate transgender voters?*
- 2) Igbtmap.org classifies Minnesota’s law in their **most accessible** category for legal name changes. Read **Section 259.10 – 259.13** of the **2021 Minnesota Statutes**:
<https://www.revisor.mn.gov/statutes/cite/259/full#stat.259.10>
 - a. *Do you agree that this process is accessible? In what ways?*
 - b. *What issues of accessibility persist within this statute?*
 - c. *How could it be amended for greater ease in access to name changes for all transgender individuals in Minnesota?*
 - d. *Why is accessibility of name change procedures important?*
- 3) The case study notes that compounded vulnerabilities prevent homeless transgender youth from changing the gender and name markers on their ID documents. *What other sub-groups of transgender individuals might face disproportionate access barriers, and why?*
- 4) Consider the State Department’s goal of including gender ‘X’ designation on passports. *What issue does this aim to solve?*
 - a. *Do you believe it would be a successful means of increasing documentation inclusivity?*

¹⁴ Beauchamp, Toby. “Artful Concealment and Strategic Visibility: Transgender Bodies and U.S. State Surveillance After 9/11.” *Surveillance & Society*, 2009. <https://ojs.library.queensu.ca/index.php/surveillance-and-society/article/view/3267>

¹⁵ Beauchamp, Toby. “Artful Concealment and Strategic Visibility: Transgender Bodies and U.S. State Surveillance After 9/11.” *Surveillance & Society*, 2009. <https://ojs.library.queensu.ca/index.php/surveillance-and-society/article/view/3267>

¹⁶ “Social Security Administration Will Discontinue Sending No-Match Letters to Employers – For Now.” <https://www.idsupra.com/legalnews/social-security-administration-will-9595998/>; “Employer Correction Request Notices (EDCOR).” <https://www.ssa.gov/employer/notices.html>

III. Debate

1. Transgender Persons' Participation in Sports

Debate Question

Should transgender women and men be allowed to play on the respective women's and men's sports teams?

Overview

In 2021, New Zealand's Laurel Hubbard competed at the Tokyo 2020 Olympic Games. Her participation in the women's heavyweight competition sparked intense controversy. Why? Hubbard was the first openly transgender woman to compete in a female sporting event at the Olympics.¹

Debate around transgender athletes has been particularly salient in the US in recent years, specifically regarding participation in middle- and high-school sports. As of January 2022, ten states have passed legislation to restrict the participation of trans youth in sports corresponding to their gender identity: Florida, Tennessee, West Virginia, Arkansas, Florida, Idaho, Mississippi, Minnesota, South Dakota, and Texas.²

At a more competitive level, the National Collegiate Athletic Association (NCAA) adopted new regulations for transgender athletes in January 2022. Similar to Olympic standards, transgender participation for each sport is now to be determined on a sport-by-sport basis by national governing bodies of the specific sports.³

Arguments for Trans Participation. Participation in sports is a universal right. It can be particularly beneficial for transgender youth, who face disproportionate discrimination, isolation, and bullying. Participation in sports is shown to be a protective force against these social and psychological challenges.⁴

Further, laws that restrict transgender participation in sports require a means of measuring 'sex'. This implicates the examination of bodily traits, such as genitals, hormones, and/or chromosomes. Such inspection may not be consensual and may cause psychological distress.⁵

¹ "Laurel Hubbard, Olympics' First Openly Transgender Woman Stokes Debate on Fairness" <https://www.nytimes.com/2021/07/31/sports/laurel-hubbard-trans-weight-lifting.html>

² "States Restricting How Transgender Students Play Sports" <https://www.usnews.com/news/best-states/articles/2021-12-01/these-states-restrict-how-transgender-students-participate-in-school-sports>; "Sports, Transgender Rights and the Bodily Politics of Cisgender Supremacy" <https://www.mdpi.com/2075-471X/10/3/63>

³ "NCAA adopts new policy for transgender athletes" <https://www.nbcnews.com/nbc-out/out-news/ncaa-adopts-new-policy-transgender-athletes-n1287758>

⁴ "Including Transgender Athletes in Sex-Segregated Sport" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149799

⁵ "Sports, Transgender Rights and the Bodily Politics of Cisgender Supremacy" <https://www.mdpi.com/2075-471X/10/3/63>

Bills against transgender participation present no evidentiary basis regarding the number of transgender athletes currently competing, or wishing to compete, in sports. The bills do not substantiate the claim that these athletes actively harm the success of cis-gender females.⁶

Arguments Against Trans Participation. Today, almost every sport at the high school and collegiate level is sex-segregated. Proponents argue that the policy protects women in sports by reducing their risk of injury while playing and ensuring equal opportunity to succeed.⁷

Sex is often measured by human chromosomes, appearance, and hormones. Those who undergo male puberty develop different bodily characteristics which can be beneficial in certain sports: greater muscle mass and area, body size, endurance, and strength. Such advantages are not fully removed for trans women by taking testosterone blockers.⁸

Further Considerations. The above is not an exhaustive list of arguments. Consider the following questions during the debate:

- How should ‘sex’ be defined and determined in sports?
- Is fairness more important than inclusivity?
- What is the value of participation in sports? Which stance better preserves that value?
- What are the chances that female sports will become dominated by trans women?
- Is there a difference in arguments and priorities when discussing youth (middle and high school) sports, as opposed to competitive leagues and the Olympic Games?

Suggested further readings (optional):

- South Dakota Senate Bill 46
 - South Dakota’s Senate became the first U.S. legislative chamber to pass anti-trans legislation in 2022.⁹
 - <https://legiscan.com/SD/bill/SB46/2022>
- The ‘Munk Debates Podcast’
 - A world-renown podcast that convenes civil and substantive debates between today’s sharpest minds on pressing and contentious issues. It provides balance dialogues to bridge polarization.
 - Podcast episode, *“Be it resolved: Yes you can have fair Olympics with transgender athletes competing against cisgender women.”*
 - <https://open.spotify.com/episode/5SJp5Y1HubcMDaikFeh3Nj?si=19267aee5713403a>

⁶ “Sports, Transgender Rights and the Bodily Politics of Cisgender Supremacy” <https://www.mdpi.com/2075-471X/10/3/63>

⁷ “Sports, Transgender Rights and the Bodily Politics of Cisgender Supremacy” <https://www.mdpi.com/2075-471X/10/3/63>

⁸ “U.S. states move to ban transgender women from sports. Here’s what’s happening”

<https://globalnews.ca/news/7693256/transgender-girls-sports-us-bills-explained/> ;

“Young transgender athletes caught in middle of states’ debates” https://www.espn.com/espn/story/_/id/32115820/young-transgender-athletes-caught-middle-states-debates

⁹ “South Dakota Senate Becomes First Chamber To Pass Anti-Trans Legislation In 2022” <https://www.hrc.org/news/south-dakota-senate-becomes-first-chamber-to-pass-anti-trans-legislation-in-2022gi>

Motion.

Transgender women and men should be allowed to play on the respective women's and men's sports teams.

Debate Structure.

- 1) **Preparation.** 5 minutes of preparation with teams.
- 2) **Speeches.**
 - 3-minute speech, Side 1, support of the motion.
 - 3-minute speech, Side 2, opposition to the motion.
- 3) **Preparation.** 2 minutes of preparation with teams for rebuttals.
- 4) **Rebuttals.**
 - 1 minute for rebuttal, Side 1.
 - 1 minute for rebuttal, Side 2.
- 5) **Deliberation.** 2 minutes for judges to deliberate on a decision.
- 6) **Decision and comments.** 2 minutes for judges to provide their decision, reasons for decision, and comments.
- 7) **Debrief.** The whole class will discuss the debate and give any additional comments.

Prepared by Amalie Wilkinson