

**THE MILITARY HIERARCHY AS A MEANS TO DEMYSTIFY GENDER NON-CONFORMANCE AND PROMOTE SOCIAL ACCEPTANCE**

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## INTRODUCTION

**The high levels of legal, semi-legal, and extra-judicial violence against LGBT people in many of the world's new democracies result from the explosive combination of authoritarian legacies, weak governments, powerfully unacceptable police forces and deep levels of societal homophobia. These three forms of violence blend into each other: written laws, governmental measures, official rhetoric, police violence, undemocratic police measures, and extra-judicial activity.<sup>1</sup>**

*A. Overview*

This paper argues that it is time to begin changing the Western view that sex and gender are immutable and binary. Transgender people (trans), those who cross over this societal binary, have historically been discriminated against in just about every area of their lives. Society has solidified the trans community's place as an unrecognized and marginalized portion of the population because medical and psychological professions treat gender non-conformance as a pathology. The fallout of this pathological classification is apparent in education, employment, health care, family relationships, marriage, housing, and multiple areas of public accommodation.

This discrimination has a cumulative impact. In the extreme it causes suicidal depression, substance abuse, high risks of HIV, and increased levels of involvement in an underground economy.<sup>2</sup> As a first step to breaking the cycle of discrimination I propose using the military's strict hierarchy to integrate trans persons—on a case-by-case basis—into the military thereby providing them with the skills and opportunity to function positively in society at large. This approach traces the same path that Japanese Americans and African Americans used as part of their “conscious effort” to counteract racism beginning in the Civil War and World War II.<sup>3</sup> Entering the military is ultimately a first step in addressing the trans community's “substantive barriers to liberty” by providing job training, medical benefits, money for food and housing, and access to further education via the GI Bill.

The remainder of this introduction addresses the terms used in this paper. Part II begins with a brief look at the historical treatment of transsexuals from a medical and psychological perspective as a basis for understanding how we have come to the current state of discrimination. Part III then integrates statistics and case law as a way to further focus on specific aspects of the historical and contemporary social marginalization. Part IV discusses current military policy and the hurdles that a trans person faces in enlisting and serving. Finally, Part V addresses the proposition that the military's hierarchy be used to demystify gender non-conformance and promote social acceptance of the trans community.

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<sup>1</sup> Mark Ungar, *State Violence and Lesbian, Gay, Bisexual and Transgender (lgbt) Rights*, 22 NEW POL. SCI. 61, 75 (2000).

<sup>2</sup> See generally Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011) available at [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf). These themes repeat throughout the survey.

<sup>3</sup> Maria J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 354-55 (1987).

### *B. Terms and Definitions*

The specific vocabulary of this paper requires at least a brief examination of the terms I use going forward. As a starting point it is necessary to make an immediate distinction between “sex” and “gender.” In the U.S. it is generally understood that one’s gender flows directly from one’s physical sex, meaning that a biological male with male sex organs is identified as a man and vice versa for women.<sup>4</sup>

In reality, however, sex and gender are not necessarily interrelated. Sex refers to whether an individual is a male or female with respect to one’s biological reproductive capacity or potential.<sup>5</sup> Gender, on the other hand, is a cultural and social construct in which an individual develops into either a man or a woman.<sup>6</sup> Gender identity is thus an individual’s subjective sense of gender and self.<sup>7</sup>

Since the U.S. perceives sex as being determinative of gender, medical and psychological institutions pathologize people who fail to conform to the sex and gender binary. The primary diagnosis for such persons is Gender Identity Disorder (GID). The disorder centers on “feelings of unhappiness or distress about the incongruence between the gender-signifying parts of one’s body, one’s gender identity, and one’s social gender.”<sup>8</sup>

This paper also makes heavy use of the interchangeable term transgender and trans person. Transgender is an umbrella term used in this paper to refer to individuals who cross over the socially and culturally imposed boundaries of their birth gender regardless of mode or destination.<sup>9</sup> The term encompasses “anyone whose gender identity and/or gender expression does not match society’s expectations of how an individual who was assigned a particular sex at birth should behave in relation to their gender.”<sup>10</sup> The term thus appropriately applies to: “pre-operative, postoperative, and non-operative transsexuals who may or may not use hormones; intersex individuals; persons exhibiting gender characteristics and identities that are perceived to be inconsistent with their gender at birth, or gender non-conforming; persons perceived to be androgynous; transvestites; cross-dressers; or drag queens or kings.”<sup>11</sup>

I use the term transsexual in this paper to indicate a subset of persons who fall under the larger umbrella of transgender. This term refers to “people whose gender identity is different from their assigned sex at birth and who live in a gender different from their birth sex, or desire to do so.”<sup>12</sup> Generally transsexuals use hormones and sex reassignment surgery (SRS)<sup>13</sup> to modify their bodies so as to “align themselves physically with their gender identity.”<sup>14</sup> As

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<sup>4</sup> SUSAN STRYKER, *TRANSGENDER HISTORY* 8 (2008).

<sup>5</sup> *Id.* Specifically, production of sperm or egg. This is a genetic determination made primarily by chromosomes; currently chromosomes cannot be changed.

<sup>6</sup> *Id.* at 11.

<sup>7</sup> GRANT, *supra* note 2, at 13

<sup>8</sup> STRYKER, *supra* note 4, at 13.

<sup>9</sup> *Id.* at 1.

<sup>10</sup> Nikki Burrill & Valita Fredland, *The Forgotten Patient: A Health Provider’s Guide To Providing Comprehensive Care For Transgender Patients*, 9 IND. HEALTH L. REV. 69, 71 (2012).

<sup>11</sup> *Id.*

<sup>12</sup> GRANT, *supra* note 2, at 181.

<sup>13</sup> *Id.* Provides a comprehensive overview of the surgeries available to FtM and MtF. Sex Reassignment Surgery (SRS) can range greatly from reconstruction of the chest or breast augmentation to genital surgery.

<sup>14</sup> *Id.*

shorthand, persons born biologically male, but who identify and express their gender as female are referred to as Male-to-Female (MtF); persons born biologically female, but who identify and express their gender as male are referred to as Female-to-Male (FtM).<sup>15</sup> Transsexuals and transgendered persons are distinguished from cissexuals (CIS persons), a term indicating an individual who expresses and biologically fits western society's sex and gender binary.

In addition to this terminology it is necessary to distinguish between cross-dressing and transvestic fetishism when it comes to this paper's discussion of the military and an individual's "fitness to serve." As addressed above, the act of cross-dressing falls under the umbrella term of transgender. However, cross-dressing is not a paraphilia because generally there is not a fetishistic dynamic associated with the act.<sup>16</sup> Most individuals who engage in cross-dressing do so as a mode of self-expression.<sup>17</sup> Transvestic fetishism, on the other hand, is a diagnosis in which an individual does have "intense sexually arousing fantasies, sexual urges, or behaviors involving cross-dressing."<sup>18</sup>

## I. A MEDICAL AND PSYCHOLOGICAL HISTORY: PATHOLOGY AND DISEASE

As discussed in the overview, Western society has historically recognized gender and sex as binary and immutable. Such an understanding is a convenience for us in navigating our social culture. In the 1850s, some U.S. cities began passing municipal ordinances making it illegal for an individual to appear in public "in a dress not belonging to his or her sex."<sup>19</sup> According to academics these ordinances targeting gender presentation were passed because of capitalism; primarily as a result of the migration from small rural communities where individuals were previously restrained from expressing their gender non-conformance to modern industrial cities where they now had the opportunity and anonymity to begin their personal expression.<sup>20</sup> These laws had surprising longevity and in particular were used in the 1950s and 60s to target gender non-conforming persons.<sup>21</sup>

Though there was some early advocacy for better social treatment, trans-rights groups did not gain recognition as a social movement until the mid-20th century.<sup>22</sup> Despite this advocacy, by 1980 the American Psychiatric Association (APA) classified transsexualism as a

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<sup>15</sup> Burrill, *supra* note 10, at 71.

<sup>16</sup> TARYNN M. WITTEN, GENDER IDENTITY AND THE MILITARY – TRANSGENDER, TRANSSEXUAL, AND INTERSEX-IDENTIFIED INDIVIDUALS IN THE U.S. ARMED FORCES 12-13 (2007).

<sup>17</sup> *Id.* at 13.

<sup>18</sup> *Id.* Per the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed.1994), an individual diagnosed with Transvestic Fetishism meets the following criteria: "(a) Over a period of at least 6 months, in a heterosexual male, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving cross-dressing and (b) The fantasies, sexual urges, or behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning".

<sup>19</sup> STRYKER, *supra* note 4, at 31; *see generally*, Clare Sears, *Electric Brilliancy: Cross-Dressing Law and Freak Show Displays in Nineteenth-Century San Francisco*, 36 no. 3 & 4 WOMEN'S STUD. Q. 170 (2008) (addressing San Francisco Board of Supervisors' Revised Orders 1863 local law against cross-dressing in public). This ordinance applied to anyone who was gender non-conforming as the intricacies of the vocabulary used today to describe different kinds of gender non-conformance were not created until later in the 19th Century. STRYKER, *supra* note 4, at 34.

<sup>20</sup> STRYKER, *supra* note 4, at 31, 33.

<sup>21</sup> Sears, *supra* note 19, at 170.

<sup>22</sup> STRYKER, *supra* note 4, at 41.

psychosexual disorder.<sup>23</sup> The APA placed transsexualism under the broader category of Gender Identity in the DSM-III<sup>24</sup> stating that its designation as a psychosexual disorder was warranted because it “met the generally accepted criteria used by the framers of DSM-III for inclusion.”<sup>25</sup>

### A. *The Social Power of Medicine*

As suggested by the above discussion of the APA, there is significant social power in medicine. Science began to replace religion during the 18<sup>th</sup> Century when there were rapid medical developments.<sup>26</sup> Medical science has historically been a double-edged sword; it can lead to both positive change and negative change.<sup>27</sup> As is pointed out in *Transgender History*, “Medical practitioners and institutions have the social power to determine what is considered sick or healthy, normal or pathological, sane or insane—and thus, often, to transform potentially neutral forms of human difference into *unjust and oppressive social hierarchies*.”<sup>28</sup>

Perhaps there is nothing as unjust or oppressive as the transsexual person’s interaction with the medical community. Access to medical services for transsexuals, specifically, has required that they testify to symptoms of mental illness.<sup>29</sup> They must pathologize themselves, identify themselves as “sick” before they can get help because sickness “legitimizes medical intervention.”<sup>30</sup> This kind of self-flagellation results from the requirement that transsexuals subject themselves to the scrutiny and strict regulation of medical authorities. As one can see, the transsexual’s relationships to the medical and psychological establishments are tenuous at best.

Currently, transsexualism is still defined in the APA’s DSM-IV as GID.<sup>31</sup> An April 2011 study completed by the Williams Institute estimates that 0.3 percent of adults in the U.S. are

<sup>23</sup> Rick Mayes & Allan V. Horwitz, *DSM-III and the Revolution in the Classification of Mental Illness*, 41 no. 3 J. HIST. BEHAV. SCI. 249, 251 (2005).

<sup>24</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) (DSM). (The DMS is the primary diagnostic manual for mental disorders).

<sup>25</sup> Mayes, *supra* note 23, at 251; *see generally* Kenneth J. Zucker & Robert L. Spitzer, *Was the gender identity disorder of childhood diagnosis introduced into DSM-III as a backdoor maneuver to replace homosexuality? A Historical Note*, 31 J. SEX AND MARITAL THERAPY 31 (2005).

<sup>26</sup> STRYKER, *supra* note 4, at 36.

<sup>27</sup> *Id.* Positive changes being improvements in procedures and more accurate diagnosis and drug regiments; negative changes include “‘proving’ that black people are inferior to white people, or that females are inferior to males”.

<sup>28</sup> *Id.*

<sup>29</sup> STRYKER, *supra* note 4, at 36-37.

<sup>30</sup> *Id.*

<sup>31</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) *available at* <http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=482#> (select DMS-IV along tabs at the top of the page) [hereinafter DSM-IV]. The Diagnosis requires: “A. A strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex). In adolescents and adults, the disturbance is manifested by symptoms such as a stated desire to be the other sex, frequent passing as the other sex, desire to live or be treated as the other sex, or the conviction that he or she has the typical feelings and reactions of the other sex. B. Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex. In adolescents and adults, the disturbance is manifested by symptoms such as preoccupation with getting rid of primary and secondary sex characteristics (e.g., request for hormones, surgery, or other procedures to physically alter sexual characteristics to simulate the other sex) or belief that he or she was born the wrong sex. C. The disturbance is not concurrent with a physical intersex condition. D. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning”.

transgender.<sup>32</sup> Even with these low statistics, heated debates and large protests occurred over whether GID was still properly categorized as a mental disorder during the APA's 2009 DSM-V drafting meeting in San Francisco.<sup>33</sup> Despite these protests and the APA's re-consideration of the mental classification, a transgender diagnosis will again be included in the 2013 release of DSM-V.<sup>34</sup> However, the DSM-V Task Force emphasizes that the classification is based on gender variant behavior, thoughts and distress.<sup>35</sup> Additionally the task force is renaming GID as "Gender Incongruence."<sup>36</sup> The name change is primarily to address concerns about the stigmatization of the word "disorder."<sup>37</sup> This classification name change, however, will not be rolled out until the release of DSM-V.

Despite GID's current inclusion in the DSM, there is no consensus as to whether gender non-conformance of any kind is rightly classified as a medical condition, a psychopathic disorder, or neither.

### 1. Exclusion from the DSM

One of the strongest arguments advanced for why GID is not a mental illness is that many transsexual people do not feel distressed or disabled as a result of their gender identity.<sup>38</sup> In fact these persons resent having their sense of gender labeled as a disorder and a sickness.<sup>39</sup> According to the APA, "A psychological state is considered a mental disorder only if it causes significant distress or disability."<sup>40</sup> Logically, if transsexual people do not experience significant distress or disability from their gender identity it does not constitute a disorder. Rather it is suggested that the high rates of depression, distress, and anxiety attributed to this "disorder" are really a result of the problems transsexual individuals face finding affordable care, social acceptance, and support, not as a result of distress surrounding their gender identity.<sup>41</sup>

Reform advocates also argue that the timing of the inclusion of GID as a diagnosis is suspicious and that retaining the diagnosis "continue[s] to raise questions of consistency, validity, and fairness."<sup>42</sup> In supporting this point, reform advocates specifically reference DSM revisions that make diagnostic categories "increasingly ambiguous, conflicted and over inclusive."<sup>43</sup> Coupled with the concern of over inclusion is the criticism that the 1980 GID

<sup>32</sup> GARY J. GATES, HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1 (2011).

<sup>33</sup> See generally Lois Wingerson, *Gender Identity Disorder: Has Accepted Practice Caused Harm?* *Psychiatric Times*, Feb. 19, 2009 available at [www.psychiatristimes.com/display/article/10168/1415037](http://www.psychiatristimes.com/display/article/10168/1415037) (subscription required).

<sup>34</sup> DSM-IV, <http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=482#> (last visited Nov. 4, 2012) (select Proposed Revision along tabs at the top of the page). DSM-V is set to be released May 18-22, 2013: during the APA's 2013 Annual Meeting in San Francisco, CA. DSM-IV, <http://www.dsm5.org/about/Pages/Timeline.aspx> (last visited Nov. 4, 2012).

<sup>35</sup> DSM-IV, <http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=482#> (last visited Nov. 4, 2012) (select Rational along tabs at the top of the page).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> STRYKER, *supra* note 4, at 13.

<sup>39</sup> *Id.*

<sup>40</sup> AMERICAN PSYCHOLOGICAL ASSOCIATION, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION 3 (APA Committee on Lesbian, Gay, Bisexual, and Transgender Concerns 2d ed. 2011).

<sup>41</sup> *Id.*

<sup>42</sup> Kelly Winters, *GID Reform Advocates*, GIDREFORM.ORG, <http://www.gidreform.org> (last visited Nov. 4 2012).

<sup>43</sup> *Id.*

classification only came after “sexual orientation” was declassified as a mental illness seven years earlier in the DSM-II.<sup>44</sup> Reform advocates argue that the removal of “sexual orientation” from the DSM-II left a hole and that the subsequent inclusion of GID (and its over-inclusive diagnosis) in the DSM-III is merely an attempt to “fill[]the vacancy left by the declassification of homosexuality.”<sup>45</sup>

In particular critics focus on the similarities between the retired sexual orientation diagnosis and the GID diagnoses where individuals diagnosed are not a “normal” male or female, or “legitimate” man or woman.<sup>46</sup> As one advocate for GID reform puts it, “In the supporting text of the Gender Identity Disorder diagnosis, behaviors that would be ordinary or even exemplary for ordinary women and men are presented as symptomatic of mental disorder on a presumption of incongruence with born genitalia.”<sup>47</sup> Of real significance is the failure to legitimize these individuals as a normal man or a woman. As Kelly Winters states, “Under the premise of ‘disordered’ gender identity, self-identified trans-women and trans-men *lose any rightful claim to acceptance as women and men*, but are reduced to mentally ill men and women respectively.”<sup>48</sup>

Along the same lines, advocates for GID repeal argue that the diagnostic category not only reinforces the “false, negative stereotypes of gender variant people” but “at the same time fail[s] to legitimize the medical necessity of sex reassignment surgeries and procedures for transsexual women and men who urgently need them.”<sup>49</sup> The result is a growing group of transsexuals who are “*potentially subject to diagnosis of psychosexual disorder, stigma and loss of civil liberty.*”<sup>50</sup>

Advocates also take issue with the APA’s continued use—at least until May of 2013—of the diagnosis title “GID”; particularly since the change to “Gender Incongruence” has been contemplated since 2010. They argue that the continued use of the name “suggests that cross-gender identity is itself disordered or deficient” and that “[i]t implies that gender identities held by diagnosable people are not legitimate, in the sense that more ordinary gender identities are, but represent perversion, delusion or immature development.”<sup>51</sup>

Aside from these less scientific objections to the continued inclusion of GID as a disorder in the DSM, advocates for GID reform argue that recent psychological research shows that there is little evidence of “pathology” in transsexuality. A study presented at the 20th European Congress of Psychiatry notes that:

Preliminary analyses confirmed that GID subjects did not show pathological personality traits and did not reach standardized cut-off scores for anxiety, depression, or any other general psychopathological item . . . These results are in line with recent findings on the topic and support the notion that transsexualism, although possibly causing negative feelings and psychological distress, might be

<sup>44</sup> Zucker, *supra* note 25, at 31,32. Homosexuality was declassified from the DSM-II in 1973.

<sup>45</sup> *Id.* at 34 (quoting other author).

<sup>46</sup> KELLY WINTERS, GID REFORM ADVOCATE: ISSUES OF GID DIAGNOSIS FOR TRANSSEXUAL WOMEN AND MEN (undated) available at <http://www.gidreform.org/gid30285.html>.

<sup>47</sup> *Id.* at 4.

<sup>48</sup> *Id.* at 2.

<sup>49</sup> *Id.* at 1.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

not [be] considered a psychiatric disorder.<sup>52</sup>

Advocates also point to medical research that supports removing GID as a mental disorder including: (1) medical research showing that some transsexual individuals actually have the brain composition of their self-identified sex even before they start taking estrogen or testosterone supplements; and (2) medical research showing that transsexualism may have a genetic and environmental explanation based on exposure to prenatal hormones coupled with other psychological and behavioral causes.<sup>53</sup> As additional support relating to this research, advocates suggest transsexuality is more appropriately seen as a medical issue because the treatment for GID is to physically modify one's body.<sup>54</sup> This physical alignment with one's subjective perception of his or her gender differs from the traditional treatment of mental disorders that focuses on modification of the mind.<sup>55</sup>

Lastly, advocates point to other countries and international movements that do not accept transsexuality as a mental illness. For example, The Yogyakarta Principles<sup>56</sup> on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity rejects gender non-conformance as a mental disorder. Included in its third principle is the statement that:

Persons of diverse sexual orientation and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.<sup>57</sup>

Further, in December 2002 the British Lord Chancellor's Office officially took the position that transsexualism is not a mental disorder.<sup>58</sup> In May 2009 the French government followed suit declaring that a transsexual gender identity no longer qualifies as a psychiatric

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<sup>52</sup> C. Palumbo et al., *Presence of Psychiatric Symptoms and Personality Profiles Among Transsexuals: Is Gender Identity Disorder A True Clinical Entity?*, 27 Supp. 1 EUR. PSYCHIATRY 1 (2012); see also Esther Gomez-Gil et al., *Hormone-treated Transsexuals Report Less Social Distress, Anxiety and Depression*, 37 PSYCHONEUROENDOCRINOLOGY 662 (2012).

<sup>53</sup> Jessica Hamzelou, *Transsexual Differences Caught on Brain Scan*, NEW SCIENTIST (Jan. 26, 2011, 12:16 PM), <http://www.newscientist.com/article/dn20032-transsexual-differences-caught-on-brain-scan.html>; Frank P. M. Kruijver et al., *Male-To-Female Transsexuals Have Female Neuron Numbers In The Limbic Nucleus*, 85 no. 5 J. CLINICAL ENDOCRINOLOGY & METABOLISM, 2034, 2039 (2012) available at <http://jcem.endojournals.org/cgi/content/full/85/5/2034>.

<sup>54</sup> Colin A. Ross, *Ethics of Gender Identity Disorder*, 11 no.3 ETHICAL HUM. PSYCHOL. & PSYCHIATRY 165, 167 (2009).

<sup>55</sup> *Id.*; see also THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE GENDER IDENTITY DISORDERS (7th ed. 2012) available at [http://www.wpath.org/publications\\_standards.cfm](http://www.wpath.org/publications_standards.cfm) (formerly known as the Harry Benjamin International Gender Dysphoria Association and the *Harry Benjamin Standards Of Care*).

<sup>56</sup> The Principles were developed November 6-9, 2006 at Gadjah Mada University during a meeting of the International Commission of Jurists, the International Service for Human Rights, and human rights experts from around the world.

<sup>57</sup> THE YOGYAKARTA PRINCIPLES (2006), [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm) (last visited Nov. 4 2010) (select Principle 3 from the dynamic table of contents).

<sup>58</sup> Secretariat to the Interdepartmental Working Group on Transsexual People, *Government Policy Concerning Transsexual People*, JUSTICE.GOV.UK, <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/constitution/transsex/policy.htm> (last visited Nov. 4, 2012).

condition.<sup>59</sup>

## 2. Inclusion in the DSM

Proponents for retaining GID in the DSM argue that those diagnosed with GID “take great comfort from believing they have a condition that can be cured with proper treatment.”<sup>60</sup> Proponents of this viewpoint rebut the argument that medical diagnosis is the appropriate benchmark. This is primarily out of concern that the criteria will come down to whether someone has pre-existing physical indications of the desired sex and will cause under-inclusive diagnoses regardless of the criteria.<sup>61</sup> Some mental health professionals state that GID is undoubtedly a pathology arguing that gender non-conforming behaviors, desires, and experiences do qualify as a dysfunction because they are incongruent with the sex and gender binary.<sup>62</sup>

Other proponents for retaining the GID classification are concerned that without the diagnosis they will be left to shoulder the entire cost of psychiatric and medical treatment. This is a prominent concern since insurance companies (including Medicare and Medicaid) will not pay on claims unless the mental disorder is recognized by the International Classification of Diseases (ICD) or the DSM.<sup>63</sup>

## II. SOCIAL HISTORY OF MARGINALIZATION: A STATISTICAL AND LEGAL LOOK

**A woman shall not wear man’s clothing, nor shall a man put on a woman’s clothing; for whoever does these things is an abomination to the Lord your God.**<sup>64</sup>

As will be more fully explored below, sexual reassignment surgery (SRS) often is insufficient to “guarantee [someone] legal personhood” in their identified gender.<sup>65</sup> Rather, it appears that it “neuters them.”<sup>66</sup> This has historically been proven true as Chinere Ezie notes in *Deconstructing the Body*: “In the eyes of many judges, sex reassignment surgery renders a person neither male nor female, but merely ‘a transsexual’—an abject status that excludes the individual from civil rights protections and, more fundamentally, *from the category of the human.*”<sup>67</sup>

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<sup>59</sup> *La transsexualité Ne Sera Plus Classée Comme Affectation Psychiatrique*, LEMONDE.FR (May 16, 2009, 11:32AM), [http://www.lemonde.fr/societe/article/2009/05/16/la-transsexualite-ne-sera-plus-classee-comme-affectation-psychiatrique\\_1193860\\_3224.html](http://www.lemonde.fr/societe/article/2009/05/16/la-transsexualite-ne-sera-plus-classee-comme-affectation-psychiatrique_1193860_3224.html).

<sup>60</sup> STRYKER, *supra* note 4, at 13.

<sup>61</sup> See *Conflicting View on GID*, HEMINGWAYS.ORG, <http://www.hemingways.org/GIDinfo/conflict.htm> (last visited Nov. 4, 2012); see also Mercedes Allen, *Transgender in the Genes?*, GAY CALGARY, Nov. 2008, at 50 available at <http://www.gaycalgary.com/Magazine.aspx?id=61&article=617>. A physical indication would probably center around some degree of brain structure of the desired sex.

<sup>62</sup> *Controversy Continues to Grow Over DSM’s GID Diagnosis*, 38 PSYCHIATRIC NEWS 25, (July 18, 2003) available at <http://psychnews.psychiatryonline.org/newsarticle.aspx?articleid=106462>.

<sup>63</sup> Burrill, *supra* note 10, at 71.

<sup>64</sup> Stryker, *supra* note 4, at 27. People looking for a religious backing for their discrimination against transgender individuals cite to Deuteronomy 22:5.

<sup>65</sup> Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination – The Need For Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 164 (2011).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 165 (emphasis added).

Discrimination against trans persons is institutionalized in many ways beginning in early education and continuing in every area of their lives including employment, housing, healthcare, and family life. This section addresses each in turn.

### A. Education

In the 2010 *National Transgender Discrimination Survey* of 6,450 trans people from all of the fifty states, the majority of participants report having their first experience with systemic discrimination in K-12.<sup>68</sup> An alarming 78 percent report harassment, 35 percent report physical assault, and 12 percent report sexual violence.<sup>69</sup> Surprisingly, perpetrators are mostly teachers and staff of these K-12 institutions. This discrimination has a profound and lasting effect on trans individuals' ability to graduate<sup>70</sup> and obtain higher education. Such discrimination is also "correlated with a number of [other] negative outcomes including higher rates of sex work, incarceration, homelessness, smoking, drug and alcohol abuse, HIV, and attempted suicide."<sup>71</sup>

The problem is by no means confined to K-12. Institutions of higher learning provide more opportunity for discrimination: from housing to financial aid and scholarships.<sup>72</sup> For those trans persons who successfully earn higher education degrees the survey notes that "At each level of educational attainment . . . respondents had considerably lower incomes than the general population."<sup>73</sup>

The ability to complete educational programs—whether it be K-12 or any form of higher education—is the basis for future wellbeing and self-sufficiency. The effects of education discrimination can severely limit an individual's ability to be a healthy and productive person. In this particular context allowing trans persons into the military on a case-by-case basis would rectify some of the impact of that educational discrimination by providing them with skill sets that are transferable to civilian jobs and also provide them access to funding for higher education via the GI Bill.

### B. Employment

The ability to obtain employment is necessary to one's self support, but "[A]lso contributes greatly to a sense of dignity and accomplishment over a lifetime."<sup>74</sup> It is undisputed

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<sup>68</sup> GRANT, *supra* note 2, at 2, 33. The *National Transgender Discrimination Survey* talks in terms of transgender v. gender non-conforming. For consistency reasons I have taken these terms and reduced them to either the umbrella term of trans person or transgender. These terms are distinguishable from the term transsexual. See the Terms and Definitions section of this paper for clarification.

<sup>69</sup> *Id.* at 33.

<sup>70</sup> *Id.* A full 15 percent left a school setting; 6 percent expelled for gender identity expression.

<sup>71</sup> *Id.* at 46. The experiences students report of mistreatment in an educational institution has a positive correlation with a lower income levels with "50 percent being less likely to earn \$50,000/year than the general population" as well as a positive correlation (51 percent) between this harassment and suicide attempts. Students who experience physical assault at an educational institution are 50 percent more likely to be incarcerated and two times as likely to enter into sex work, drug dealing and other segments of the underground. As a result of both the underground employment and drug use, trans persons are eight times more likely to be HIV positive than the general population.

<sup>72</sup> *Id.* at 33. In higher education setting 19 percent of respondents report university administrations precluding them for using target gender housing while another 5 percent report being completely denied housing. An additional 11 percent report being denied or losing financial aid or scholarships because of their gender expression.

<sup>73</sup> *Id.* The study showed that participants are "4-5 times more likely to have a household income of less than \$10,000/year at each educational category, including college graduates".

<sup>74</sup> *Id.* at 50.

that unemployment in any population can lead to serious social consequences.<sup>75</sup> However, trans persons experience twice the rate of unemployment as the general population and encounter trouble finding and retaining dignified employment.<sup>76</sup>

Further, for those who successfully obtain employment, 90 percent experience on-the-job harassment and 15 percent take home less than \$10,000 per year, which is four times the rate seen in the general population.<sup>77</sup> Generally speaking those trans people who are satisfactorily employed either hide or otherwise put their transitions on hold in an attempt to avoid discrimination.<sup>78</sup> For transitioned transsexuals, 78 percent report being more comfortable at work and having increased work performance.<sup>79</sup>

Additionally, as briefly addressed above, those trans persons who were unable to find or retain a job due to bias are much more likely to become homeless, incarcerated, involved in sex work, drug sales, or other types of “underground employment.”<sup>80</sup> In fact the survey reports that 16 percent of respondents admit to engaging in some kind of “underground employment” in order to support themselves.<sup>81</sup>

In short, trans persons are denied or frustrated in their attempts to create productive and healthy lives. As the survey notes, “[g]iven the high rates of unemployment . . . and . . . high rates of suicide attempts . . . , *employment issues are of particular concern to transgender and gender non-conforming people.*”<sup>82</sup> There is no question that having steady employment is necessary for self-support and provides a sense of self-affirmation. Unfortunately, the law has been exceedingly slow to recognize and protect trans persons in the work place as legitimate contributors to society.

In the 1984 Title VII case *Ulane v. Eastern Airlines*, the court took a narrow view of sex when interpreting the statute based on its plain meaning and legislative history.<sup>83</sup> *Ulane*, a pilot for Eastern Airlines, was fired after she stopped presenting herself as a man and underwent SRS.<sup>84</sup> She brought her case arguing that Title VII prohibited discrimination against her based on her transsexuality and in the alternative that Title VII prohibited discrimination against her as a female.<sup>85</sup> The court reasoned:

[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder.<sup>86</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* The survey reveals that 47 percent of participants experienced being rejected for a position, denied promotion or fired for their transgender/gender non-conformity; 44 percent are under-employed. *Id.* at 53.

<sup>77</sup> *Id.* Not all harassment is name-calling or physical assault: 14 percent of those working were denied access to a gender conforming restroom at work; *Id.* at 51.

<sup>78</sup> *Id.* Data from the survey indicates that 71 percent hide and 57 percent put their transition on hold.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 64.

<sup>82</sup> *Id.* at 50.

<sup>83</sup> *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984).

<sup>84</sup> *Id.* at 1081–82.

<sup>85</sup> *Id.* at 1083–84.

<sup>86</sup> *Id.* at 1085.

Two years later there was some hope for the broadening of “sex” as interpreted under Title VII with the 1989 United States Supreme Court case *Price Waterhouse v. Hopkins*.<sup>87</sup> This is perhaps one of the only contexts in which equating sex with gender benefited the trans community. This case involved a female senior manager at Price Waterhouse who was denied a promotion in part because she was too “masculine.”<sup>88</sup> The firm’s Policy Board described her as “macho,” “overcompensating for being a woman,” and advised her to take “a course at charm school.”<sup>89</sup> The Policy Board told her that to increase her chances of future promotion she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>90</sup> In response she sued for discrimination based on sex.<sup>91</sup> In concluding that Title VII protects persons from “sex stereotyping,” Justice Brennan stated that it does not “[r]equire expertise in psychology to know that, if an employee’s flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.”<sup>92</sup> The Court further explained that “[i]n the specific context of *sex* stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of *gender*.”<sup>93</sup>

The extent of *Price Waterhouse*’s reach based on “sex stereotyping” and discrimination “because of sex” is questioned as applied to discrimination against transsexuals in *Schroer v. Billington*.<sup>94</sup> While the court in *Schroer* had initial reservations about the plaintiff’s claim, it ultimately awarded her relief without contradicting other federal courts such as the *Ulane* court, which held that discrimination based on the characteristic of transsexuality in and of itself is not protected by Title VII.<sup>95</sup>

In *Schroer v. Billington*, Schroer, a pre-operative MtF, applied as a man for a job with the Library of Congress’s Congressional Research Services. Schroer previously spent twenty-five years in the U.S. Armed Forces and held top security clearance and “important command and staff positions.”<sup>96</sup> Schroer was offered the job, but before accepting she asked to go to lunch with Preece, the Library’s Assistant Director for Foreign Affairs, Defense and Trade, in order to inform her that she was transgender.<sup>97</sup> During the lunch, Schroer explained her intention to begin the transition process and that she would begin presenting as a woman in the office in the near future.<sup>98</sup> In light of this information the Library rescinded its offer.<sup>99</sup> It cited concerns that there

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<sup>87</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1986). Interestingly § 107 of The Civil Rights Act of 1991 responded to *Price Waterhouse* by “setting forth standards applicable in ‘mixed motive’ cases.” The revision is currently codified in 42 U.S.C. § 2000e-2 (m): “Impermissible consideration of race, color, religion, sex, or national origin in employment practices: Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice”.

<sup>88</sup> *Id.* at 231.

<sup>89</sup> *Id.* at 235.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 232; 42 U.S.C. § 2000 et seq.

<sup>92</sup> *Price Waterhouse*, 490 U.S. at 256.

<sup>93</sup> *Id.* at 250 (emphasis added).

<sup>94</sup> *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

<sup>95</sup> *Id.* at 304.

<sup>96</sup> *Id.* at 295.

<sup>97</sup> *Id.* at 295–98.

<sup>98</sup> *Id.* at 296.

may be difficulties with Schroer's security clearance, her honesty, and possible distraction due to her transition.<sup>100</sup> Schroer subsequently brought a Title VII action.<sup>101</sup> During the proceedings the Library defended its position arguing that discriminating against transsexuals as a class is "[N]ot unlawful discrimination under Title VII."<sup>102</sup> The court addressed the issue in the context of "sex stereotyping" and whether it is discrimination "because of sex."

The court first acknowledged *Price Waterhouse* and its liberalization of Title VII to include discrimination based on "sex stereotyping."<sup>103</sup> It begins by looking at other circuits, noting that post-*Price Waterhouse* the First, Third, Seventh, Ninth, and Tenth circuits all hold that Title VII precludes an employer from discriminating against an employee based on a sex stereotype.<sup>104</sup> The Sixth Circuit, the court then noted, took *Price Waterhouse* a step further and specifically read the case to preclude discrimination because of one's status as a transsexual:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination that would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in discrimination, because the discrimination would not occur but for the victim's sex. Discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender nonconforming behavior is impermissible discrimination, irrespective of the cause of that behavior.<sup>105</sup>

The *Schroer* Court, however, is initially reluctant to extend *Price Waterhouse* as far as the Sixth Circuit, stating that "what *Price Waterhouse* actually recognizes was a Title VII action for *disparate treatment*, as between men and women, based on sex stereotyping."<sup>106</sup> The *Schroer* court agrees with the Sixth Circuit that status as a transsexual does not preclude one from having a Title VII claim, but the Court also says that the claim must actually arise due to the "employee's appearance or conduct and the employer's stereotypical perceptions."<sup>107</sup> The court specifically notes that no claim would be stated if a person is discriminated against just because they have gender dysphoria.<sup>108</sup>

In this case, the court says that:

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<sup>99</sup> *Id.* at 299.

<sup>100</sup> *Id.* at 298, 300.

<sup>101</sup> *Id.* at 300. 42 U.S.C. § 200e-2(a)(1) states that it is unlawful for an employer "to fill or refuse to hire . . . any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals . . . sex." (Available at <http://www.eeoc.gov/laws/statutes/titlevii.cfm>).

<sup>102</sup> *Id.* at 300.

<sup>103</sup> *Id.* at 303.

<sup>104</sup> *Id.* at 300.

<sup>105</sup> *Id.* at 303–04.

<sup>106</sup> *Id.* at 304 (emphasis in the original).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

[w]hat makes Schroer’s sex stereotyping theory difficult is that, when the plaintiff is transsexual, direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII.<sup>109</sup>

The court ultimately concludes that Schroer is entitled to relief based on a claim for sex stereotyping under *Price Waterhouse*, stating that it does not matter for “purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender non-conforming transsexual.”<sup>110</sup>

After concluding that Schroer had a claim for sex stereotyping, the court then considered whether she also had a claim for discrimination “because of sex.”<sup>111</sup> For illustrative purposes, the court proposed a hypothetical: suppose that an employer fires an employee because she converts from Christianity to Judaism. Further, suppose that the employer says that he has no problem with employing Christians or Jews but takes issue merely with “converts.”<sup>112</sup> Such discrimination would be “because of religion.”<sup>113</sup> There is no question that “converts” are included under the statute’s protection, because any discrimination that flows from the change of religion is discrimination “because of religion.”<sup>114</sup>

The Court then analogized the conversion from Christianity to Judaism to the conversion from presenting as a man to presenting as a woman.<sup>115</sup> The Court states that “courts have traditionally carved such persons out of the statute by concluding that ‘transsexuality’ is unprotected by Title VII. In other words, courts have allowed their focus on the label ‘transsexual’ to blind them to the statutory language itself.”<sup>116</sup> In any case, the court concludes that when the library withdrew its offer to Schroer after the realization that she was going to undergo SRS, it literally discriminated “because of . . . sex.”<sup>117</sup>

In addition to these contemporary cases, more recent headway has been made. In April 2012, the U.S. Equal Employment Opportunity Commission ruled that “employers which discriminate against an employee or potential employee based on their *gender identity* is [sic] in violation of Title VII.”<sup>118</sup> Although not binding, this ruling is a policy step in a positive direction, particularly since there is specific reference to “gender identity” rather than a reference to gender stereotyping. This begins to point directly to transsexuality as a protected status under Title VII. Indeed, this is a progression from the holding in *Schroer*, in which the court carefully avoids such a direct statement.

While these cases prove that the law is trending in a positive direction for transsexual

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<sup>109</sup> *Id.* at 305.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 306.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 306-307.

<sup>117</sup> *Id.* at 308.

<sup>118</sup> *Transgender Employees Now Protected By Anti-Discrimination Law After ‘Landmark’ EEOC Ruling*, HUFFINGTON POST (April 30, 2012, 1:09 PM) [http://www.huffingtonpost.com/2012/04/24/transgender-employees-anti-discrimination-law-eeoc-\\_n\\_1449282.html](http://www.huffingtonpost.com/2012/04/24/transgender-employees-anti-discrimination-law-eeoc-_n_1449282.html) (emphasis added).

individuals, there is still a long way to go to eradicate employment discrimination as the statistics addressed above indicate.<sup>119</sup> As a primary matter, instigating a policy change to allow trans persons to serve in the military on a case-by-case basis will connect them with dignified employment. Steady employment in a controlled environment, in turn, addresses many of the social difficulties trans persons face including access to housing, healthcare, and education. Further, allowing trans persons to serve in the military grants them the ability to utilize the military's rigid policies and procedures applicable to all active personnel to eradicate employment discrimination in both recruitment and promotion. Ultimately, this forced integration will ideally lead to trans acceptance within the military population, an attitude that will transfer to the civilian population as active service members transition to veteran status.

### C. Healthcare

**Many transgender people face a tremendous number of barriers when trying to access the healthcare system for day-to-day issues like a sore throat or a scrape of the knee, issues that somebody ordinarily can go to their doctor for without fear of discrimination or humiliation.**<sup>120</sup>

Data from the *National Transgender Discrimination Survey* indicates that “discriminatory events” are common and consistent in the day-to-day experiences of trans persons. Commentary suggests that such experiences have a collective impact “from losing a job because of bias to losing health insurance; from experiencing health provider abuse to avoiding health care; from long-term unemployment to turning to work on the streets.”<sup>121</sup> This cumulative impact increases the probability that a trans person will suffer from mental and physical health conditions.<sup>122</sup>

Unfortunately, even with documents like the American Hospital Association's *The Patient Care Partnership* guide, healthcare providers have not stopped intentional or unintentional discrimination against gender non-conforming individuals.<sup>123</sup> As Michael Silverman notes in his paper *Issues in Access to Healthcare by Transgender Individuals*: “It is not necessarily intentional discrimination, but rather the result of a system that has never stopped to ask how we can address the needs of this population.”<sup>124</sup>

Despite *The Patient Care Partnership*, 28 percent of participants in the survey report

<sup>119</sup> GRANT, *supra* note 2, at 130. Aside from the financial difficulties faced by trans persons attempting to bring a case, 12 percent report that they were denied equal treatment or services by a judge or court official; 12 percent report being harassed or disrespected by a judge or court official; 1 percent report physical assault perpetrated by a judge or court official; 19 percent report “any problem” from a judge or court official.

<sup>120</sup> Michael Silverman, *Issues in Access to Healthcare by Transgender Individuals*, 30 WOMEN'S RTS. L. REP. 347, 348 (2009).

<sup>121</sup> GRANT, *supra* note 2, at 84.

<sup>122</sup> *Id.*

<sup>123</sup> See AMERICAN CANCER SOCIETY, THE PATIENT CARE PARTNERSHIP'S BILL OF RIGHTS, available at <http://www.aha.org/advocacy-issues/communicatingpts/pt-care-partnership.shtml>. Originally developed in 1973 and titled *Patients' Bill of Rights*. Later amended in 2003 and renamed *The Patient Care Partnership*. While neither document is legally binding, they serve to provide patients and providers with a baseline expectation of how care should be provided and received in a healthcare setting. Regardless of these non-discrimination policies, it does not appear to help with trans care.

<sup>124</sup> Silverman, *supra* note 120, at 348.

postponing medical treatment when sick or injured based on their fear of discrimination from healthcare providers.<sup>125</sup> Additionally, 48 percent of respondents report having postponed seeking medical attention because they could not afford the care—which again is impacted by the state of trans education and employment addressed in the above cases and statistics.<sup>126</sup>

Further, respondents report “serious hurdles to accessing health care,” including 19 percent who were refused care, 50 percent who could not get competent care,<sup>127</sup> two percent who were victims of physical violence in a doctor’s office, and 28 percent who were subject to harassment when in a healthcare setting.<sup>128</sup> Perhaps one of the most frustrating things about these individuals’ difficulty in accessing appropriate and safe medical care is that as a group, trans people are in need of consistent healthcare due to their regimens of hormones and their increased risk of HIV, suicide, alcohol abuse, and drug abuse. To put the issue in perspective, the survey finds that trans persons “reported over four times the national average of HIV infection,”<sup>129</sup> which is unsurprising since 11 percent report working in the underground sex trade for income.<sup>130</sup> Additionally, 26 percent of the respondents admit to having abused drugs or alcohol as a coping mechanism for mistreatment, and 41 percent report attempting suicide.<sup>131</sup>

Aside from the discrimination at medical facilities and general health concerns, access to insurance is extremely important, especially for a successful FtM or MtF transition. Based on the above discussion about employment, it is no surprise that 19 percent of trans persons do not have any kind of health insurance whatsoever, and only 51 percent of employed trans persons report that they can get health insurance through their employer.<sup>132</sup> Rather, most trans persons obtain medical insurance through public assistance programs like Medicare or Medicaid.<sup>133</sup>

*Radtke v. Miscellaneous Drivers* illustrates the difficulties that trans persons can face in accessing healthcare. The case concerns the denial of health coverage to a postoperative trans woman.<sup>134</sup> Essentially the coverage administrator refused to recognize her as the legal “spouse” of her husband based on the administrator’s determination that state law prohibited same sex marriage. The court ultimately rejected this argument; *Radtke* is examined in-depth in the section addressing family life below.

The difficulty and prejudice trans persons face in accessing healthcare can also be addressed by allowing them to serve in the military on a case-by-case basis. Since the military regulates its own medical care, trans persons will receive proper and standardized care during their time in service. The benefit also extends to military doctors as they will be educated on how to manage the medications and needs of trans patients. Ideally this new education and demystification surrounding trans persons will flow to the civilian population as the medical providers and other personnel transition out of military service.

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<sup>125</sup> GRANT, *supra* note 2, at 72.

<sup>126</sup> *Id.*

<sup>127</sup> Patients had to educate their providers on their medical requirements.

<sup>128</sup> GRANT, *supra* note 2, at 72.

<sup>129</sup> *Id.* at 80. Survey results showed approximately 2.64 percent, versus 0.6 percent in the general population.

<sup>130</sup> Prostitutes’ Education Network estimates that 1 percent of women in the U.S. have worked in the underground sex trade. *Id.* at 22.

<sup>131</sup> *Id.* at 2. Approximately 1.6 percent of the general population has attempted suicide.

<sup>132</sup> *Id.* at 76. As compared to 58 percent of the general population.

<sup>133</sup> *Id.*

<sup>134</sup> *Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye & Dental Fund*, No. 10–4175 (MJD/JJG) 2010 U.S. Dist WL 1094452, at \*3 (D. Minn. 2012).

### D. Family Life

A 2010 survey reveals that quality of life and interfamily personal relationships take one of two paths when transgender people come out: some flourished (approximately 43 percent), while others (approximately 57 percent) experienced rejection, including verbal and physical abuse by a family member.<sup>135</sup> Of those individuals who were trans parents, 70 percent report that they had maintained a good relationship with their children after coming out, but 29 percent did report that an ex-partner actively limited their contact with their children.<sup>136</sup> As one would suspect, acceptance by family leads to a wide range of positive outcomes whereas rejection has a strong connection with negative outcomes including increased risk of suicide, homelessness, entrance into sex trade, and exposure to HIV.<sup>137</sup>

The positive and negative experiences of trans persons are similarly reflected in the way courts examine marriages between a transsexual and CIS person. The bulk of the case law surrounding family matters focuses on one's recognized legal status as a man or woman. Generally speaking, the legal classification is the basis for the ability to marry and partake in all the responsibilities and legal benefits that flow from such a status including: ability to obtain health coverage via a spouse's employer, standing for support and maintenance actions, standing for probate actions, standing for wrongful death suits, and standing for custody actions. Though at its core the issue is obviously one of legal standing, the following cases highlight the ways in which "transgender bodies remain unintelligible to the judiciary along with complex notions of sex."<sup>138</sup>

For at least the last 36 years, some states have recognized the marriage of a postoperative transsexual person to a CIS person of the opposite sex.<sup>139</sup> This recognition, however, is often dependent upon the extent of SRS that the transsexual has undergone. Thus, courts essentially put an individual's genitals on trial.

The seminal case is that of *M.T. v. J.T.* In that case a MtF woman married a man after she had SRS "to remove male sex organs and construct . . . a vagina."<sup>140</sup> She subsequently filed a motion for support and maintenance, but her husband argued that she was actually a man and that the marriage was therefore void.<sup>141</sup> The court takes great interest in the current state of the wife's genitals. As the surgeon who completed the operation testifies, "traditional penile/vaginal intercourse" is possible and while she is without "uterus or cervix . . . her vagina ha[s] a 'good cosmetic appearance.'"<sup>142</sup> The court acknowledges that a transsexual can be surgically treated by modifying existing genitalia to coincide with the person's gender.<sup>143</sup> The court concludes that "If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, *thereby possessed of the full capacity to function sexually as a male or*

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<sup>135</sup> GRANT, *supra* note 2, at 88.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination – The Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141,167-68 (2011). The oldest of these cases is *Corbett v. Corbett*, [http://www.vanuatu.usp.ac.fj/courses/LA306\\_Family\\_Law/Cases/Corbett\\_v\\_Corbett.html](http://www.vanuatu.usp.ac.fj/courses/LA306_Family_Law/Cases/Corbett_v_Corbett.html) (last visited Nov. 6, 2012).

<sup>139</sup> *M.T. v. J.T.* was decided in 1976.

<sup>140</sup> *M.T. v. J.T.*, 140 N.J.Super. 77, 80 (N.J. Super. Ct. App. Div. 1976).

<sup>141</sup> *Id.* at 79.

<sup>142</sup> *Id.* at 80-81.

<sup>143</sup> *Id.* at 89.

*female*, as the case may be, we perceive *no legal barrier*, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated."<sup>144</sup>

Though progressive at the time, this holding precludes all but the minority from obtaining the married status. Indeed, the money necessary to undergo extensive SRS—so that one may possess the “full capacity to function sexually as a male or female”—places this status outside the reach of most trans persons who have not been able to obtain as much surgery as medically possible to take the physical form of their desired sex.<sup>145</sup>

The significance of this is exposed when we juxtapose the case of *M.T. v. J.T.* with the 2005 case of *In re Marriage of Simmons* in which a trans man underwent minimal SRS.<sup>146</sup> In the *Simmons* case, Sterling, an FtM, had hormone replacement therapy and was later married to a woman.<sup>147</sup> The couple underwent artificial insemination and the wife gave birth to a child.<sup>148</sup> Sterling was named the father by operation of statute.<sup>149</sup> During that time Sterling had a hysterectomy and oophorectomy but no other SRS.<sup>150</sup> However, he did petition for, and was granted, a new birth certificate showing his sex as male.<sup>151</sup> Sterling later filed for divorce and petitioned for sole and permanent custody of the child.<sup>152</sup> The court first found the marriage invalid because Sterling was a woman at the time of marriage.<sup>153</sup> The court rejected that the hysterectomy was sufficient to fully transform Sterling into a man because he still retained “all of his female genitalia.”<sup>154</sup> The court stated that to transition to a man he needs “a vaginectomy, reduction mammoplasty, metoidioplasty, scrotoplasty, urethroplasty and phalloplasty.”<sup>155</sup> The court further rejected that the issuance of a marriage license and birth certificate proves that he is a man because “the issuance of marriage licenses and new birth certificate are ministerial acts that generally do not involve fact-finding.”<sup>156</sup> The *Simmons* case thus seems to follow the “genitals-on-trial” line of reasoning found in *M.T. v. J.T.* despite the fact that the state recognizes Sterling as a man for administrative purposes.<sup>157</sup>

In contrast to the cases above, the court in the 2004 case of *Kantaras v. Kantaras* takes the view that sex is immutable based on an examination of statutory plain meaning and legislative history.<sup>158</sup> In that case Michael Kantaras was born a female but underwent SRS

<sup>144</sup> *Id.* (emphasis added).

<sup>145</sup> Based on its holding, the court must have concluded that “full capacity to function sexually” did not require that one possess the ability to procreate from the standpoint of the transitioned sex. I.e. FtMs did not have to ejaculate and MtFs were not required to be able to carry a child.

<sup>146</sup> *In re Marriage of Simmons*, 825 N.E.2d 303, 307 (Ill. App. Ct. 2005).

<sup>147</sup> *Id.* at 306, 307.

<sup>148</sup> *Id.* at 307.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* The combination of procedures “removed his uterus, fallopian tubes and ovaries”.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 308-09.

<sup>154</sup> *Id.* at 309.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 310.

<sup>157</sup> The second half of the case deals with Sterling's attempt to get custody. Per my count he makes five different arguments but the court systematically rejects each because Sterling is not legally a male in any context.

<sup>158</sup> *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2d Dist. 2004).

including hormone treatment, a hysterectomy, and double mastectomy.<sup>159</sup> After all of these operations Michael married Linda.<sup>160</sup> Linda was pregnant at the time and the couple later used artificial insemination to conceive another child.<sup>161</sup> Michael adopted the first child and was presumptively the father of the second.<sup>162</sup> Six years later Michael filed for divorce and sought custody of both children; Linda filed a counter petition arguing that the marriage was void because it violated Florida's same sex marriage and adoption statutes.<sup>163</sup> The question on appeal was whether at the time of marriage Michael was a male or female within the meaning of the Florida marriage statute.<sup>164</sup>

The court initially turned to other jurisdictions that have answered the question, looking specifically at Ohio, Kansas, Texas, and New York; all of which take the hard line that sex is a pure question of law.<sup>165</sup> Ultimately the *Kantaras* court agreed with those courts "in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth."<sup>166</sup>

The *Kantaras* court finds that Ohio, in the case of *In re Ladrach* prohibits marriages between trans and CIS people because there is "no authority in Ohio" for such marriages.<sup>167</sup> The Ohio court states that it is only the court's responsibility to interpret statutes. It is the responsibility of the legislature to change the marriage statute "if it is to be the public policy of the state of Ohio to issue marriage licenses to post-operative transsexuals."<sup>168</sup>

The *Kantaras* court then looks to Kansas in the probate case of *In re Estate of Gardiner*.<sup>169</sup> In that case, the Kansas court determines that the marriage between a widow, who was an MtF, and her deceased husband was void stating that "if the legislature intended to include transsexuals . . . [in the marriage statute] . . . it could have been a simple matter to have done so."<sup>170</sup> The Kansas court again looks to the intent of the legislature stating that "The words 'sex', 'male,' and 'female' in everyday understanding do not encompass transsexuals . . . [only] a biological man and a biological woman . . ." <sup>171</sup> The Kansas court concludes by saying:

A male-to-female postoperative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to 'produce ova and bear offspring' does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes.<sup>172</sup>

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<sup>159</sup> *Id.* at 155.

<sup>160</sup> *Id.* at 155-56.

<sup>161</sup> *Id.* at 156.

<sup>162</sup> *Id.* at 155-56.

<sup>163</sup> *Id.* at 155.

<sup>164</sup> *Id.* at 157.

<sup>165</sup> *Id.* at 158.

<sup>166</sup> *Id.* at 161.

<sup>167</sup> *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. 1987).

<sup>168</sup> *Kantaras*, 884 So. 2d at 158; *Ladrach*, 513 N.E.2d at 832.

<sup>169</sup> *In re Estate of Gardiner*, 42 P.3d 120 (2002).

<sup>170</sup> *Kantaras*, 884 So. 2d at 159; *Gardiner*, 42 P.3d at 136.

<sup>171</sup> *Kantaras*, 884 So. 2d at 159; *Gardiner*, 42 P.3d at 135.

<sup>172</sup> *Kantaras*, 884 So. 2d at 159; *Gardiner*, 42 P.3d at 135.

Regardless of the extent of the SRS, a transsexual still “inhabits . . . a male body in all aspects other than what the physicians have supplied.”<sup>173</sup>

The *Kantaras* court then turns to the Texas case of *Littleton v. Prange* in which the Texas court also finds void the marriage between a postoperative MtF and her deceased CIS husband.<sup>174</sup> On this finding, the Texas court denies her standing to bring a wrongful death suit as a surviving spouse.<sup>175</sup> The court again defers to the legislature to determine whether transsexual marriages are to be recognized stating that:

it would be intellectually possible for this court to write a protocol for when transsexuals would be recognized as having successfully changed their sex . . . [but] we cannot make law when no law exists: we can only interpret the written word of our sister branch of government, the legislature.<sup>176</sup>

Lastly the *Kantaras* court looks at the New York case *Francis B. v. Mark B* in which the New York court concludes that the policy reason behind marriage is for procreation.<sup>177</sup> The New York court reasons that since the trans man in that action (and presumably all others) is unable to perform as a male in a procreative function he is precluded from filing for divorce, as there was no valid marriage to begin with.<sup>178</sup>

As *Kantaras* illustrates, courts take different approaches to precluding transsexual and CIS marriages. The rationales range from outright dismissal that the legislature has not considered the issue to the inability of these modified bodies to procreate. Ironically, under this latter construction some CIS men and women would fail.

Alternatively, *Radtke* illustrates a second more modern approach that reaches the opposite conclusion—that sex is mutable—based on legislative non-action and state agency recognition of sex changes for their records purposes. In the *Radtke* case, Ms. Radtke—a postoperative MtF—received breast implants and underwent other SRS.<sup>179</sup> She also obtained a name change and modified birth certificate reflecting her new name and female sex.<sup>180</sup> In 2005 Ms. Radtke married Mr. Radtke who subsequently enrolled her as a participant under his healthcare plan offered through his employer and administered by Helpers Union Local (Fund).<sup>181</sup> In 2008, one of Ms. Radtke’s breast implants ruptured and the only means of treatment was to replace the implant.<sup>182</sup> She made a “pre-authorization” request to the Fund, but the implant was excluded from coverage for “changes for sex transformation surgery . . . and any related expenses.”<sup>183</sup> Ultimately the Fund sent a termination of coverage letter to Mrs. Radtke stating that in light of her sex change she was not legally married to Mr. Radtke based on

<sup>173</sup> *Kantaras*, 884 So. 2d at 159; *Gardiner*, 42 P.3d at 135.

<sup>174</sup> *Kantaras*, 884 So. 2d at 159; *Littleton v. Prange*, 9 S.W.3d 223 (Tex.App.1999).

<sup>175</sup> *Kantaras*, 884 So. 2d at 159; *Littleton*, 9 S.W.3d at 231.

<sup>176</sup> *Kantaras*, 884 So. 2d at 159; *Littleton*, 9 S.W.3d at 230.

<sup>177</sup> *Kantaras*, 884 So. 2d at 160; *B. v. B.*, 355 N.Y.S.2d 712, 717 (N.Y. Sup. Ct. 1974).

<sup>178</sup> *Kantaras*, 884 So. 2d at 160; *Francis B.*, 355 NYS2d at 717.

<sup>179</sup> *Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023 (D. Minn. 2012). The extent of SRS is not revealed in the record but in context it appears that the surgery was sufficient to render her anatomically female.

<sup>180</sup> *Id.* at 1025.

<sup>181</sup> *Id.* at 1026. She was only enrolled after having produced a marriage certificate.

<sup>182</sup> *Id.* at 1027.

<sup>183</sup> *Id.*

Minnesota's prohibition of same sex marriage and therefore she was "not an eligible dependent under the Fund."<sup>184</sup> In October of 2010 Ms. Radtke filed a complaint alleging wrongful denial of ERISA benefits; the Fund counterclaimed seeking restitution in the amount of \$80,410.79.<sup>185</sup>

The court framed the issue as "whether Minnesota law considers Christine Radtke to be male or female for the purpose of marriage."<sup>186</sup> If female, then she is married to Mr. Radtke and an eligible dependent for the Fund's coverage.<sup>187</sup> The court acknowledges that the Radtkes complied with state procedural requirements for a valid marriage but that the court will "look behind" the marriage to determine if the state recognizes it.<sup>188</sup> The court first concludes that based on *Price Waterhouse* the federal courts no longer accept the narrow definition of "sex" found in *Ulane*.<sup>189</sup> Second, that court acknowledges that there are multiple facets in determining sex including: "chromosomal, anatomical, hormonal, and reproductive elements" and that "the assigned sex of an individual at birth is based *only* on observation of anatomy at birth, which itself may change when the individual reaches puberty."<sup>190</sup>

In looking at Ms. Radtke, the court reasons that she is *anatomically* and *hormonally* female. The court then states that in interpreting the marriage statute it will look to "'the designation appearing on the current birth certificate issued to that person by the State in which he or she was born,' [as well as] to the official government documents issued by the State of Minnesota, including court orders and marriage certificates and licenses."<sup>191</sup> The court backs its conclusion that sex is mutable by pointing to the Social Security Administration and the Board of Immigration Appeals as two administrative agencies that acknowledge sex changes for purposes of their documentation.<sup>192</sup>

The court then turns its attention to changing sex under Minnesota law. It initially notes that the state is among 43 jurisdictions that allow persons who have had SRS to obtain modified birth certificates to reflect their name and sex change.<sup>193</sup> The court goes on to state that "The only logical reason to allow the sex identified on a person's original birth certificate to be amended is to permit that person to actually use the amended certificate to establish his or her legal sex for other purposes, such as obtaining a driver's license, passport, or marriage license."<sup>194</sup>

The court reasons that the state legislature was fully aware that these amended documents would be used to such ends.<sup>195</sup> The court determines that the state legislature was aware that other states were allowing trans persons to marry but had taken no steps to restrict such unions in Minnesota. This contrasts the Minnesota legislature's passage of statutes prohibiting same sex marriages when it became aware that other states were allowing and recognizing same sex marriages.<sup>196</sup> The court finds it ridiculous to conclude that the state "recognizes Plaintiff as

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1028.

<sup>186</sup> *Id.* at 1030.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1031-2.

<sup>189</sup> *Id.* at 1032.

<sup>190</sup> *Id.* (emphasis added).

<sup>191</sup> *Id.* (emphasis added) (quoting *In Re Lovo-Lara*, 23 I. & N. Dec. 746, 753 (BIA 2005)).

<sup>192</sup> *Id.* at 1032, 34.

<sup>193</sup> *Id.* at 1033.

<sup>194</sup> *Id.* at 1034.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 1034.

female for some purposes—birth records and driver’s licenses, but not for others—marriage certificates.”<sup>197</sup>

The court further points to the fact that even states that prohibit same sex marriage have not prohibited trans marriages because: “the transsexual’s gender and genitalia are no longer discordant; they have been harmonized through medical treatment. [The transsexual] has become physically and psychologically unified and *fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy.*”<sup>198</sup>

Based upon the above, the court concludes:

Consequently, plaintiff should be considered a member of the female sex for marital purposes . . . In so ruling we do no more than give legal effect to a Fait accompli, based upon medical judgment and action which are irreversible. Such recognition will promote the individual’s quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality.<sup>199</sup>

While it appears in this case that the court gives more weight to the extent of Ms. Radtke’s documentation reflecting her transitioned sex, dicta in the opinion suggests that if she had not gone through extensive SRS this case may have come out differently. Thus, in reality, *Radtke* may actually do no more than stand for the position put forth in *M.T. v. J.T.*—that sex is mutable so long as one undergoes extensive reassignment surgery.

As more and more states begin recognizing same sex marriages the concerns surrounding trans standing begin to dissipate. In such states a trans person, regardless of the amount of SRS they have undergone, would be able to marry; in these instances it would not matter if the state recognized a trans person as a man or a woman. However, in the interim, and as is discussed further in section V, recruiting trans persons into the military will help to demystify transsexualism and transgenderism in a broader context so that ballot measures recognizing same sex marriage or other trans rights issues will have a better chance at passing.

### *E. Housing*

“Housing is a necessity and a basic human right but one that is often denied to trans people.”<sup>200</sup> Only 32 percent of trans survey participants report owning their home.<sup>201</sup> This is directly related to the ability to find and retain a job, which in turn is based on an individual’s completed education.

What is even more telling of this systemic discrimination is that 19 percent of respondents report being denied equal opportunity in securing housing and 11 percent report experiencing an eviction due to their gender non-conformance. Additionally, 19 percent also reported being homeless at some point.<sup>202</sup>

The survey shows that trans persons who have experienced homelessness are two and a

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 1034-5.

<sup>199</sup> *Id.* at 1035.

<sup>200</sup> GRANT, *supra* note 2, at 106.

<sup>201</sup> *Id.* General population is 67 percent.

<sup>202</sup> *Id.*

half times more likely to have been incarcerated and more than four times more likely to have engaged in sex work for income.<sup>203</sup> As a result, homeless trans persons are at a higher risk for HIV, substance abuse, and suicide attempts.<sup>204</sup>

Trans persons even have difficulty finding charity housing. For those on the streets, nearly 30 percent report being turned away when attempting to access homeless shelters and 42 percent report having to stay in facilities aligning with their biological sex.<sup>205</sup> Over half the participants report that they experienced harassment while staying in shelters.<sup>206</sup>

The military provides on-base housing. Allowing trans persons to serve on a case-by-case basis will provide them with an opportunity to obtain housing in much the same way they will obtain standardized and regulated healthcare. Additionally, it will allow them to avoid the dangers associated with homelessness while providing an opportunity to be of service and develop life and employment skills.

### *F. Public Accommodations*

The *National Transgender Discrimination Survey* also compiled data on the experiences of trans persons in places of public accommodation.<sup>207</sup> The survey concludes that “[t]ransgender and gender non-conforming people experience grave abuses when accessing everyday goods and essential services, from retail stores and buses to police and court systems . . . this mistreatment in so many settings contributes to *severe social marginalization* and safety risk.”<sup>208</sup> In places of public accommodation, 53 percent report being verbally harassed, 44 percent were denied equal treatment, and eight percent were physically attacked.<sup>209</sup> The statistics suggest that police officers and employees of the retail industry are the greatest offenders.<sup>210</sup>

#### 1. Public Restrooms

One of the severe (but often overlooked) social marginalizations is access to public restrooms. Usually in public there is only access to a Men’s or Women’s room. If a trans person is not yet passing, or ambiguous, there can be serious safety risks in entering a public restroom. While the armed forces are not likely to change this feature on its military bases, internal policy can make it a serious crime to harass a trans person in the restroom. The strict hierarchy of the armed forces will again be effective in enforcing this policy.

#### 2. Identification Documents

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<sup>203</sup> *Id.* Alarmingly, 12 percent of respondents reported having sex with someone in order to have access to a bed.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 130. A total of 15 types of accommodation were listed from greatest percentage of mistreatment/discrimination to least: (greatest) retail stores, public officers, doctor’s office or hospital, Hotel or Restaurant, Government agency/official, Bus, Train, or Taxi, Emergency Room, Airplane or Airport staff/TSA, Judge or court Official (19 percent reporting a problem connected to the legal system), Ambulance or EMT, Domestic Violence Shelter/Program, Rape Crisis Centers and drug treatment programs (least).

<sup>208</sup> *Id.* at 135 (emphasis added).

<sup>209</sup> *Id.* at 124.

<sup>210</sup> *Id.* at 130.

Another severe social marginalization is the ability to obtain gender-congruent documentation. Having gender-congruent identification is important from an economic, legal, and social standpoint.<sup>211</sup> Considering how heavily society relies on official identification documents, it is clear that a driver's license or ID card is essential for navigating everyday life. Additionally, "[a]ccess to employment, housing, health care and travel all can hinge on having appropriate documentation."<sup>212</sup> However, getting gender-congruent identification can be a significant challenge. Part of the challenge is that the process for doing so is different in every state and the process is not easily identifiable; second, often a change of gender on a birth certificate or ID card is based on a person's surgical status.<sup>213</sup> A status that often requires certification from a surgeon that one has undergone irreversible SRS.<sup>214</sup>

The *Radtke* case illustrates the extent and pervasiveness of gender identifiers and documentation that needs to be updated in order to fully assimilate into society as the new sex. After the fund originally denied Ms. Radtke's insurance claim, she appealed, sending a letter and exhibits to the fund including:

The certification from her surgeon that she underwent SRS in 2003, a copy of the Minnesota State Court ordering the Wisconsin State Registrar to issue an amended birth certificate designating her as female; a copy of her amended Wisconsin birth certification; her marriage certificate; the order granting her name change; and documents demonstrating that state and federal agencies, such as Internal Revenue Service, the Minnesota Department of Public Safety, and the Social Security Administration, recognized Ms. Radtke as female and Mr. Radtke's legal spouse.<sup>215</sup>

As the survey notes, "[t]he costs of transition-related surgeries, which are rarely covered by health insurance, are beyond the reach of most transgender people, particularly because the community experiences such high rates of employment discrimination and poverty."<sup>216</sup> Additionally, the surgery required to get gender-congruent documentation denies the opportunity to obtain such documents to persons who do not wish to have surgery or cannot have surgery due to medical disqualifications.

The survey shows that only 21 percent of transitioned transsexuals have all their personal documents updated to be gender congruent and 33 percent have been unsuccessful or have not attempted to update their documents at all.<sup>217</sup> Of those who successfully changed some of their documents, 59 percent report changing their driver's license or ID card and 48 percent report

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<sup>211</sup> *Id.* at 124; (40 percent of those who presented non-gender congruent ID reported being harassed).

<sup>212</sup> *Id.* at 138.

<sup>213</sup> *Id.* at 138-39. Some sites such as AMSA can be of use in determining what records are necessary to update state "administrative" documentation. State by State LGBT Legislation, AMSA.ORG, <http://www.amsa.org/AMSA/Homepage/About/Committees/GenderandSexuality/StatebyStateLGBTLegislation.aspx> (last visited Nov. 6, 2012).

<sup>214</sup> *See id.* Notably the State Department in 2010 and 2011 liberalized the requirements for obtaining a passport with the desired sex. National Center for Transgender Equality, *Understanding the New Passport Gender Change Policy*, TRANSEQUALITY.ORG, [http://transequality.org/Resources/passports\\_2012.pdf](http://transequality.org/Resources/passports_2012.pdf) (last updated Jan. 2012).

<sup>215</sup> *Radtke*, CIV. 10-4175 MJD/JJG, 2012 WL 1094452 at \*4.

<sup>216</sup> GRANT, *supra* note 2, at 138.

<sup>217</sup> *Id.* at 139. The statistics discussed in this portion of the paper are only statistics collected from people who have transitioned FtM or MtF, as they are the persons forced to update their documents to effectively function in society.

changing their Social Security card.<sup>218</sup> Additionally, 26 percent report successfully changing their passport and 24 percent report being issued a new birth certificate.<sup>219</sup>

With respect to documentation, the Military again may not be an appropriate place to draw the final line. However, having trans persons serving in the military can only help to break down the stigma and discrimination they face in the civilian world.

### 3. Police Interaction

There are also high levels of interaction between police and trans persons.<sup>220</sup> Interaction usually results because the trans person is a victim of a crime, has a domestic dispute, is living on the street, or is engaged in an underground industry.<sup>221</sup> The survey reveals a general distrust of the police by trans persons, with 46 percent reporting that they do not feel comfortable seeking assistance from law enforcement officials.<sup>222</sup> This discomfort is not particularly surprising since 22 percent of respondents indicate that they were harassed by law enforcement for their gender non-conformance.<sup>223</sup> Part of this harassment includes experiences of persons being targeted by police simply for “Walking While Transgender.”<sup>224</sup> Due to these high percentages of harassment trans persons experience at the hands of law enforcement, it is easy to see why they are deterred from trying to access “one of the major resources that society provides to protect the safety of individuals in their time of need.”<sup>225</sup>

Police interaction can also be indirectly impacted via the integration of trans individuals into the military. Ideally, the confusion and fear surrounding the trans person will be dissipated via forced interaction between trans and CIS persons while enlisted. Ultimately, the hope is that this interaction will cause a change in perception. A change that will be carried from the military into the civilian world by military veterans turned law enforcement officers.

## III. THE MILITARY: A STRICT HIERARCHY

### *A. Antiquated Notions of Strength and Sexuality*

The traditional Western view of the gender binary—that women are females, men are males, and there is nothing in-between—is rigidly reflected in military history and its rules and regulations.<sup>226</sup> The military’s strict hierarchy and its attention to discipline and physical manifestations of strength show the military originally to have been male focused as it fulfilled its mission to create combat-ready troops.<sup>227</sup> Indeed, in the military context everything is

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 158.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> There is also significant data surrounding the discrimination, physical assault, and general harassment trans persons experienced while incarcerated, however an in-depth examination of the topic is beyond the scope of this paper.

<sup>225</sup> GRANT, *supra* note 2, at 170.

<sup>226</sup> WITTEN, *supra* note 16, at 1.

<sup>227</sup> *Id.* at 1-2.

measured against the male body as the benchmark of “strength” and anything that falls physically short of its capabilities is automatically labeled as “deficient” or “weak.”<sup>228</sup>

As Tarynn Witten articulates in her 2007 report *Gender Identity and the Military-Transgender, Transsexual, and Intersex-identified Individuals in the U.S. Armed Forces*, “If the idea of rigidity is associated with male power or masculinity and the female body with acceptance, softness, and weakness, then discrimination between bodies is arguably essential to the military’s need to produce masculine, warrior-like bodies capable of preserving military effectiveness.”<sup>229</sup> It is no surprise that when the military places bodies into a binary box<sup>230</sup> it will undoubtedly come up against bodies that do not conform to either—such as postoperative transsexuals. When the military is unable to make a binary determination, the very structure of the military and its policies and procedures are threatened.<sup>231</sup> The responses to such ambiguity can range from the mundane to the completely irrational.<sup>232</sup>

The most recent data available on trans service members comes from a 2008 survey of 827 U.S. vets and active personnel from all branches of the military.<sup>233</sup> Unfortunately, there does not appear to be any data regarding the actual prevalence of trans persons within the military as a whole. However, the survey does report that approximately one-third of participants experienced discrimination while on the job.<sup>234</sup> Approximately one-third also report other non-military related discrimination.<sup>235</sup> Perhaps the most illuminating statistic, is the one which really underscores the military’s strict gender binary; only three percent of persons identifying as transsexual report being able to transition before being caught and discharged from the military.<sup>236</sup>

### B. Current Mental and Physical Military Standards

All military departments use the Department of Defense Instruction 6130.03, Medical Standards for Appointment, Enlistment, or Induction in the Military Service to “Establish

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 2. Ironically, FtMs who inject testosterone—an anabolic steroid—experience increased muscle mass which results in greater physical strength.

<sup>230</sup> In illustrating this binary box Witten looks to the implementation of DADT with its moorings in the “Western biomedical, Judeo-Christian-Islamic belief that only two sexes, male and female, exist and that heterosexual reproductive sexuality is the only acceptable form of sexuality.” *Id.* at 2. Further, this viewpoint is grounded in religious text, specifically Leviticus 20:13, which condemns homosexuality: “If a man has intercourse with a man as with a woman, both commit an abomination. They must be put to death.” *Id.* at 3. While we have seen the repeal of DADT and its regulation of homosexuals in the military, gender non-conformity has not enjoyed such liberation and still remains taboo in both Western sociology and the Western military. *Id.*

<sup>231</sup> *Id.* at 2.

<sup>232</sup> *Id.* Witten recounts a 2004 article from the *LA Times* which reported a story about a U.S. Marine who allegedly killed a prostitute after discovering she was a transsexual. Military persons most threatened by these non-conforming bodies appear to be those who are in “traditionally accepted male heterosexual roles.” *Id.* at 8.

<sup>233</sup> KARL BRYANT & KRISTEN SCHILT, *TRANSGENDER PEOPLE IN THE MILITARY: SUMMARY AND ANALYSIS OF THE 2008 TRANSGENDER AMERICAN VETERANS ASSOCIATION SURVEY 1* (2008).

<sup>234</sup> *Id.* This is compared to 90 percent of respondents who report on-the-job discrimination in the employment statistics for civilians *supra*.

<sup>235</sup> *Id.* Presumably this would encompass an experience in one or more of the categories discussed above pertaining to civilians.

<sup>236</sup> *Id.*

medical standards, which, if not met, are grounds for rejection for military service.”<sup>237</sup> The provisions are in place to:

Ensure that individuals under consideration for appointment, enlistment, or induction into the Military Services are: (1) Free of contagious diseases that probably will endanger the health of other personnel. (2) Free of medical conditions or physical defects that may require excessive time lost from duty for necessary treatment or hospitalization, or probably will result in separation from the Service for medical unfitness. (3) Medically capable of satisfactorily completing required training. (4) Medically adaptable to the military environment without the necessity of geographical area limitations. (5) Medically capable of performing duties without aggravation of existing physical defects or medical conditions.<sup>238</sup>

Currently, U.S. policy is that gender non-conforming individuals “fall under the aegis of disease.”<sup>239</sup> “Disease” that the military identifies and excises with surgical precision when it is found. Witten describes the military’s treatment of the disease as “(1) preventative: do not let trans . . . identified persons into the military and (2) acute: remove them from the military when they are so-identified.”<sup>240</sup>

As suggested above, the preventative measure is taken initially when one attempts to enter the military. Upon recruitment, every service member must pass an entry-level security background check and submit to a physical and mental examination.<sup>241</sup> Under Enclosure Four of the standards of medical fitness, a person exhibiting “major abnormalities and defects of the genitalia including but not limited to change of sex . . .” is rejected as physically unfit.<sup>242</sup> Alternatively, entry can be denied for mental unfitness due to psychological conditions “including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias.”<sup>243</sup>

Under the mental fitness disqualification regulation, Witten observes that “the military incorrectly classifies transsexualism as a paraphilia, a psychiatric disorder involving deviant sexual practices, and lumps transsexualism together with paraphilias such as transvestic fetishism . . .”<sup>244</sup> She also notes that “This further stigmatizes those individuals who do so identify [as trans], and perpetuates the military’s rigid sense of binary sexual difference and

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<sup>237</sup> DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE INSTRUCTION 6130.03: MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE MILITARY SERVICE 1 (April 28, 2010) [hereinafter DODI 6130.03]. The DoDI has the date of April 28, 2010 and indicates that the revisions in the document will be incorporated September 12, 2011. For clarity, references to page numbers are used for the preface of the document; paragraphs are used to refer to the remainder of the directive. E4.1 indicates that the standards apply to applicants and current service members.

<sup>238</sup> *Id.* at 2.

<sup>239</sup> WITTEN, *supra* note 16, at 5.

<sup>240</sup> *Id.* at 4.

<sup>241</sup> *Id.* at 8; SERVICE MEMBER LEGAL DEFENSE NETWORK, FREEDOM TO SERVE: THE DEFINITIVE GUIDE TO LGBT MILITARY SERVICE 29 (2011).

<sup>242</sup> DODI 6130.03, *supra* note 237 at ¶¶ E4.14 (f), E4.15(r).

<sup>243</sup> *Id.* at ¶ E4.29(r).

<sup>244</sup> WITTEN, *supra* note 16, at 5.

idealization of the masculine body.”<sup>245</sup>

Once one enters into service (or stays on as a reserve), the guide *Freedom to Serve* warns of the difficulties and dangers of dressing in the clothing of the target gender or moving forward with a transition because service members can be discharged under the same provisions discussed above.<sup>246</sup> The guide specifically cautions against “cross-dressing” as it violates regulations of conduct and can result in a criminal offense as discussed in the case law section below.<sup>247</sup>

Additionally, the military medical system does not recognize any transgender standards of care and does not provide any kind of transition-related care.<sup>248</sup> Service members are not allowed to use civilian medical providers. Thus, even if a service member finds a civilian doctor and begins using hormones or undergoes SRS, discharge or criminal charges are probable.<sup>249</sup>

### *C. Discharge and Trans Veterans*

**I am transgender, now a betrayed soldier, a veteran who served in the military for 8 years [sic] I received my honorable discharge because I hid myself as well as I could till I could take no more, I was a sergeant willing and wanting a full career, cut short I had to disappear.**<sup>250</sup>

Despite being listed as a military medical regulation, discharges for “sexual gender and identity disorders” are classified as administrative.<sup>251</sup> This impacts future access to Veteran Affairs (VA) health facilities for individuals discharged under this administrative provision because the Department of Defense regulations do not qualify such administrative discharges as a disability.<sup>252</sup> Even if one is discharged and does have access to VA health facilities, the VA does not provide or pay for SRS.<sup>253</sup> However, a June 10, 2011 directive released by the Department of Veteran Affairs confirms “fair and equal treatment to transgender veterans,” and provides “transition-related care-like hormones and mental health services.”<sup>254</sup> In addition to these improvements, the VA is required to refer to patients by their preferred gender and name, regardless of their legal status.<sup>255</sup>

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<sup>245</sup> *Id.*

<sup>246</sup> SERVICE MEMBER LEGAL DEFENSE NETWORK, *supra* note 241, at 29.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* (Discharge will occur when military finds during physical exam that the individual is taking hormones or has undergone SRS. Individuals face criminal prosecution for using non-military doctors).

<sup>250</sup> Evelyn, Comment to *The New DADT: The Military’s Ban on Transgender Service*, OUTSERVEMAG.COM (Feb. 1, 2012, 9:52 AM) <http://outservemag.com/2012/01/the-new-dadt-the-militarys-ban-on-transgender-service/>.

<sup>251</sup> SERVICE MEMBER LEGAL DEFENSE NETWORK, *supra* note 241, at 30.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 31.

<sup>254</sup> Department of Veterans Affairs, VHA Directive 2011-024, Providing Health Care for Transgender and Intersex Veterans (June 9, 2011), <http://www.sldn.org/pages/transgender-issues2>.

<sup>255</sup> Katie Miller, *The New DADT: The Military’s Ban on Transgender Service*, OUTSERVEMAG.COM. <http://outservemag.com/2012/01/the-new-dadt-the-militarys-ban-on-transgender-service/> (last visited Nov. 6, 2012).

## D. Case Law

### 1. SRS and Physical Modification

Case law is limited on addressing postoperative trans persons in the military. The first case to address a service member's SRS and highlights the great deference the court gives to military policy is the 1981 case of *Doe v. Alexander*.<sup>256</sup> Doe was born a male and served in the Air Force for over eight years.<sup>257</sup> After leaving the Air Force, she underwent MtF SRS and later applied to be an officer in the Army Reserve.<sup>258</sup> The Army rejected her application and Doe brought an action under the Civil Rights Act of 1871.<sup>259</sup> She sought to enjoin the Army from enforcing the regulation which requires discharge for “major abnormalities and defects of the genitalia such as change of sex.”<sup>260</sup>

The Court initially says that reviewing military regulations raises a question of justiciability.<sup>261</sup> However, the Court ultimately concludes that the claim is not reviewable because (1) there is no constitutional right to participate in military service, (2) Doe's alleged injuries—potential commission as a Captain—are speculative, and (3) “the courts are peculiarly ill-equipped to develop judicial standards for passing on the validity of judgments concerning medical fitness for the military.”<sup>262</sup> In making the last determination the Court refers to a 1911 case, saying that the Court in that case refuses to review army medical fitness regulations because reviewing the discharge of an officer for medical fitness purposes would cause great “embarrassment” and “detriment” to the Army.<sup>263</sup>

The second case concerning SRS, *Leyland v. Orr*, addresses the argument that an individualized assessment should be made for every trans person as to whether or not their trans condition would significantly interfere with their ability to perform their duties.<sup>264</sup> Leyland underwent MtF SRS and was subsequently discharged from the Air Force Reserves due to mental instability and physical unfitness.<sup>265</sup> Leyland brought suit arguing that she should be reinstated because the discharge was “arbitrary and not based on an individualized assessment of her ability to perform her duties as required by Air Force regulations.”<sup>266</sup> The Court concludes that it need not address the psychological basis for discharge because her SRS—penile amputation and abnormal genitalia—is a disqualifying physical condition.<sup>267</sup> The Court first recites the purpose for the Air Force's physical fitness standards stating “[i]t is the intent of these standards to . . . remove from . . . active service . . . those individuals possessing medical defects which will *significantly interfere* with their duty to perform or station assignability.”<sup>268</sup>

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<sup>256</sup> *Doe v. Alexander*, 510 F. Supp. 900 (D. Minn. 1981).

<sup>257</sup> *Id.* at 902.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 902; 42 U.S.C. § 1983.

<sup>260</sup> *Doe*, 510 F. Supp. at 902.

<sup>261</sup> *Id.* at 904.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Leyland v. Orr*, 828 F.2d 584 (9th Cir. 1987).

<sup>265</sup> *Id.* at 585.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* (emphasis added).

At some point during the proceedings, the Air Force presented an expert witness to testify that “the known and potential long-term effects of sex change constitute a risk significant enough to restrict the individual’s performance of Air Force duties, especially when remote geographic assignments are involved.”<sup>269</sup> The expert compares placing postoperative transsexuals in remote field locations without proper medical facilities with placing someone with coronary artery disease in a remote field where there is no available coronary care.<sup>270</sup> In short he states that post-operative transsexuals “be denied entry or continued active duty for their benefit and for the benefit of the United States Air Force.”<sup>271</sup>

The Court further concludes that there is no need for individual determinations with regard to whether the sex change would impair a service member’s ability to perform their duties.<sup>272</sup> This is primarily based on the expert’s determination that there are some conditions, such as limb loss, which always requires discharge because “the particular condition invariably impairs the evaluatee’s ability to perform.”<sup>273</sup> Based on additional testimony, the Court agrees (without apparent scientific backing) that individuals who have undergone SRS are invariably impaired and “have potential health problems which may require medical care and maintenance not available at all potential places of assignment.”<sup>274</sup>

Aside from *Doe* and *Leyland*, the question of how being trans-identified may affect a service member’s ability to function as a soldier is addressed in one internal military document.<sup>275</sup> The June 1987 report was conducted at Brooks Air Force Base in Texas and focuses on whether transsexualism raises safety concerns for aviators. The subject of the report is a MtF 33-year-old-flight instructor for the U.S. military who is undergoing estrogen therapy and underwent cosmetic facial surgery and electrolysis on her facial hair.<sup>276</sup> During the case study, the authors Clements and Wick, observe that the subject “was a reserved and feminine-appearing patient who possessed exceptional verbal skills.”<sup>277</sup> They further recount that “[s]he was appropriately concerned about her examination and interested in being helpful . . . She possessed above-average intelligence and was neither flamboyant nor hysterical.”<sup>278</sup>

Ultimately the report finds that “through practitioner awareness and rapport with the patient, the transsexual need not be considered unsafe to fly.”<sup>279</sup> The report does, however, stress that it is “typical . . . for the transsexuals to be very troubled.”<sup>280</sup> Likewise, it indicates that “[m]oderate to severe coexisting personality disturbances are the rule rather than the exception,” and that “depression is severe enough to lead to suicidal actions and genital mutilation.”<sup>281</sup> The report warns that the “transsexual aircrew member will need repetitive support from their

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<sup>269</sup> *Id.* at 587.

<sup>270</sup> *Id.* at 585-86.

<sup>271</sup> *Id.* at 586.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> T.L. CLEMENTS & R.E. WICK, TRANSSEXUALITY AND FLIGHT SAFETY (May 8, 1987), <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA229995>.

<sup>276</sup> *Id.* at 2, 3.

<sup>277</sup> *Id.* at 5.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at report documentation page.

<sup>280</sup> *Id.* at 9-10.

<sup>281</sup> *Id.* at 10.

aviation medical officer and occasional referral to a competent and experienced psychiatric professional.”<sup>282</sup>

Though these cases and study were persuasive in their day, the real question still outstanding in *Leyland* is whether trans surgery actually causes any significant interference with ability to perform or be stationed in a remote location. The conclusion that there would be some sort of significant interference seems particularly remote considering twenty-first century medical and mobility advances. The *Leyland* court is fooled into equating the low health risks post SRS and trans hormone management to the high risks associated with coronary artery disease. Coronary heart disease and SRS are significantly different, one of those major differences being that SRS and subsequent hormonal maintenance does not get worse, while coronary artery disease can degenerate and requires more observation and close maintenance by a healthcare professional.<sup>283</sup> At base, there is no scientific data indicating that SRS or trans status invariably impairs a service member’s ability to perform their duties. Further, the 1987 Air Force report does not express any concern regarding a trans person’s ability to serve who is pre-hormone use and pre-surgery. Similarly, the findings do not express concern about transsexuals serving post surgery. Rather, the study merely notes that like with any surgery “complications associated with the [SRS] surgeries will prolong the period of unsafe aviation duties.”<sup>284</sup> Based on these dated examinations and medical understanding an individual hearing for a determination of fitness is appropriate.

## 2. Self-understanding and Expression

The following set of four cases address the mental aspect of military policy. The set illustrates the military’s progression toward increasingly restrictive times and places where trans service members can self-express by cross-dressing.

The first case, *United States v. Davis*, is a 1988 case suggesting that off-base cross-dressing is tolerated.<sup>285</sup> Davis, a pre-operative MtF sought psychiatric treatment for trans issues from a Navy psychiatrist and also attended trans support groups off base in female attire.<sup>286</sup> During this time, Davis was observed in female attire on two occasions in and around the Puget Sound Naval Shipyard.<sup>287</sup> The behavior was alleged as a violation of Article 134 of the Uniform Code of Military Justice (UCMJ 134) as a “disorder[] or neglect[] to the prejudice of good order and discipline” or as being “of a nature to bring discredit upon the armed forces.”<sup>288</sup> The issue was whether a male wearing female clothing was an offense, as such behavior is “not inherently unlawful and . . . lack[s] words of criminality.”<sup>289</sup>

The court states that the two elements of an offense under Article 134 include: “(1) [t]hat the accused did or failed to do certain acts; and (2) [t]hat, under the circumstances, the accused’s

<sup>282</sup> *Id.* at 14.

<sup>283</sup> Compare United States National Library of Medicine, *Coronary Heart Disease*, PUBMED HEALTH (June 22, 2012), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0004449/>, with United States National Library of Medicine, *Gender Identity Disorder*, PUBMED HEALTH (Feb. 13, 2012), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002495/>.

<sup>284</sup> *Id.*, *supra* note 275.

<sup>285</sup> *U.S. v. Davis*, 26 M.J. 445 (C.M.A. 1988).

<sup>286</sup> *Id.* at 447.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 448; 10 U.S.C. § 934.

<sup>289</sup> *Davis*, 26 M.J. at 446.

conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.”<sup>290</sup> While the court agrees that the conduct is not criminal outside the military context, the conduct is “illegal solely because, *in the military context, its effect* is to prejudice good order or to discredit the service.”<sup>291</sup>

The court concludes that Davis’s crime is:

that *his unusual conduct, when it occurred on a military installation, had an adverse effect on military order and discipline and created a negative perception of the armed services . . .* Under such circumstances, the ‘wrongfulness’ of the conduct consisted of its threat to good order and discipline and its discredit to the armed forces—these elements conforming to the first two clauses of Article 134.<sup>292</sup>

Thus, dicta in *Davis* suggests that a service member can engage in cross-dressing so long as they did not come near or enter onto a military installation. This appears to be narrowed in the 1991 Navy case *United States v. Guerrero*, which restricts cross-dressing to times when the service member is off-base and “in private.”<sup>293</sup> In light of *Davis*, the court in *Guerrero* again investigates whether cross-dressing violates UCMJ 134.<sup>294</sup> Guerrero was charged with cross-dressing at his off-base apartment in front of a recruit and a retired Master Chief.<sup>295</sup> Guerrero’s neighbor, a civilian, also testifies that he had complained to the building manager, because from his apartment, ten to fifteen feet away, he could see into Guerrero’s apartment when the blinds were not drawn and had observed Guerrero cross-dressing.<sup>296</sup>

Based upon the two elements necessary for violation of Article 134 laid out in *Davis*, the court determines that cross-dressing can be the basis for a criminal conviction.<sup>297</sup> However, the court notes that “determining whether the specific episodes of cross-dressing were, indeed, unlawful presents a more difficult question, one not easily disposed of under the general rubric of prejudice or discredit. It is difficult because cross-dressing can certainly be non-prejudicial and even enhance morale and discipline.”<sup>298</sup> The court then goes on to give examples of men dressing as women to portray characters or for parody purposes and that such cross-dressing is a benefit.<sup>299</sup> The court concludes that it “is not cross-dressing *per se* which gives rise to the offense.”<sup>300</sup> “Rather, it is (1) the time, (2) the place, (3) the circumstances, and (4) the purpose for the cross-dressing, all together, which form the basis for determining if the conduct is ‘to the prejudice of good order and discipline . . . or was of a nature to bring discredit upon the armed forces.’”<sup>301</sup> In considering these factors, the court determines that there would be no basis for a

<sup>290</sup> *Id.* at 448. At the time, Article 134 was found in paragraph 60, Part IV, of the Manual for Courts Martial, United States, 1984.

<sup>291</sup> *Id.* (emphasis in original).

<sup>292</sup> *Id.* at 448, 449 (emphasis added).

<sup>293</sup> *U.S. v. Guerrero*, 33 M.J. 295 (C.M.A. 1991).

<sup>294</sup> *Id.* at 297.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 296, 97.

<sup>297</sup> *Id.* at 297-98.

<sup>298</sup> *Id.* at 298.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

charge when engaging in cross-dressing in the privacy of one's own home with the curtains drawn, because there would be a reasonable belief that the person would not be observed and would not bring discredit to himself or the Navy.<sup>302</sup>

Third, the 1990 Army case of *United States v. Gunkle* narrows *Guerrero* so that cross-dressing in the privacy of one's home cannot be done in front of civilian family members and civilian friends.<sup>303</sup> In that case, Gunkle cross-dressed in his home and appeared in feminine dress in front of his young daughter and her friend.<sup>304</sup> The court concludes that the cross-dressing appearances, which happened on three different occasions "outside the privacy of his bedroom," and is a sufficiently legal and factual basis for a violation of the UCMJ.<sup>305</sup>

Lastly, the 1994 case of *United States v. Modesto* illustrates the extent of the military's paranoia about gender non-conformance.<sup>306</sup> In that case, Modesto, an officer in the Dental Corps, was convicted of cross-dressing in public and performing in "drag queen" shows as a female impersonator in violation of UCMJ 133.<sup>307</sup> The Criminal Investigation Command not only had agents follow him and observe his behaviors at these off-base incidents but also conducted a search of his off-post house.<sup>308</sup>

This section of cases illustrating the continued restriction of cross-dressing highlights the military's discomfort surrounding gender non-conformance. While the military currently adheres to a strict binary, it is clear from these cases that some trans individuals are fully capable of completing the work required of any enlisted individual—regardless of how they dress. Keeping trans people out of the military is ultimately a disservice to both trans persons and the armed services, because the military's visceral reaction to cross-dressing is destructive. It teaches intolerance and discrimination. There is no reason—once logistics are figured out—why trans persons should be precluded from serving.<sup>309</sup>

#### IV. A PROPOSED SOLUTION: THE MILITARY HIERARCHY AS A MEANS TO DEMYSTIFY GENDER NON-CONFORMANCE AND PROMOTE SOCIAL ACCEPTANCE

In Wittin's 2007 report dealing with transsexuals in the military she admits that "... it is possible that the presence of such non-conforming bodies in the military might be seen as a gateway to undermining the ideal of two strictly separable body types and fundamentally alter the military's idealization of the traditional masculine body."<sup>310</sup> In essence this would begin the process of eradicating the West's gender binary. However, she is quick to limit this possibility under current military code. Under current policy, the only time U.S. military personnel will

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<sup>302</sup> *Id.*

<sup>303</sup> U.S. v. Gunkle, ARMY 9701960, 1999 WL 35021320 (A. Ct. Crim. App. Oct. 18, 1999).

<sup>304</sup> *Id.* at \*7.

<sup>305</sup> *Id.* (The court failed to provide any backing for its ruling).

<sup>306</sup> U.S. v. Modesto, 39 M.J. 1055 (A.C.M.R. 1994).

<sup>307</sup> *Id.* at 1060.

<sup>308</sup> *Id.* at 1056-57.

<sup>309</sup> I realize that this proposition comes with many logistical questions, specifically concerning how to integrate trans persons from the purpose of basic training, etc. These, however, do not seem insurmountable if concessions are made between military policy and trans service members. The details of the implementation are beyond the scope of this paper.

<sup>310</sup> WITTEN, *supra* note 16, at 4.

have contact with trans persons is if the U.S. coordinates with a foreign military that allows trans people to serve. Witten writes that, regardless of how willing individual military members are to work with gender non-conforming persons from the militaries of other countries, they will inevitably be “constrained” by the U.S. military’s historic preference for “strict separation” between the sexes and its policies and treatment of gender non-conforming persons.<sup>311</sup>

To the extent that Wittin recognizes that U.S. military policy is the reason why gender non-conforming persons from other militaries will have difficulty interacting with the U.S. military, I agree. However, Wittin just points to the problem. A solution would be to allow a case-by-case basis determination for trans persons to enter the military and thereby using the military as a vehicle to begin the process of demystifying and integrating them into society at large.

Indeed, “[w]ith regard to race, and increasingly with regard to gender, the military experiment in social engineering has been heralded generally as a great success.”<sup>312</sup> By way of example, consider Japanese Americans and African Americans who entered the military as part of a “conscious effort” to counteract racism.<sup>313</sup> “It was a choice that led to material improvement in their lives and the lives of other blacks and Japanese-Americans, and that forced the recognition of their existence and personhood upon their fellow Americans.”<sup>314</sup>

Allowing trans persons into the military will similarly recognize the personhood of individuals in a socially marginalized group. At least requiring the military to make individual determinations regarding one’s serviceability declares, “[y]ou exist. Your experience of deprivation is real . . . This nation and its laws acknowledge you.”<sup>315</sup> Further, entering the military and earning an income is a way to address the “substantive barriers to liberty” that socially marginalized groups face.<sup>316</sup> The military provides job training, medical benefits, money for food and housing. Plus, it provides the potential for further education with the GI Bill. As shown by the statistics above, this will undoubtedly raise the quality of life for trans persons.

Even critics who argue that the military still has “unconscious bias” admit that the military has provided minorities with an opportunity to “improve their life conditions.”<sup>317</sup> Therefore, benefit is derived for minority groups even though they may still experience some discrimination. This proposed first step is one time when government-imposed hierarchy can have a beneficial impact on this marginalized community. Thus, similar to the ways the military has worked to integrate race and gender into the military, via the use of strict hierarchy, there is an opportunity to demystify and de-stigmatize the transsexual and trans person through the same approach.

Respondents of the *National Transgender Discrimination Survey* also agree that the military is a necessary route to pursue on the path to equality. In the survey, participants were given a list of 13 policy areas from which to select four that are most important to develop as

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<sup>311</sup> *Id.* at 4, 16.

<sup>312</sup> See Charles Moskos, *How Do They Do It? Why the Military is the Only Truly Integrated Institution in America*, THE NEW REPUBLIC, Aug. 5, 1991, at 16-20 but see Mario L. Barnes, “But Some (of Them) Are Brave”: Identity Performance, the Military, and the Dangers of an Integration Success Story, 14 DUKE J. GENDER L. & POL’Y 693, 695 (2007).

<sup>313</sup> Maria J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 355 (1987).

<sup>314</sup> *Id.* at 356.

<sup>315</sup> *Id.* at 390.

<sup>316</sup> *Id.* at 391.

<sup>317</sup> Barnes, *supra* note 312, at 695, 696.

routes for greater equality for trans persons. Within the policy priorities, seven percent indicate “[a]llowing transgender/gender non-conforming people to serve in the military.”<sup>318</sup>

While the trans community is interested in entering the military, only the military is keeping them out. The military is able, independent of the APA and Congress, to allow trans persons to serve based upon a case-by-case determination.<sup>319</sup> As Mara Keisling, the Executive Director for the National Center for Transgender Equality (NCTE), points out, the military routinely issues medical waivers for other mental disorders including anxiety and depression.<sup>320</sup> In an interview for *OutServe Magazine* she stated that:

There is no reason why the military cannot use objective, rational criteria to determine if a trans person is fit to serve. The range of trans people is huge. Some people may have already transitioned entirely by the time they want to serve. Some people may identify as trans but have no desire to physically transition. But they’re still not allowed to serve because the disqualification is condition-based, not dependent upon the individual.<sup>321</sup>

This case-by-case basis approach is more equitable and rational than a “condition-based” disqualification when considering the lack of backing for the rejection of the case-by-case approach in *Leyland* and the benefit to both the trans community and the military.

Furthermore, the military medical policy rationales for why trans persons are denied entry into the military simply do not apply to trans persons as a class. Trans persons—with exception—are “[f]ree of contagious diseases that probably will endanger the health of other personnel.”<sup>322</sup> The second standard, that applicants be “[f]ree of medical conditions or physical defects that may require excessive time lost from duty for necessary treatment or hospitalization, or probably will result in separation from the Service for medical unfitness,” can be addressed by allowing an individualized determination.<sup>323</sup> Generally, trans people do not have extensive medical requirements, unless they are transsexual and undergoing SRS. For example, the only maintenance required for postoperative trans persons is hormone treatment and biannual blood work to confirm the hormones are being sustained at appropriate levels.<sup>324</sup> Admittedly, if one does undergo SRS there can be periods of long recovery, though not all trans persons intend to get surgery during their time of service. Regardless, a case-by-case determination can be used to assess whether the applicant can serve during such time. One concession those interested in getting SRS may need to make is to condition their admittance into the military upon delaying the extensive surgery during their time of service.

Similarly, there is no indication that pre and postoperative trans persons are not “[m]edically capable of satisfactorily completing required training.”<sup>325</sup> In fact, this point is substantially rebutted not only by the cases discussed above, but also by the fact that there are

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<sup>318</sup> GRANT, *supra* note 2, at 178.

<sup>319</sup> Miller, *supra* note 255.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> DODI 6130.03, *supra* note 237, at 2.

<sup>323</sup> *Id.*

<sup>324</sup> See generally NICK BORTON ET AL., MEDICAL THERAPY AND HEALTH MAINTENANCE FOR TRANS MEN: A GUIDE FOR HEALTH CARE PROVIDERS (Lyon-Martin Women’s Health Services 2005).

<sup>325</sup> DODI 6130.03, *supra* note 237, at 2.

some closet trans persons currently serving in the military; if their performance as a class was unsatisfactory this simply would not be the case.<sup>326</sup> The fourth policy reason for trans preclusion from the military is based on the assumption that they are not “[m]edically adaptable to the military environment without the necessity of geographical area limitations.”<sup>327</sup> However, the only case addressing this concern is the 1987 case of *Leyland* which, as discussed in the previous section, fails to truly investigate the differences in risk between transsexualism and coronary artery disease. Additionally, medical advancement in the last 25 years may lay this concern to rest.

Finally, there is no evidence that trans persons, as a class, are not “[m]edically capable of performing duties without aggravation of existing physical defects or medical conditions.”<sup>328</sup> Such determinations can again be made on a case-by-case basis. Therefore, this examination of the five purposes that the military’s medical standards are in place to accomplish reveals no persuasive reason as to why a condition-based approach to trans military preclusion is appropriate.

## CONCLUSION

Trans persons face substantial discrimination in just about every aspect of personal and public life. While allowing trans persons into the military is not a complete solution to eradicating this kind of discrimination, it will beneficially impact the trans community. Not only will the military’s strict hierarchal structure help to demystify trans persons, but it will also validate them as people. Aside from demystification and validation, providing trans persons with a legitimate option for self-support, medical assistance, and education will impact the community by getting trans persons into a better position to obtain dignified jobs on discharge, or further education via the GI Bill. This will help to overcome the prejudices many have faced in school and elsewhere, keep them off the streets, and out of the sex and drug trade. Not only does this solution benefit the trans recruit directly, but it also benefits the government—as it means the military can induct additional recruits who are often driven to excel. Society at large also benefits by allowing trans persons to contribute positively and consistently to a more enlightened and receptive community. For all these reasons I contend that allowing case-by-case induction is a necessary and important step in addressing the trans community’s “substantive barriers to liberty.”

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<sup>326</sup> In fact many of these persons are overachievers in the military. *See generally* WITTEN, *supra* note 16, at 7, *see also* Miller, *supra* note 255.

<sup>327</sup> DODI 6130.03, *supra* note 237, at 2.

<sup>328</sup> *Id.*