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**5 Remarks from the Editor-in-Chief**

John S. Hoag

## POETRY

**7 The Woods This Country**

Ari Banias

## PRACTICE

**8 Civil Rights Battles in Rural Georgia****Have a New Color: Rainbow**

Shelly C. Anand, Robert Bush, and Susan Wells

## FEATURE ARTICLES

**21 Respecting Trans\* Identities:** Recent Movements for the Legal Recognition of Gender Identity in Latin America

Peter Dunne

**39 Still Serving in Silence:** Transgender Service Members and Veterans in the National Transgender Discrimination Survey

Jack Harrison-Quintana and Jody L. Herman

**53 The Provocative Human Right to Be**

Chloe Schwenke

**67 In the Shadows:** The Difficulties of Implementing Current Immigration Policies in Adjudicating Gender-Diverse Asylum Cases in Immigration Courts

Michael Santos

**83 Creating Inclusive Policy Reform for LGBT Older Adults with HIV**

Angela Perone

## COMMENTARY

**96 Social Media, Ethics, and Exposing Pricate Information about LGBTQ Users**

Leone Kraus

**101 Reproductive Justice Is and LGBTQ Issue**

Laura Nixon

# LGBTQ POLICY JOURNAL

## *Order Form*

The *LGBTQ Policy Journal at the Harvard Kennedy School* is a student-run, non-partizan review dedicated to publishing interdisciplinary work on policy-making and politics including and impacting LGBTQ (Lesbian, Gay, Bisexual, Transgender, and Queer) communities and individuals. We strive to improve the quality of public policies affecting LGBTQ communities by furthering reflection and debate on the complex economic, political, and social consequences of public policy regimes for LGBTQ persons.

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# Editor's Note

John Hoag

"In this world, there is a kind of painful progress. Longing for what we've left behind, and dreaming ahead."

— Tony Kushner, *Angels in America, Part Two: Perestroika*  
(Theatre Communications Group, 1993)

Another year has seen another set of successes for lesbian, gay, bisexual, trans\*, and queer (LGBTQ) advocates and allies—marriage equality in France and New Zealand and the United States v. Windsor ruling among them. Progress feels inevitable. In our extended LGBTQ community at the John F. Kennedy School of Government at Harvard University, the mood has largely been celebratory.

Yet discrimination, structural violence, and intolerance continue on a profound scale. Many Latin American trans\* activists struggle for appropriate legal recognition and safety. Would-be LGBTQ Olympians are now weighing their decision to attend next year's winter games in Sochi, Russia, where homophobic policies are increasing, despite significant opposition. The fight for rights in Uganda may be better known around the world today, but it is no less violent. Political asylum is made more complex when sexual orientation and gender identity are considered. Some rural residents in the United States do not enjoy the freedom and acceptance that urban LGBTQ populations do.

So while we celebrate, much work remains. Major wins for a portion of the LGBTQ community are certainly important but by no means sufficient for the movement as a whole. Injustice of any type is a threat

to us all. This, the third edition of the LGBTQ Policy Journal at the Harvard Kennedy School, seeks to feature cases of inequality at the intersection of populations and identities, as well as the activists, citizens, and professionals that address them. The articles and commentaries, both in the print edition and on the Web site, illuminate the complex realities we live in.

Our achievements simply allow us to move forward on other, equally important work. We are proud to feature an excellent set of articles in this print edition, and we aspire to continue to build a print and online platform that features scholarship, analysis, and advocacy related to lesbian, gay, bisexual, trans\*, and queer communities around the globe. Join in our journey to dream ahead.

John S. Hoag  
Editor-in-Chief  
Cambridge, MA

# The Woods This Country

Ari Banias

The promise of the trees is  
a grand ladder into tufted green –

that I'm genderless  
unless seen.

But the woods are also exactly  
where they'd bring me, dig a hole in that anonymous  
geography and dump me. It's not as if  
I can roam, muscle around, be feral.

In town, the Christian café teems  
with caffeinated right-wingers.

The trunks scorched brittle as stunned deer  
delineate the illness  
of all trees, an inability to leave.

Still, I like to think my house would be the one  
the fire stopped just short of.

When I tell him I haven't always been a man, my new friend  
tries to pull in his shock

like a suddenly freaking out  
dog at the end of a leash. Studies me  
peripherally. I can't help but see him

bringing me out  
to the woods, so to speak.  
My dog still as a tree.

# Civil Rights Battles in Rural Georgia Have a New Color: Rainbow

Shelly C. Anand, Robert Bush, and Susan Wells

*THE AUTHORS ARE ALL A PART OF the Georgia Legal Services Program, where Shelly C. Anand is a bilingual staff attorney, Robert Bush is a senior staff attorney, and Susan Wells is a public information specialist.*

**T**ammy grew up in small rural towns. Her family moved to Dalton, Georgia, when she was thirteen. “Atlanta is just too big for me. Too many people,” she said.

When she came out as a lesbian several years ago, Tammy stayed near her family, which includes five children, four girls and a boy, from her two marriages. She found, however, that many of the women in the small gay community in her area used drugs. She fell in with them and wound up being arrested and put on probation. She got sober and stayed out of trouble for six years, developed a committed relationship with a woman, and worked at a convenience store. While working there, she befriended a customer, Paul, in whom she confided her sexual orientation.

One night in the summer of 2012, Tammy and her partner had an argument. Upset, Tammy called Paul to talk. He asked her to meet him, and he took her to a remote area and raped her. She was devastated. She went to the hospital and reported the rape to the sheriff’s office. But the detective she spoke with “was fine with me until I told her I was gay, and then she got an attitude and became a totally different person.”

Tammy asked for a different detective to work with on the rape case but was refused. Paul was not arrested and immediately began to pressure Tammy to drop the charges against him. Tammy was afraid of Paul; he would follow her around



town and was beginning to threaten not only her, but also her children. She had to change jobs because of his constant presence and began working at a factory.

Finally, feeling as though the police were doing nothing on the case, Tammy gave in to the pressure and dropped the charges against Paul. Victims of domestic violence and sexual assault often drop charges against their abusers and rarely do they face criminal repercussions for their decision. However, the deputy arrested Tammy for filing a false police report about the rape. Even though the charge was a misdemeanor, it was a probation violation, and Tammy served ninety-three days in jail on a six-month sentence. While she was incarcerated, the Department of Family and Children Services took away her three youngest daughters — ten-year-old twins and a fifteen-year-old — and put them in foster care. She pled guilty to the charge of filing a false police report so that she could get out of jail as quickly as possible and work toward being reunited with her children.

When she got out of jail, Tammy returned to her job at the factory only to find that Paul had begun working there as well. He began to stalk her again, following her and threatening her. Finally she went to the local domestic violence (DV) shelter to see if she could get a temporary protective order (TPO) to keep him away. The DV office helped her petition for a TPO and referred her to a lawyer at the Georgia Legal Services Program (GLSP). But after Tammy went to court for the hearing

on the protective order, she was fired for missing too much time from work. She believes her supervisor refused to intervene for her because Tammy is gay.

### **Georgia Legal Services Program's LGBTQ Committee**

Tammy's experience is all too common for low-income individuals living in rural areas of Georgia. GLSP is a large, statewide nonprofit law firm, created with the purpose of serving low-income marginalized people living in the one-hundred and fifty-four counties in Georgia outside the five-county metropolitan Atlanta area. The majority of our clients live in small towns and rural areas throughout the state. Similar to other Legal Services Corporation-funded legal aid programs throughout the country, our mission is to provide access to justice and avenues out of poverty for low-income clients. As likely victims of crime and discrimination, low-income LGBTQ people living in rural Georgia are a natural fit for our services.

Recognizing lesbian, gay, bisexual, transgender, and queer (LGBTQ) people as an underserved minority, a group of LGBTQ and allied lawyers and staff at GLSP formed an internal committee focused on creating a culturally competent environment within GLSP and developing methods for reaching out to low-income LGBTQ individuals in the rural parts of the state. The LGBTQ committee formulated the following as its mission statement:

The Committee works on two fronts: (1) to develop outreach methods to ensure that lesbian, gay bisexual, transgender, and queer (LGBTQ) applicants can access legal services and feel secure in reaching out to GLSP for quality legal assistance and representation; and (2) to develop and use legal theories ensuring equal justice for LGBTQ clients.

Historically, GLSP has focused on ensuring openness and cultural competency in our interactions with, representation of, and advocacy for racial minorities, women, the elderly, individuals with disabilities, and individuals who are limited English proficient (LEP). Though GLSP's staff has always assumed its own openness to LGBTQ clients, we had not had any specific training or outreach programs in place for several years. GLSP extended its services to low-income people with HIV/AIDS to help ensure these individuals were able to get the health care they needed through Medicaid. But after new medications eased those issues, we at GLSP realized the organization had not specifically conducted targeted outreach to potential LGBTQ clients as we had done for LEP populations, the disabled, victims of domestic violence, and minorities. In addition, the state of Georgia has become more LGBTQ unfriendly, with a constitutional amendment banning same-sex marriage and a state government now dominated by socially conservative Republican lawmakers.

The goals of the LGBTQ committee are therefore multifaceted. Since the beginning of 2013, our organization has implemented a three-pronged approach

to reaching the LGBTQ community in Georgia. First, we researched the social, economic, and political landscape for low-income LGBTQ individuals living in rural Georgia. Second, we are creating a culturally competent atmosphere at GLSP by surveying our staff and providing training to each of our ten regional offices, as well as involving staff in outreach. Finally, we are employing innovative methods to extend our outreach to these communities, which will hopefully increase the number of low-income LGBTQ Georgians who know, first, that our services are available to them, and second, that GLSP staff members understand their issues and are eager to help. Some methods for doing this outreach have included showing same-sex families on our brochures, placing hate-free zone signs in each of our offices, and including rainbow flags in our e-mail signatures and on our Web site. This article explores these multifaceted goals and our process for creating effective outreach, advocacy, and representation methods to the low-income LGBTQ community in rural Georgia.

### **LGBTQ Individuals Living in Rural Georgia**

The 2010 Census asked respondents to report if they were in same-sex relationships. The resulting data (at least for those willing to identify themselves in such a way on a census form) indicates there are at least 30,000 LGBT households in Georgia across all of the state's one-hundred and fifty-nine counties (Douglas-Brown 2011). Of

those households, 28 percent identified as rearing children.

In October 2012, Gallup released survey results from its study of 120,000 U.S. adults and their sexual orientation and/or gender identity (Gates and Newport 2012). The survey reported that 35 percent of those who identify as LGBT report incomes of less than \$24,000 a year, significantly higher than the 24 percent reported for the population in general. In Georgia, that means that approximately 10,500 LGBT households live below the federal poverty level. According to the Gallup survey, even though Southerners self-report being LGBT slightly less often than in other parts of the country—3.2 percent versus 3.8 percent—gay families in the South are more likely to be poor and members of minorities than their non-LGBT counterparts (Gates and Newport 2012). And LGBT households with female members are just as likely to be rearing children as in the general population.

The results of the Gallup survey corroborate other studies with data on rural LGBTQ populations. The Williams Institute at UCLA issued a study in June 2013 showing that lesbian couples who live in rural areas are nearly three times as likely to be poor as coupled lesbians in large cities (Badgett et al. 2013). More than 10 percent of men in same-sex couples in small metropolitan areas are poor compared with only 3.3 percent of coupled gay men in large metropolitan areas. Compared to heterosexual families, gay and lesbian families with children are much more likely to be poor, especially in rural areas. As written in

the study, “Almost one in four children living with a male same-sex couple and 19.2 percent of children living with a female same-sex couple are in poverty, compared to 12.1 percent of children living with married different-sex couples. African American children in gay male households have the highest poverty rate (52.3 percent) of any children in any household type” (Badgett et al. 2013). Further, African Americans living in same-sex couples had poverty rates more than twice the rates of different-sex couples.

The Gallup survey and the Williams Institute study mirror much of the client population of the Georgia Legal Services Program; in order to qualify for representation with the Georgia Legal Services Program, our clients must have incomes below 200 percent of the federal poverty level. In 2012, 75 percent of our clients were women (Georgia Legal Services Program 2012). With respect to race and ethnicity, 44.4 percent of our clients in 2012 identified as African American, while 9.3 percent identified as Hispanic, and .4 percent identified as Asian.

Given the demographics of our client base and the statistics gleaned from the Gallup survey and Williams Institute study, there is a significant likelihood that many of our existing clients are low-income LGBTQ individuals, even when they do not disclose their sexual orientation or gender identity to us. The LGBTQ committee of GLSP recently surveyed all of its staff members, which include attorneys, paralegals, and support and intake staff. Respondents iden-

tified having represented LGBTQ clients in thirty counties in rural Georgia. Interestingly, quite a few respondents said they had never had an LGBTQ client of which they were aware. Regardless, both the Gallup survey and Williams Institute study demonstrate that LGBT individuals in rural Georgia are likely to be low income, of color, and women with children, hence mirroring the demographics of our client population.

Currently, the State of Georgia has not enacted anti-hate crime laws or laws that protect against employment discrimination on the basis of sexual orientation or gender identity (Georgia Legal Services Program 2012, 5, 13). Further, in the wake of pervasive school bullying against LGBTQ youth in the United States, Georgia has failed to legislate any sort of protections for school children (Williams Institute 2009). While there are no explicit protections under state

Outside the Atlanta metropolitan area, LGBTQ individuals and families have few allies and are often faced with reactions from public officials ranging from blank lack of recognition to active discrimination.

### **Legal and Policy Barriers for LGBTQ Individuals in Rural Georgia**

Outside the Atlanta metropolitan area, LGBTQ individuals and families have few allies and are often faced with reactions from public officials ranging from blank lack of recognition to active discrimination. State policy and statutes are largely silent on LGBTQ issues, other than the overt ban on same-sex marriage. There are no state statutes or policies protecting LGBTQ people from harassment or discrimination and there are limited programs recognizing the unique problems of the LGBTQ population in any training offered to state social workers or law enforcement agencies outside metro Atlanta.

law, Georgia Equality reports that “38% of public school students in Georgia are now covered with [school-based] anti-bullying policies that include gender identity and 54% of students are covered with policies that include sexual orientation.” Georgia Equality Georgia’s state-wide anti-bullying statute, which does not include explicit protections for LGBTQ students, can and should be leveraged to address cases of bullying.

Further, Georgia is a “right to work” state, where employees can be fired for almost any reason, including their sexual orientation. The lack of legal protections for the LGBTQ population in Georgia makes the population vulnerable to harassment, discrimination, and violence in both the public and private sphere. This vulnerability is further compound-

ed by the increased likelihood of poverty for the LGBTQ population.

To better serve the LGBTQ communities in rural Georgia, GLSP sought additional information on LGBTQ individuals in rural Georgia. In a Bible-belt state, finding facts about gay life outside of the cities is a difficult pursuit. However, anecdotal information can be gleaned from occasional newspaper articles such as those that appeared in the summer of 2012 when Valdosta City Mayor John Gayle refused to sign a proclamation recognizing South Georgia Pride Day (Bagby 2012). LGBTQ advocates and allies tried to explain that the proclamation focused on anti-bullying and anti-hate, not same-sex marriage, but Gayle was adamant in his refusal (Bagby 2012). Even though Pride Day still took place in Valdosta, the organization has started a Change.Org online petition to get the mayor to sign the proclamation (Bagby 2012).

Other accounts of the public, political, and legal nonacceptance of the LGBTQ population in Georgia are even more troubling. Several instances reported in a Williams Institute memorandum from 2009 offer examples of institutionalized discrimination that goes largely unremarked in Georgia.

In one such case, a Georgia Division of Family and Child Services employee reported that some of her coworkers complained about working with her because she was a lesbian. Her supervisors subjected her to a four-hour interrogation and told her not to tell anybody what happened during the interview. Two weeks later, she was suspended for

“alleged misconduct” (Williams Institute 2009).

In another example, a public school bus driver in McDonough, Georgia, was fired after a coworker found and distributed a personal ad he had posted six years earlier on a gay dating Web site. When he asked for a reason for the firing, school officials told him it was “in the best interests of the school system” and that he already “knew the answer” (Williams Institute 2009).

In addition, the legal issues raised in the LGBTQ committee survey run the gamut of civil legal issues. Domestic violence, access to benefits, child custody, employment, and housing were issues most often encountered. With respect to access to domestic violence protection here in Georgia, our committee also recently surveyed domestic violence advocates and shelters across the state about their policies with respect to LGBTQ victims of domestic violence. While the data is still being gathered and analyzed, one response was particularly enlightening (Georgia Legal Services Program 2012).

Amy Weaver is the executive director of Hospitality House for Women in Rome, Georgia. In the last twelve months (from the time of the survey), her organization had served approximately 574 victims of domestic violence. Of those victims, fifteen were believed to be LGBTQ and five openly identified as LGBTQ. In many instances, her organization was able to serve and assist LGBTQ survivors, but in instances where her organization did not provide services, it was mostly due to the victims’ own

fear of applying for protective orders. The largest barrier for LGBTQ victims, as Weaver said, is “fear of the repercussions of admitting their LGBT status” to service providers. There is no doubt that low-income LGBTQ individuals avoid accessing other legal, social, and health services due to the pervasive fear that agencies will not serve them or will discriminate against them due to their sexual orientation or gender identity.

### **Creating a Culturally Competent Environment for LGBTQ Clients at GLSP**

Part of the work of GLSP’s LGBTQ committee is to help potential clients overcome their fear of reaching out to our program for legal assistance and representation. GLSP must establish a reputation of being open and culturally competent to all potential clients no matter their sexual orientation or gender identity. In our survey of staff and attorneys, many reported that they were unaware of any clients identifying themselves within the LGBTQ spectrum. Further our survey indicated that many attorneys and staff were not aware of resources available to the LGBTQ community.

There is no doubt that low-income LGBTQ individuals avoid accessing other legal, social, and health services due to the pervasive fear that agencies will not serve them or will discriminate against them due to their sexual orientation or gender identity.

To initiate our work internally, GLSP staff attorney Cole Thaler made a presentation to GLSP managers about the importance of developing cultural competency and effective services for LGBTQ clients. The presentation included similar data to that of the Gallup survey and the Williams Institute study showing the disproportionate percentage of LGBTQ people who are low income. Thaler also discussed the variety of reasons why LGBTQ people might be low income but reluctant to seek the aid of a legal services organization, including fear of coming out to family and friends and the fear of homophobic or transphobic responses from legal services.

In August 2012, we invited the National Center for Lesbian Rights (NCLR), in conjunction with California Rural Legal Assistance (CRLA), to provide an outreach and organizational assessment training to the LGBTQ committee. On recommendation from our trainers, the LGBTQ committee polled our staff and domestic violence shelters to glean an understanding of where our organization stood on outreach, advocacy, and representation of LGBTQ individuals.

After receiving the NCLR/CRLA training, the LGBTQ committee cre-

ated its own training to be rolled out in each of the ten GLSP offices throughout Georgia. Our first training was held on 5 April 2013 in GLSP's Gainesville office. Led by staff attorneys Shelly Anand and Thaler, the training included a review and explanation of terminology relevant to the LGBTQ community, including definitions of various sexual orientations, and an explanation of the transitioning process for female to male (F to M) and male to female (M to F) individuals. Next, we provided examples of legal issues our clients may face due to their LGBTQ status. Our examples included a transwoman who cannot get Medicaid to cover her prostate exam and a gay Latino man who was fired from his job due to his sexual orientation. In reviewing these examples, we asked lawyers and staff to practice the intake process for an individual who called in with each of these issues. How would an advocate uncover the root cause of the problem? What are ways of framing necessary questions that are culturally sensitive and welcoming?

Every day, hundreds of individuals throughout the state of Georgia call GLSP for legal assistance. Our intake staff must first ensure that these individuals are financially eligible for our services and that we are currently taking the type of case for which they seek legal assistance. Our intake process involves detailed questions about the individual's income, debts, household composition, race, gender, veteran status, immigration status, disability, and whether or not the individual is a victim of domestic violence. With respect to asking

these questions of members within the LGBTQ community, there are ways we can avoid heteronormative or gender-normative assumptions. For instance, instead of assuming that a woman has a husband or romantic partner that is male, intake staff can ask questions such as "Do you have a romantic partner or spouse?" With respect to gender identity, instead of assuming the gender of our applicants, we can ask, "How do you identify your gender?" No doubt some of our applicants will be unfamiliar with the wording of this question, but the systemic practice of this line of questioning indicates that we do not make assumptions regarding one's orientation or gender identity.

Finally, our training engaged our group in a brainstorming session on how we can conduct more effective outreach to the low-income LGBTQ community to ensure that these potential clients view our program as a resource and are confident that we are an LGBTQ-friendly organization. Ideas generated included getting involved with the various Pride events that occur throughout the state of Georgia; reaching out to various LGBTQ organizations within our counties such as PFLAG; putting rainbow stickers in our offices, on our e-mail signatures, on our Web site, and on our business cards; and including photographs of same-sex couples and families on various legal brochures that we distribute in communities.

GLSP has already begun the process of ensuring that outreach to the LGBTQ community is a priority. Our Elder Action Team, the statewide body of



GLSP attorneys doing work under Title III of the Older Americans Act, recently attended training about reaching out to elder LGBTQ clients. Further, GLSP included LGBTQ families as a focus in a successful grant proposal to the U.S. Department of Justice (DOJ) for funds to represent minority victims in domestic violence situations. As stated in the GLSP's October 2012 grant proposal, "LGBTQ survivors of partner abuse in rural areas face additional challenges. Homophobia and transphobia can serve to further isolate survivors from sources of assistance. Fear of being 'outed' by abusers and potentially losing their jobs, housing, or relationships may keep survivors silent. Survivors may be afraid to ask for help because they fear telling family members and faith leaders they are in a same-sex relationship."

All of these steps, we believe, will begin the slow but necessary process of bringing potential LGBTQ clients to our doorstep so that we can effectively advocate for their rights and help alleviate the barriers that keep them in a perpetual state of poverty.

### **Using Existing Tools to Serve the Low-Income LGBTQ Population**

In addition to individual client service and representation, a major focus of GLSP's work is on impact litigation and services, specifically taking on cases, and in some instances litigation, to create the most positive change possible in low-income, marginalized communities.

Clearly there are state and federal laws and policies in place that discriminate against LGBTQ populations, especially the low-income and isolated members of this marginalized population. GLSP and other advocacy organizations must work to change those laws and policies. In the interim, we can utilize tools developed from serving other marginalized groups to help LGBTQ clients gain the personal, social, and economic security and stability they seek.

#### ***The 1993-2006 GLSP HIV/AIDS Legal Project***

Starting in 1993 and concluding in 2006, GLSP provided services to a regular flow of LGBTQ clients during its HIV/AIDS Legal Project. During that time, GLSP conducted successful outreach into the LGBTQ rural population by partnering with HIV/AIDS clinics funded under the federal Ryan White Program, which provides resources to help cities, states, and local organizations working with low-income people with HIV/AIDS. Individuals with HIV/AIDS came to health clinics, and our attorneys were made available at these clinics to help clients with the myriad legal problems that arose both because of the disease and because of their gender identity or sexual orientation. Throughout the duration of the HIV/AIDS Legal Project, it became clear that many LGBTQ people would overcome their fear and the stigma of disease to come to the clinics because they understood that, by doing so, they could find critically needed help. By placing GLSP attorneys at the HIV/AIDS health clinics, the organization



sent the message that LGBTQ people were welcomed by GLSP. And many of the individuals who came seeking medical help also took the helping hand offered by GLSP.

GLSP can now use the lessons learned during those years to help LGBTQ individuals with tools available under current law.

For example, an advance directive for health care (ADHC, similar to a durable power of attorney) can overcome some obvious obstacles LGBTQ families face, such as a partner being able to visit his/her partner in the hospital, to deal with doctors regarding treatment, and to make end-of-life decisions. Attorney Robert Bush in our Savannah office has published an article in *Gay Savannah*, the largest LGBTQ media presence in the region, about LGBTQ couples using ADHCs to enable same-sex families to make these decisions. He presented a workshop in conjunction with *Gay Savannah* entitled “Cementing LGBT Relationships.”

Attendees of the workshop were able to educate themselves about the protections afforded by the ADHCs and they were able to execute their ADHC on site. Attendees were asked to provide the names of senior LGBTQ individuals in the area who could attend a subsequent workshop, “Cementing LGBT Relationships at 60+,” which targets the particularly isolated elder LGBTQ population. The contacts made through the initial workshop have further allowed GLSP to host similar events for this population at other venues in the area including the Agape Empower-

ment Church. Subsequent articles and seminars will focus on other issues affecting the LGBTQ community and seek to reach elder LGBTQ individuals through a widening web of contacts.

GLSP attorney Cole Thaler points out that transgender people in Georgia can seek name changes to align their legal names with their gender identity. “While name change petitions are relatively simple to file without attorneys,” Thaler said, “transgender people sometimes find themselves in front of hostile or confused judges and need a lawyer’s help to make the name change process proceed smoothly.” Georgia law also permits transgender people to change the gender designations on their birth certificates and driver’s licenses to match their identity, provided they can produce the requisite medical documentation.

Another tool lawyers and advocates can use to help LGBTQ individuals in states with anti-gay laws and policies is to recognize when agencies are violating federal policies that are actually more LGBTQ-friendly. For instance, the federal Department of Housing and Urban Development (HUD) recently passed regulations prohibiting discrimination against same-sex and unmarried couples in public housing. Unfortunately, the Northwest Georgia Housing Authority (NWGHA) was late in implementing the regulations, as is probably true of other local housing authorities around Georgia as well as around the country. Regardless, the NWGHA had to announce a change to its policy to comply with HUD regula-

tions, and we will ensure they are aware that they may face legal action if regulations are not followed. We can also push HUD to enforce its regulations by sanctioning local and federal authorities for noncompliance.

### ***GLSP's Elderly and Disabled Public Benefits Hotline***

GLSP created a hotline for the elderly and people with disabilities to assist in navigating Georgia's complex public benefits bureaucracy. More than 879 individuals and families have received help from GLSP paralegals in getting more than \$704,500 in public benefits. Elderly people and people with disabilities learned of the hotline through senior centers, health clinics, community organizations, and city government partnerships. Funded by a \$90,000 grant from the National Council on Aging, the project was the brainchild of two GLSP advocates who recognized the need to assist clients in creating comprehensive packages of benefits that would provide income stability with health care and help with utility costs and getting food on the table.

Based on the successful model that the hotline provides, could a similar hotline be set up for LGBTQ individuals and families to identify solutions for the legal and policy issues they face? Being able to call a hotline addresses the fear of coming to a law office to ask for help. Similarly, Webinars on legal tools available to LGBTQ people, followed up by online forums where questions can be addressed and legal forms transmitted, could be another way of allowing LGBT

individuals to seek help without the risk of personal exposure.

### **Domestic Violence Training for Judges, Law Enforcement, and Social Workers**

Over the past twenty years, GLSP lawyers and paralegals have trained hundreds of judges, law enforcement officers, and social workers on effectively and respectfully working with domestic violence victims and situations. GLSP partnered with battered women's shelters all over the state in providing these trainings. Initially, law enforcement officers at such trainings often voiced cynicism about the scope of domestic violence in their community, rarely made arrests of perpetrators, and often blamed the victim. Some judges had similar attitudes. However, after years of experience training officials dealing with domestic violence cases, GLSP lawyers now find that police departments make the trainings mandatory, the attendees are much more respectful and sincere about trying to help victims, and judges are more consistent about granting twelve-month temporary protective orders to victims and imposing stronger sanctions against perpetrators. GLSP Family Violence Project Director Vicky Kimbrell recently trained a group of three hundred new lawyers at the Transition into Law Practice and Mentoring Program on Domestic Violence. She was able to give the new lawyers insight on the barriers that domestic violence victims face in leaving violent homes, which range from the

potential of deadly gun violence, to partner threats to harm children, to the economic realities of breaking free. She also included for the first time information on LGBTQ survivors who face those traditional barriers, plus a whole new set of distinct issues, from threats about “outing” to threats to take custody from parents who may not have legally recognized rights to children.

Under the DOJ grant, we are planning for future trainings to include sections on LGBTQ family violence issues. Separate trainings on dealing with LGBTQ people in crisis could also be offered if resources, that is, grants and volunteers, can be identified. As Tammy’s story illustrates, law enforcement officers and the Department of Family and Children Services workers outside the metropolitan areas of Georgia are in need of sensitivity training.

### **Creating Meaningful Partnerships within our Communities**

In all of these efforts, GLSP has been able to reach and serve targeted populations with the help of trusted partners already operating in the communities we sought to serve: the Ryan White clinics, senior centers, health clinics and NCOA, battered women’s shelters, and domestic violence awareness advocates.

We are already identifying partners working with rural LGBTQ populations in Georgia and organizations willing to refer clients to GLSP for help with legal issues. In some areas of the state, notably Savannah where there is a relatively large

LGBTQ population, GLSP’s regional offices are already listed in LGBTQ publications and directories as being LGBTQ-friendly resources. We plan to make sure each regional office is publicized as being available and welcoming to LGBTQ clients.

Additionally, GLSP is partnering with United 4 Safety, a collaboration of agencies and experts in Georgia working to reduce the incidence of intimate partner violence within the LGBTQ community by improving understanding of domestic violence protections and other resources available as well as providing training and resource development. While United 4 Safety works mainly in the metro Atlanta area, its members want to work with GLSP in our efforts to serve LGBTQ clients in rural areas as well.

### **Conclusions and Questions**

There is little hope of immediate changes to the policies and laws in Georgia that present particular challenges to LGBTQ people. However, with the help of lawyers and other policy specialists, there are many avenues open to aid LGBTQ individuals and families in achieving security, stability, and a path out of poverty. One central challenge is convincing LGBTQ people that coming forward and asking for help is worth the risk. That challenge can be mitigated somewhat by using technology to allow LGBTQ people to access our help privately through hotlines, Web sites, and Webinars. We can also reach LGBTQ people in Georgia with the help of trusted partners already

operating in rural communities. Established platforms can be leveraged to train judges, law enforcement officials, social workers, and others who come in contact with LGBTQ people in crisis to help them understand how to deal sensitively with this population.

Despite lessons learned over the years about how to reach and help marginalized populations in Georgia, some questions remain about how best to provide GLSP's services to LGBTQ individuals and families. One difficulty is how to identify LGBTQ clients. We are exploring whether to ask clients at intake whether they identify as LGBTQ as part of our regular screening. Having this information would be helpful in analyzing the client's problems and identifying targeted solutions. However, we are concerned that non-LGBTQ clients could be put off by such a question and that LGBTQ clients could be frightened by it. Those discussions continue. Meanwhile we are working to publicly demonstrate that GLSP is LGBTQ accepting and friendly so that people will be more willing to identify themselves to us.

And of course, the highest bar to leap is that of getting the necessary resources to offer help to the LGBTQ clients. Nationally, legal service organizations for low-income people are laying off lawyers and limiting cases because of drastically reduced budgets; for example, funding for the Legal Services Corporation has been drastically cut. GLSP has laid off about 10 percent of its staff in the past three years and is facing yet another year of budget cutting in 2013.

That said, among the lessons learned over the years by GLSP is that while funding may go up and down, our services are a vital necessity to marginalized populations in Georgia—including LGBTQ people—and we will keep finding ways to serve them.

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# Respecting Trans\* Identities

## Recent Movements for the Legal Recognition of Gender Identity in Latin America

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### **Abstract:**

Latin America has historically struggled with extreme violence and discrimination against trans\* individuals. In recent years, however, policy makers in certain Latin American countries have begun to take progressive steps toward legally recognizing gender identity. These measures have culminated in the passage of a landmark statute in Argentina in May 2012, described as “the most progressive gender identity law in history.” What marks out the new policies in Latin America for particular recognition is both that they have arisen in the face of widespread societal prejudice and that, in proposing and enacting these changes,

politicians across the region have exhibited a sophisticated and nuanced appreciation of gender identity. Central and South America remain among the most dangerous and deadly places worldwide for trans\* people to live, and it is not the purpose of this article to suggest that legal recognition alone will ameliorate the myriad problems experienced by trans\* communities in these regions. Rather, the article merely seeks to show that, in certain countries across Latin America, policy makers have begun to adopt rules on the recognition of gender identity that, unlike similar measures in North America and Europe, reject harmful notions of a rigid gender binary and are beginning, for the first time, to prioritize the self-identification of trans\* communities.

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**L**atin America has historically struggled with the issue of prejudice against trans\* individuals and those whose identity or self-expression do not conform to the traditional gender binary. This problem continues to the present day, with widespread reports of violence and discrimination against trans\* people across Central and South America.

In recent years, however, policy makers in certain Latin American countries have begun to take progressive steps in one area relating to trans\* communities: the legal recognition of gender identity. These steps have culminated in the passage of a landmark statute in Argentina in May 2012, described by activists as “the most progressive gender identity

law in history” (Transitioning Africa 2012). What marks out the new policies in Latin America for particular recognition is not simply that they have arisen in the face of widespread societal prejudice. Rather, it is the fact that, in proposing and enacting these changes, politicians across the region have exhibited a sophisticated and nuanced appreciation of gender identity, something that has unfortunately often been lacking in previous debates on trans\* issues.

It is clear that in terms of violence and discrimination, Latin America remains one of the most dangerous and deadly places worldwide for trans\* people to live. However, on the narrower issue of gender recognition, Latin America’s rejection of outdated “gatekeeper” requirements, as well as its moves toward prioritizing the agency of trans\* people, means that policy makers across the region are increasingly placing themselves at the forefront of global action on the legal recognition of trans\* identities.

## Transphobia in Latin America

Transgender Europe’s Trans Murder Monitoring project documented the killing of 872 trans\* people in Central and South America during the years 2008 to 2012; in Brazil alone, at least 390 trans\* persons have been killed since 2008 (Transgender Europe 2012). According to statistics from the Health Ministry in Argentina, the average life expectancy for trans\* individuals in that country is thirty-five years (Ministerio de Salud 2011), as compared to seventy-four years for cis males and

eighty years for cis females (CIA 2012).<sup>1</sup>

A particularly distressing feature of the murder of trans\* individuals in Latin America is the extreme level of violence that frequently accompanies homicides. In his May 2011 report to the Human Rights Council, Christof Heyns—the United Nations (UN) Special Rapporteur on extrajudicial, summary or arbitrary executions—highlighted the murder of Lorenza Alvarado Hernández, a twenty-three-year-old trans\* woman from Comayagüela, Honduras, in December 2010 (Heyns 2011). Alvarado Hernández was found dead in a ditch, her body beaten and burned, with used condoms nearby suggesting she had also been raped before death. News reports indicated that blows to Alvarado Hernández’s face from stoning were of such severity as to render her remains virtually unrecognizable (International Gay and Lesbian Human Rights Commission 2011).

In addition to violence, transphobia in Latin America manifests as longstanding and severe restrictions in access to health care, employment, and education (REDLACTRANS and International HIV/AIDS Alliance 2012). In its 2012 *State-Sponsored Homophobia* report, the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) notes that there are currently no national laws in existence in Latin America that prohibit employment discrimination based on an individual’s gender identity or expression (ILGA 2012).<sup>2</sup> Diane Rodríguez, director of the Ecuadorean transgender rights group Silueta X, has recounted

how she was forced to give up her university studies because of “professors and other officials who, upon seeing my body in transition, retaliated against me and harassed me in every sense of the word” (Women’s Communication Workshop, Varea, and Cordero 2008). Rodríguez states that trans\* persons are frequently kicked out of their homes at a young age and, with few support networks in place, are forced into informal employment, such as sex work (Green 2011). Indeed, members of the group, Organizacion Trans Reinas de la Noche (OTRANS) write that sex work is frequently “the price they must pay” in order to be able to live and express their true gender identity (Merlo and Murali 2012). However, participation in the sex trade exposes trans\* individuals to significant health risks, and communities in Latin America remain disproportionately affected by HIV/AIDS. According to recent statistics, while the HIV incidence rate among the general female population across Latin America is approximately 1 percent, trans\* women currently experience the virus at a rate of 35 percent (Gillette 2013).

### **A New Sensitivity: Reforming Gender Identity Recognition**

Significant and complex barriers have obstructed, and continue to obstruct, the realization of trans\* equality in much of Latin America. In recent years, however, policy makers across the region have begun to show greater sensitivity to the abuses faced by trans\* persons. This has shown up in numerous legal and policy initiatives, such as



public education campaigns and comprehensive antidiscrimination laws. It is in the dual areas of legal recognition of gender identity and assistance for those who seek to medically transition, however, that a number of states in Latin America have had a particularly meaningful impact and are at the forefront of global reform.

The recent positive steps toward the legal recognition of gender identity in Latin America have manifested themselves in a number of ways. In 2009, the Parliament in Uruguay passed a landmark statute on the legal recognition of trans\* people (BBC News Americas 2009). The law, which begins by affirming that “Everyone has the right to free development of [their] personality according to [their] own gender identity,” permits individuals to amend their name and gender (either male or female) in the official civil register and on all identity documentation, such as passports and birth certificates (National Center for Transgender Equality 2009). The right to affect a legal name change has also won approval in Ecuador, where the Office of the Ombudsman successfully argued that the anti-discrimination protections in Title 2, Article 11 of the new Constitution entitled five trans\* people to be issued with amended identity cards (International HIV/AIDS Alliance 2010). In Peru, the Civil First Courtroom (“Primera Sala Civil”) of the Superior Court of Lima ruled in August 2012 that a trans\* woman, Fiorella Vincenza Cava Goicochea, was entitled to change the name and sex markers on her identity papers

(Hidalgo 2012). The court ordered the District Municipality of Miraflores to issue Cava Goicochea with rectified documents. Similarly, in 2010, a court in Chile held that access to genital reconstruction surgery could not be a prerequisite for a trans\* man to change the name and sex on his legal documents (ILGA 2010).

In Cuba and Brazil, authorities have gone beyond the legal recognition of gender identity and begun offering free public health services to trans\* individuals. In Chile, authorities are slated to begin providing similar services from 2013. In Cuba, Resolution 126 of 4 June 2008, issued by the Ministry of Public Health, established a specialized center in Havana for the provision of integrated care, including counseling, hormone therapy, and sex reassignment surgery (Gorry 2010). In addition, Cuba’s National Center for Sex Education (Centro Nacional de Educación Sexual, or CENESEX), the high-profile sex education center run by Mariela Castro, daughter of President Raul Castro, has continued to advance the National Strategy of Care for Transsexuals, bringing together officials from all levels of government including the education, labor, and justice ministries (Acosta 2008). In January 2010, CENESEX, along with the Cuban Multidisciplinary Society for Sexual Studies (SOCUMES) and the National Commission for Comprehensive Attention to Transsexual People (the National Commission), issued a joint declaration supporting the declassification of transsexuality as an illness (Gorry 2010).



In Brazil, the Fourth Regional Federal Court in Rio Grande do Sul ruled in 2007 that the Ministry for Health was required to provide free sex reassignment surgery to qualifying individuals or it would face a fine of \$5,000 per day (Associated Press 2007). The court agreed with federal prosecutors that the absence of publicly funded surgeries violated the constitutional right to medical care. In Chile, Health Minister Jaime Manalich announced in May 2012 that, beginning in 2013, free or subsidized sex reassignment surgery would be available to individuals in that country (Harrison 2012; Poladian 2012). Entitlement will be determined by a person's income bracket and may directly benefit up to four thousand trans\* people in the country (Poladian 2012).

All of these new measures represent, as Uruguayan activist Diego Sempol states, an incredible "step forward" for trans\* communities in Latin America (BBC News Americas 2009). Legally recognizing an individual's self-identified name and gender is an express acknowledgement on the part of governments across the region that trans\* individuals face a real risk of violence and discrimination when they present

in a way that does not conform with the gender markers on their personal documents. Similarly, in making hormone treatment and sex reassignment surgery freely available through the public health care system, the authorities in Cuba, Chile, and Brazil are removing a financial obstacle that had previously prevented thousands of people from receiving appropriate and much-needed care. However, in addition to the clear, tangible advancements for the rights of trans\* people introduced by these new initiatives, there are a number of additional developments that, while perhaps less noticeable, are no less important and that, when compared with prevailing trends in Europe and North America, place Latin American policy makers at the forefront of recognizing gender identity.

A requirement for sex reassignment surgery remains majority practice worldwide in those countries that legally recognize gender identity changes. It is, however, not best practice if seeking to promote the health and agency of trans\* individuals. In both Uruguay and Cuba, authorities have stressed that the legal recognition of an individual's preferred gender identity, as well as ac-

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cess to state-subsidized health care are not conditional upon that individual submitting to sex reassignment surgery or forced sterilization (National Center for Transgender Equality 2009; Acosta 2008). In discussing Resolution 126, Mariela Castro stated that the policy “establishes all of the aspects of care for transsexuals, including the operation for those who qualify and are interested, because not all transsexuals want the surgery” (Acosta 2008).

Sex reassignment surgery and sterilization are invasive, often irrevocable, procedures. Individuals who seek to legally change their gender identity may reject sex reassignment surgery for numerous reasons, including trauma to one’s body, medical complications, and maintaining the option of having children post-transition. The World Professional Association for Transgender Health (WPATH) has stated that “no person should have to undergo surgery or accept sterilization as a condition of identity recognition” (WPATH 2010). Yet, despite this advice and an express statement on the issue by the Council of Europe’s Commissioner for Human Rights (Hammarberg 2009), sex reassignment and sterilization remain a requirement in twenty-nine European countries (Council of Europe 2011), including Italy, France, and the Netherlands (ILGA-Europe 2012). In early 2012, Swedish policy makers explicitly declined to remove the requirement of sterilization from their national laws (*Huffington Post* 2012). Sex reassignment surgery is prohibitively expensive, with reports of treatment costing

up to \$30,000 in some Latin American countries (Poladian 2012). While Cuba, Chile, and Brazil each now provide, or are planning to provide, differing levels of state subsidy for treatment, they remain a small minority of countries, and sex reassignment surgery thus remains out of reach for the vast majority of trans\* persons in Latin America. By refusing to require sex reassignment surgery and sterilization for the legal recognition of gender identity, governments in Latin America are helping to end the promotion of outdated and harmful notions of gender binary and are ensuring that the bar for legal recognition is not set at a financial height that most trans\* individuals will never be able to reach.

Latin American policy makers are increasingly sensitive to the dangers of breaking up established families. In Europe, fifteen states currently require trans\* individuals to be unmarried or to seek a divorce before they are entitled to have their preferred gender identity legally recognized (European Parliament Directorate-General for Internal Policies 2010). In many European countries, such as Ireland, the “divorce requirement,” as it has come to be known, is most often couched in terms of avoiding same-sex marriages (Ryan 2012). This unhelpful conflation of two entirely separate issues, sexual orientation and gender identity recognition, has unfortunately been accepted and affirmed by a recent judgment of the European Court of Human Rights (ECtHR 2012). A divorce requirement is extremely harmful to trans\* indi-

viduals and their loved ones. It leaves committed spouses without legal status and deprives the children of trans\* persons of formal recognition of their families. Forcing couples to terminate a marriage is an additional stress and burden on trans\* people during what can often already be a physically and emotionally challenging period. U.K. Member of Parliament, Hugh Bayley (2004) stated during debates on the United Kingdom's Gender Recognition Act 2004 that he could think of "no other circumstance in which the State tells a couple who are married and who wish to remain married that they must get divorced." It is, no doubt, for these very reasons that policy makers in Latin America have begun to move away from their European counterparts and are rejecting mandatory divorce provisions. The 2009 law in Uruguay, for example, does not require an individual to be childless or unmarried to invoke its provisions (National Center for Transgender Equality 2009). Unlike a majority of their European counterparts, Latin American legislatures, particularly the Argentine Congress discussed below, are showing an ability to separate out issues of gender identity and sexual orientation. They understand that recognizing gender identity has nothing to do with allowing same-sex marriage and that attempting to conflate the two issues ultimately advances the debate on neither. They also understand, as the German Federal Constitutional Court held in 2008, that divorce requirements violate the basic human rights of trans\* people by forcing individuals to choose

between two fundamental guarantees: personal integrity and marriage (German Federal Constitutional Court 2008). By rejecting divorce as a requirement for the legal recognition of gender identity, legislatures in Latin America are ensuring that trans\* individuals enjoy both stronger legal securities and greater peace of mind.

### **Continued Existence of "Gatekeeper" Requirements**

The laws regarding legal recognition of gender identity that have been adopted in Latin America are not, however, immune from critique. Despite the increasingly progressive sentiments embraced by policy makers, a number of worrying gaps do still remain.

First, although governments in Chile and Brazil are now required to subsidize sex reassignment surgery for qualifying individuals, they both retain a discretionary power to determine the conditions that trans\* persons must meet in order to be eligible for the treatment. The fear is that both governments will set the bar, particularly the indigence test, at a level that trans\* people, although disproportionately excluded from economic activity (RED-LACTRANS and International HIV/AIDS Alliance 2012), will not be able to meet. Although, the Chilean Minister for Health stated that publicly funded medical transition services would be available to trans\* individuals in that country beginning in 2013, there has since been no reported discussion of the form that assistance will take, and perhaps even more instructive, there is,

as yet, no reported case of an individual being accepted for treatment.

Second, the policy reforms in both Uruguay and Cuba require that individuals live as their preferred gender for a period of at least two years before they are entitled to have their gender identity legally recognized by the state. In Cuba, this time period has been termed “real life experience” and mirrors the legal requirements in numerous European countries, such as the United Kingdom. Forcing people to prove that they have lived in their preferred gender is problematic in a number of ways. It suggests a suspicion on behalf of authorities that an individual’s desire to transition is really just a passing phase and not something to be immediately engaged with and that trans\* individuals should have to earn the right to be taken seriously. It is in some ways akin to asking a young lawyer or accountant to complete a period of training before they are entitled to a full professional license, as if to say that there is a rigid set of criteria for being a man or woman and that trans\* people must prove that they meet that criteria before society grants them recognition.

Finally, the new policy measures in Latin America, while moving away from the requirement of surgery, still place the ultimate determination of an individual’s gender identity in the hands of medical professionals and do not fully respect the agency of trans\* people themselves. In Uruguay, the 2009 law establishes an interdisciplinary medical panel to consider applications for gender recognition. This panel’s primary responsibility is to as-

sess whether a medical professional has attested to the applicant’s stable and persistent gender dysphoria (National Center for Transgender Equality 2009). Similarly, in Cuba, persons seeking official recognition of their gender identity must first submit to a two-year diagnostic evaluation, at the end of which it is the National Commission and not the individual him or herself, who determines whether the person is trans\* (Gorry 2010). Dr. Alberto Roque, a member of the National Commission, has stated that “our job is to help transgender people, or people who are not clear about their gender identity, define that identity” (Gorry 2010). In Chile, where there currently exists no specific law permitting a change of name and sex on official documents, access to facilities for transitioning is entirely conditional upon medical and legal agreement. The decision as to whether a person should be entitled to access such medical facilities ultimately rests within the sole discretion of the courts (Garcia 2012).

The continued pathologization<sup>3</sup> of trans\* individuals is deeply troubling in all contexts, but it is particularly disheartening in Latin America where policy makers have otherwise shown themselves to be sensitive to the issue of legally recognizing gender identity. The requirement that individuals be diagnosed with gender dysphoria is not only inconsistent with the lived experiences of many trans\* people, it is also deeply offensive. Within the trans\* communities of Latin America, as in communities across the world, there

are those who strongly object to the suggestion that their gender identity is a mental illness. The requirement of medical treatment therefore creates a situation where, in order to have their preferred gender recognized on their identity documentation, many trans\* individuals in Latin America will have to claim to suffer from a mental illness that they do not even believe exists. Requiring a diagnosis of gender dysphoria also ignores the fact that, for reasons including social isolation, fear of prejudice, and a lack of resources, trans\* individuals in Latin America are significantly less likely to have access to even the most basic health care resources (REDLACTRANS and International HIV/AIDS Alliance 2012). How can trans\* persons be expected to attain a certified diagnosis of gender dysphoria when many cannot even go to their local medical clinic?

### **“The Most Progressive Gender Identity Law in History”**

It was in the context of the advancement on the legal recognition of gender identity by Latin American states, but also in the face of continuing discrimination against trans\* communities across

the region, that the Congress of Argentina came to pass the Gender Identity and Health Comprehensive Care for Trans People Act on 9 May 2012 (Nasif Salum 2012). The law, which may potentially affect as many as 22,000 trans\* people across Argentina (Quinn 2012), has been described by advocates as the “most progressive gender identity law in history” (Transitioning Africa 2012). By its Article 4, the new act permits individuals to amend the gender marker on all their official documents by simply submitting an affidavit that confirms their desire for the change. Unlike the reforms in neighboring Uruguay and in Cuba, the Argentine law does not mandate the intervention of a medical officer nor does it require that an individual first be diagnosed with gender dysphoria. All that matters is the express self-identification of the trans\* person involved (Schmall 2012). Commenting on the new law, Alejandro Nasif Salum, secretary of international relations for the Federación Argentina LGBT (FALGBT), concluded that one “could say that the Argentine State depathologized trans identities” (2012). Indeed, the Argentine law is the first legal regime that recognizes a person’s true gender identity not because of what a doctor has said but rather solely

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The new law requires public and private health care providers to offer full coverage for sex reassignment surgery and hormone treatment. Health care for trans\* persons is now included in Argentina's overall national health care policy, the Obligatory Medical Plan. Although Argentina operates a provincial-based medical system, so that each province is ultimately responsible for implementing the terms of the new law, regional policy makers must respect their obligation to provide free care, and all providers operating within a given province, whether public or private, will not be able to charge extra fees to individuals who choose to undergo physical transition (Warren 2012). Unlike the plans in both Chile and Brazil, the obligation to provide subsidized health care is not conditional on a means test. Argentina has established a general right to medical services for transitioning that hopefully will guarantee access to treatment for all trans\* persons who wish to avail thereof.

One of the major criticisms directed at previous gender recognition laws, both in Latin America and in Europe, is that they have largely excluded the voices of trans\* youth. This most frequently manifests itself in strict requirements that individuals be at least eighteen years old before they are entitled to benefit from the legal recognition of their self-identified gender. Such restrictions fail to acknowledge both the existence of trans\* young people and the extremely high levels of preju-

dice that these individuals face because of their gender identity. Trans\* youth are not only frequently rejected by family members but are also excluded from vital services, such as education, either because of direct discrimination or because the service providers refuse to respect the young people's gender identification. The Argentine law, however, expressly permits individuals under the age of eighteen years to change their legal gender with the approval of their guardians (Warren 2012). Where a guardian desires to change a minor's legal gender without the latter's consent or refuses to agree to a minor's legal gender recognition, a judicial officer may intervene to protect the rights of the young person (Warren 2012).

On 2 July 2012, Argentine President Cristina Fernández de Kirchner invited a number of leading trans\* activists to the government palace in Buenos Aires and personally handed them their new identity cards. Speaking to the audience, the president stated that the new law is not about tolerance but rather about extending basic equality to trans\* individuals (Duque 2012b). By late December 2012, 1,720 trans\* individuals had already processed changes to their official identification records. Trans\* persons across Argentina have sought to avail themselves of the new law's provisions. In a bulletin published on 1 January 2013, the Department of Immigration and the Argentine Civil Registry announced that qualifying foreign residents living in Argentina would now be able to request a change of identity on their national ID cards. In order to

be eligible, an individual must first possess permanent residency in Argentina, a national ID card, and a consular note confirming that the foreign resident's new gender identity is not recognized in his or her country of origin (Berry Appleman and Leiden 2013).

Nasif Salum sums up the Argentine law by observing that while some of the features in the new statute are present in other legislation around the world, “the law in Argentina is really the only one with all these advances at the same time and in a single act that deals comprehensively with the rights of trans people” (2012). In the wake of the law's passing, trans\* rights activists around the world, especially those in Europe, have held out Argentina as a model of best practice when dealing with gender recognition. This is particularly so for activists in both Ireland and the Netherlands, who are currently seeking to pass comprehensive and rights-observant legislation but who have thus far been frustrated by governments determined to further enshrine outdated gatekeeper checks, such as authorization panels and divorce requirements.

While generally accepted by advocates as the “gold standard,” the Argentine law has also been subject to certain critiques. In a recent interview, Esteban Paulón, president of FALGBT, noted that those who drafted the law had provided scant detail on how the health coverage provisions should operate at the provincial level. Advocates have been obliged to work with each provincial government individually, creating multiple different services to

carry out and enforce the terms of the law (Zapata 2012a). In December 2012, the newspaper *La Nación* reported that there were still only two hospitals in all of Argentina accredited to carry out sex reassignment surgery; consequently, individuals who had applied for medical transition services, under the terms of the new law, now faced months-long waiting lists to receive treatment (Massa 2012). Advocates also note that while the new law has gone some way to challenging rigid conceptions of gender binary, it still presents trans\* persons with a flat choice between a masculine or feminine identity. For those persons who see their gender as fluid rather than fixed, the legislation is therefore of limited relevance. Some within Argentina's trans\* community view their movement's next project as educating and persuading authorities on the importance of removing gender from personal identification documents or introducing an “other” marker, similar to that currently envisaged by activists in Nepal (Dot429 2013).

### **How Was Reform Achieved? Lessons for Trans\* Activists Worldwide**

The current progress on trans\* rights in Argentina and across Latin America poses important questions, not only for individuals on the ground but also for activists around the world who are seeking to accomplish similar advances in their own countries. How have advocates in Latin America, facing a history of extreme violence and discrimination



against trans\* communities, been able to achieve such significant legislative and court victories? And can the strategies employed, and lessons learned, in that region be used to further trans\* equality more generally around the globe?

The first point to note is that the advances on the legal recognition of gender identity in Latin America have not arisen within a vacuum, but rather form part of a much wider movement across the region recognizing the notion of “LGBT rights.”<sup>4</sup> In 2008 and 2009, Ecuador (Jones 2013) and Bolivia (Hurtado 2010) both enshrined equality on the basis of sexual orientation and gender identity within their national constitutions. The superior courts in Mexico (McCormick 2012) and Brazil (Barnes 2011) have cast doubt upon the validity of gay marriage bans, and in Colombia the Constitutional Court has given Parliament until June 2013 to legislate for the status of same-sex unions (St. Amand 2013). In July 2012, following the horrific murder of Daniel Zamudio, a young gay man who was fatally wounded during a homophobic attack in Santiago, Chile, President Sebastián Piñera signed a landmark anti-discrimination statute into law, granting legal protection to individuals on the basis of sexual orientation and gender identity (Associated Press 2012). The ban on gay men donating blood, still enforced in the United States and much of Europe, has recently been repealed in both Mexico (Duque 2012c) and Colombia (Zapata 2012b). At the pan-regional level, the Inter-American Commission on Human Rights (IA-

CHR) created a specialized unit for lesbian, gay, bisexual, trans\*, and intersex (LGBTI) people in January 2012 (Organization of American States 2011). Furthermore, in the case of *Atala Riffo and Daughters v. Chile*, the Inter-American Court of Human Rights (IACtHR) ruled that Chile had violated the privacy and nondiscrimination rights of a lesbian mother by awarding custody of her children to her former husband on the sole basis of the mother’s sexual orientation (IACtHR 2012).

Advances on issues of sexual orientation, or progress achieved under the umbrella term “LGBT rights,” do not always (or even often) result in identifiable benefits for trans\* communities. It has long been a criticism made by trans\* activists around the world that using the phrase “LGBT” has often allowed gay rights advocates to pursue a gay-centric, trans\* exclusionary agenda, while claiming to promote equality for all and to speak with a community-wide voice. The general movement toward LGBT rights in Latin America cannot be taken, ipso facto, as a reason for the more specific progress experienced in legally recognizing gender identity. However, there does appear to be evidence that the recent victories won by trans\* people across the region do share certain origins, and are in some ways intertwined, with the general LGBT rights movement. A prime example of this inter-connectivity can be seen in Cuba, where CENESEX and its director Mariela Castro interpret the notion of “sexuality” in its widest form (encompassing what English-language



advocates would term “gender”) and attempt to educate society both on the role that sexuality/gender plays in all individuals’ lives (whether straight, gay, or trans\*) and how lack of knowledge or misunderstanding can give rise to prejudice and discrimination (CENESEX 2013).

Perhaps the most prominently publicized victory for LGBT rights in Latin America over the past five years has been the passage of Argentina’s same-sex marriage law in July 2010. In analyzing that country’s new gender identity law, Nasif Salum (2012) has stated that one should not underestimate how important the earlier marriage law was in establishing the ground work and setting the tone for the later debate on gender recognition. Introducing the marriage bill in Congress and allowing the deputies to debate not only the specific law in question but also the wider concepts of LGBT equality created a very clear public space for individuals

issues, often for the first time, and was central to breaking down commonly held misconceptions about the LGBT community.

The fact that the marriage equality struggle was eventually won in Argentina had the effect of implanting into the general public’s consciousness an acceptance that people are entitled to equality irrespective of whether they identify as gay or trans\* (Nasif Salum 2012). One possible reason for this might be that in Argentina, as in countries such as the United States and Great Britain, the marriage equality debate has transcended the simple notion of recognizing same-sex relations and has come to symbolize the wider concept of LGBT equality. In accepting gay marriage, Argentines were perhaps, whether consciously or not, reconciling themselves with the more basic idea that nobody should be discriminated against on the basis of sexual orientation or gender identity.<sup>5</sup> Certainly, Nasif Salum sug-

Introducing the marriage bill in Congress and allowing the deputies to debate not only the specific law in question but also the wider concepts of LGBT equality created a very clear public space for individuals to discuss issues surrounding sexual orientation and gender identity.

to discuss issues surrounding sexual orientation and gender identity. While, as in many countries previously, this debate was not always favorable to sexual minorities, it did challenge Argentines, at all levels of society, to consider these

gests that without the earlier marriage law, those proposing the gender recognition bill would most likely have had to argue over every minute detail, with a result that any final legislation passed would ultimately have been consider-

ably less progressive than the actual statute eventually signed into law. The marriage law changed the landscape of sexual politics in Argentina, embedding the idea that LGBT rights are something not only that society must accept but also that the institutions of state have a positive responsibility to protect (Nasif Salum 2012).

The Argentine example is important for all advocates around the world seeking the legal recognition of gender identity, but particularly those in countries that are currently debating related notions of LGBT equality. In the United States, for example, trans\* advocates may be able to capitalize on a growing public awareness of LGBT issues, driven in large part by the marriage equality fight, in order to press, at the state level, for more rights-observant gender identity recognition laws and, at the federal level, for a trans\* inclusive Employment Non-Discrimination Act (ENDA).

The implementation of both government and civil society-led public awareness and sensitization campaigns has been a central feature of recent advances on trans\* issues in Latin America. Speaking about earlier unsuccessful attempts to enact trans\* equality measures in Cuba, CENESEX's Castro recalls that shortly after the first surgical interventions in that country during the late 1980s, sex reassignment surgery was suspended as a result of "inadequate media coverage," reporting that was both ill-informed and hostile to the rights of trans\* people, and the subsequent "virulent public reaction" (Gorry 2012). "[We learned that this type of

initiative] requires an unflagging educational process and a lot of explanation so society better understands transsexuality; we are the ones who are limited, not transsexual people" (Gorry 2010).

In February 2012, the Brazilian State of São Paulo, in partnership with the São Paulo City Metro, launched a campaign to combat homophobia and transphobia, entitled "See beyond prejudice. Respect differences" (Littauer 2012). The first stage of this project specifically aims to combat discrimination and prejudice directed toward the state's trans\* community. In Mexico, the trans\* rights group Fortaleciendo la Diversidad was honored with the 2008 Red Ribbon award at the International AIDS Conference in recognition of its groundbreaking community outreach work in San Luis, including running trans\* awareness workshops for members of the police (International HIV/AIDS Alliance 2009). In Argentina, in the months before Congress's vote on the new law, trans\* activists launched a highly praised campaign of advertisements, highlighting popular misconceptions about the trans\* community and the discrimination that trans\* persons face on a daily basis (Duque 2012b). In addition, FALGBT issued the *Guide for Communicators on Gender Identity*, educating journalists on how to use appropriate terminology in their coverage of trans\* issues (Nasif Salum 2012).

The measures adopted in Latin America can serve as a simple yet highly effective model for trans\* activists around the world. The invisibility of trans\* identities only serves

to reinforce public ignorance of trans\* experiences. By raising awareness of trans\* lives—free from stereotyping or hyperbole—activists in countries such as Mexico and Argentina have allowed members of the public, perhaps for the first time in their lives, to see and engage with gender identity and to appreciate the negative impact that refusing legal recognition can have upon one's ability to meaningfully participate in society. In Chile, the Organización de Transexuales por la Dignidad de la Diversidad has now sought to replicate Argentina's advertisement campaign, creating its own project that invites trans\* rights advocates and allies to upload videos on YouTube answering a simple question: "Why do you want a gender identity law?" (Duque 2012a). Sensitization training for the media, such as FALGBT's terminology guide, also has the potential to radically improve press coverage of trans\* identities worldwide. In the United Kingdom, Suzanne Moore's recent flippant reference to women wanting the body of a Brazilian transsexual in the *New Statesman* (Moore 2013) and Richard Littlejohn's tragic outing in the *Daily Mail* of trans\* teacher Lucy Meadows (Lees 2013), who later committed suicide, illustrate the continuing dangerous consequences of uninformed discussion within the media. It seems unlikely that policy makers in the United Kingdom will ever be able to enact the much-needed reforms to that country's gender identity recognition laws while writers in the *Observer* newspaper can still refer to trans\* women, as Julie Burchill recently

did, as "a bunch of bed-wetters in bad wigs" (Young 2013).

## Conclusion

Latin America remains an extremely dangerous and discriminatory place for trans\* individuals to live. According to Transgender Europe's Trans\* Murder Monitoring project, approximately 80 percent of all reported trans\* murders worldwide in the past five years have taken place in Central and South America (Transgender Europe 2012). Trans\* people across the region continue to face discrimination and prejudice simply for being who they are and going about their lives. In such circumstances, the progressive legal developments discussed in this article can and will have only limited effect without further measures to end trans\* human rights violations. It has not been the purpose of this article to suggest that the legal recognition of gender will ameliorate the myriad problems experienced by trans\* persons across the region. Rather, the article merely seeks to show that, in certain countries across Latin America, policy makers have begun to adopt rules on the recognition of gender identity that, unlike similar measures in North America and Europe, reject the harmful notions of a rigid gender binary and are beginning, for the first time, to prioritize the self-identification of trans\* communities.

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## Endnotes

1. Cisgender, or cis, refers to a non-trans\* person (i.e., a person whose gender identity and gender expression are aligned with the sex assigned at birth).

2. Australia and eighteen European countries have legislated against employment discrimination on the basis of gender identity. The Northwest Territories in Canada and a number of cities, counties, and states in the United States also prohibit such discrimination.

3. The pathologization of trans\* identities means the classification of such identities as a medical condition, as opposed to a matter of self-identification and/or expression.

4. Here, I use the term "LGBT rights" as it is often used in the media, as a general catchall term for developments around sexual orientation and gender identity. It must be recognized that the media often uses this term even where a measure only affects gay men,

or lesbians and gay men, or, less frequently, trans\* communities. This can be seen in the fact that I have included in this paragraph specific reference to marriage equality debates and the gay blood ban. In coverage around these issues, the media often uses the terminology "LGBT rights." It is for this reason that I have decided to specifically use this term for this paragraph. I do not wish my specific usage of the term in the context of this particular paragraph to be taken as an endorsement of the general use of this term for every issue relating to sexual orientation or gender identity. There may be cases where the description "LGBT rights" is appropriate. However, in other contexts, "LGBT rights" has been used to create an impression of diversity in circumstances, where in reality, the rights of trans\* communities have been systematically ignored. This can be cited as a factor leading to the disempowerment of trans\* communities and to the silencing of trans\* voices.

5. A flip side to this argument, however, as has been seen in a number of American states that already recognize marriage equality, is the fear that if people consider marriage equality as a synonym for full LGBT equality, they may view the recognition of marriage equality as a sign that LGBT people now, both legally and in practice, share a fully equal place in society. However, as experience in numerous jurisdictions has shown, even after the introduction of marriage equality, LGBT people, particularly trans\* communities, continue to experience both formal and societal discrimination and prejudice.

# Still Serving in Silence

## Transgender Service Members and Veterans in the National Transgender Discrimination Survey

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**Abstract:**

On 20 September 2011, the repeal of “Don’t Ask, Don’t Tell” (DADT) went into effect in the U.S. military. The repeal marked the end of discriminatory practices in the military based on sexual orientation, but it did not end the prohibition on transgender military service. The National Transgender Discrimination Survey (NTDS) found that transgender Americans serve in the military at a high rate; 20 percent of NTDS respondents had served in the armed forces as compared to 10 percent of the U.S. general population. This study draws upon both quantitative and qualitative data about transgender soldiers and veterans who responded to the NTDS to describe who these transgender soldiers and veterans are and what their experiences have been in regard to their military service. This study outlines respondents’ reported issues in obtaining corrected identity documents, accessing military health care, and experiences of discrimination. This study finds that transgender veterans experience substantial barriers in these areas and also experience high rates of family rejection and homelessness.

**Introduction**

**O**n 19 September 2008, United States District Judge James Robertson ruled in favor of the American Civil Liberties Union (ACLU) and Colonel Diane Schroer, finding that the Library of Congress had engaged in illegal employment discrimination

against Schroer. The Library of Congress had revoked Schroer’s job offer after learning she planned to transition from the sex she was assigned at birth—male—to live in accordance with her gender identity as a woman. Schroer had been an Airborne Ranger-qualified Special Forces officer and received numerous decorations over her twenty-five-year career with the Army, including the Defense Superior Service Medal. When Schroer transitioned from male to female after retirement from active duty, these accomplishments did not protect her against anti-transgender employment discrimination. In some ways, Schroer’s story is unique because she was decorated, ranked highly, and was uniquely qualified for the job she sought. But this case raises the question: if Diane Schroer, with all of her accomplishments, faced employment discrimination, then what are the experiences of other transgender veterans?

The end of 10 U.S.C. § 654, more commonly referred to as “Don’t Ask, Don’t Tell” (DADT), came about on 20 September 2011. From that day forward, military personnel of all sexual orientations could serve without hiding their partners or identities. However, this repeal process did not allow for military service by transgender people because, though engaged in the same social movement that led to the repeal of DADT and often conjoined by community affiliations in the greater culture, transgender people were technically never disallowed from service by DADT (Kerrigan 2011). The exclusion of transgender people is not mandated



by Congressional legislation; it exists within the military medical code, which lays out exclusions on the basis of what are deemed “psychosexual disorders,” including transsexualism, as well as on the basis of cross-dressing or a history of gender transition (Witten 2007). Therefore, not only are transgender individuals who wish to join the military prohibited from doing so, but those already serving honorably in the armed forces can be ousted if suspected of being transgender.

In light of the repeal of DADT, as well as the high rates of anti-transgender discrimination reported throughout the United States, we sought to answer the following question: what is the situation for transgender service members, potential service members, and veterans today? In order to offer a holistic look at these groups, our study examines data collected through the National Transgender Discrimination Survey (NTDS) to provide a quantitative and qualitative analysis. First, we will review literature about the experiences of transgender service members and veterans. Second, we will describe the methodology for the NTDS and the current study. Third, we offer a demographic portrait of the respondents to the NTDS survey who served in the military. Fourth, we review life outcomes for NTDS veteran respondents versus NTDS nonveteran respondents. And finally, we provide findings from a qualitative analysis of open-ended questions from the NTDS to look more deeply at the experiences of those who were unable to join the military as well as others who served and/or

mentioned military service in their free response answers.

## Literature Review

Little peer-reviewed research has been published regarding transgender service members or veterans. George Brown’s first study of transgender veterans described a motivation to join the armed forces that was common among those who had transitioned from male to female (Brown 1988). Brown named this motivation “flight into hypermasculinity,” which describes the desire to join the armed forces in an attempt to “correct” or repress feelings of incongruence of sex assigned at birth and gender identity (Brown 1988, 531). Brown hypothesized that the flight into hypermasculinity among transgender people assigned male at birth would result in an overrepresentation of transgender women in the U.S. military. Brown reported to Courthouse News Service that findings from a forthcoming study of data from five million service members will show that the prevalence of male-to-female transgender people in the military is twice that of the general population (Klasfeld 2012).

Brown teamed up with Everett McDuffie for a follow-up to Brown’s 1988 study, in which they examined the records of seventy active duty service members and veterans who were evaluated for gender-related issues or distress (McDuffie and Brown 2010). They found that 43 percent of these veterans—who were predominately older than forty years of age, white, assigned male at birth and now identifying as

women, and employed with at least a high school education—suffered from psychiatric problems such as depression, substance abuse, and combat-related post-traumatic stress disorder (PTSD); additionally, 61 percent reported suicidal ideation, with 11 percent attempting suicide (McDuffie and Brown 2010).

The majority of these soldiers and veterans described motivations for joining the armed forces similar to Brown's flight into hypermasculinity. Those who had reported a flight-into-hypermasculinity motivation for joining the armed services frequently reported that military service provided no relief from their distress related to their gender identity. Furthermore, McDuffie and Brown note, "This population of transgendered veterans generally described the health care systems in the Department of Defense and in the Department of Veterans Affairs as hostile and insensitive to their medical and mental health care needs in spite of the fact that they honorably served their country and were entitled to health care benefits" (McDuffie and Brown 2010, 28).

In 2008, the Transgender American Veterans Association (TAVA) and the University of California's Palm Center fielded a survey among transgender veterans to learn more about their demographics and their experiences both in and out of the U.S. military and with the

VA (Bryant and Schilt 2008). According to the survey, 64 percent of respondents identified as transgender on the male-to-female spectrum; 40 percent had a bachelor degree or higher; 44 percent made \$40,000 or more annually, while 10 percent reported an annual income of \$10,000 or less; and 54 percent owned their own homes (Bryant and Schilt 2008). Additionally, 38 percent identified their sexual orientation as heterosexual, while the remaining 62 percent identified as lesbian, gay, bisexual, or another sexual identity (Bryant and Schilt 2008). The DADT policy was in effect at the time of the survey, and respondents reported being questioned by peers (38 percent) and officers (14 percent) about their sexual orientation—a violation of the policy (Bryant and Schilt 2008). The report noted that removing the DADT policy would not be a panacea for the problems transgender service members and veterans face.

In addition, 97 percent of the transsexual-identified respondents to the TAVA survey said they were not able to transition until they had left the military (Bryant and Schilt 2008). Outside of the military, nearly one-third of respondents reported experiencing some form of discrimination in hiring or in the workplace. One-third reported some form of discrimination outside the workplace, mainly in obtaining

Transgender veterans who sought or received health care through the VA reported discriminatory treatment by doctors (22 percent) and staff (21 percent).

corrected identification documents. Transgender veterans who sought or received health care through the VA reported discriminatory treatment by doctors (22 percent) and staff (21 percent). Subsequent to Bryant and Schilt's study, the Veterans Health Administration (VHA) issued a directive mandating that all VA-covered medical care be provided to transgender and intersex veterans in the VA health system in a manner free from discrimination and consistent with one's self-identified gender (U.S. Department of Veterans Affairs 2011; U.S. Department of Veterans Affairs 2013). This directive, issued in June 2011 and renewed in February 2013, also states that "sex reassignment surgery cannot be performed or funded by VHA or VA" (U.S. Department of Veterans Affairs 2011, 2).

## Methods

This study utilizes data collected through the National Transgender Discrimination Survey, which was conducted by the National Center for Transgender Equality (NCTE) and the National Gay and Lesbian Task Force (the Task Force). Over a six-month period beginning in fall 2008, 6,456 transgender and gender nonconforming people in the United States, the largest survey sample to date, answered a seventy-question survey, reporting on their experiences of discrimination and abuse at home, in school, in the public sphere, and in the workplace (Grant et al. 2011). The survey also asked respondents about their military service, whether they had been discharged due

to anti-transgender bias, and their ability to update military discharge records.

Respondents for the survey were recruited in collaboration with 800 active transgender-led or transgender-related organizations nationwide that announced the survey to their membership. The survey link was also disseminated through 150 e-mail lists that reach the transgender community in the United States. The survey was made available online and on paper. The final sample consists of 5,956 online responses and 500 paper responses.

In this study, we employ Pearson's chi-square tests of independence to measure within-sample relationships between service members/veterans and those who did not serve in the military. Pearson's chi-square tests are only generalizable when using random samples. The test's ability to find statistical significance may also be limited when utilized with a nonrandom sample. Yet, the test can be used to crudely measure a statistical relationship between two variables within this sample and provide hypotheses for future research (Lájer 2007). Qualitative data provided by respondents through write-in responses to the survey were coded and analyzed to provide a more in-depth understanding of service members' and veterans' experiences with the military.

## Demographics of Veterans and Service Members in the NTDS

Of the total NTDS sample, 1,261 respondents (20 percent) reported that

they had served in the military at some point in their life. This section examines the demographic makeup of those respondents by race, gender, age, age of transition, and how “out” or open they are about their gender identity. Table 1 presents this data alongside data for respondents who did not serve and the full NTDS sample. Chi-square tests of independence are noted both here and in Table 2, which we used to assess the relationship between military service and the demographic variable listed.

The majority of respondents who had served in the military were White (82 percent), multiracial (11 percent), or Latino/a (3 percent). Of those who served in the military, 88 percent were assigned male at birth. Respondents who served in the military were older in age, with 56 percent being over the age of forty-five. They were also more likely than nonveterans to have transitioned at an older age, with half (50 percent) having transitioned after the age of forty-five. Those who served are less likely to be “out” or open about their gender identity (48 percent).

### **Life Outcomes for Service Members**

This section will examine the relationship between military service among NTDS respondents and outcomes in seven areas of life: employment, education, housing, health, identification documents, experiences with police and jails, and family acceptance. Table 2 presents this data. Each of the questions in the NTDS that refers to discrimination specifically asked respondents to report discrimination

due to anti-transgender bias. However, in some cases, the figures reported here may also speak to a complex interplay between transphobia and anti-veteran sentiment, whereby veterans are discriminated against because of a variety of assumptions made about them, such as PTSD and their mental health, their employable skills, and other assumptions.

#### **Employment**

NTDS respondents who served are more likely to have lost a job due to bias (36 percent) and/or to have not been hired for a job due to bias (53 percent) compared to nonveterans (24 percent and 42 percent, respectively). Within the workplace, NTDS respondents who served are more likely to have been harassed (54 percent) and to have survived physical violence (9 percent) and sexual violence (8 percent) at work. However, those respondents who had served in the military were less likely to have been compelled to do work in the underground economy (12 percent), such as sex work or drug sales for income, than those who had not served (17 percent).

#### **Education**

NTDS respondents who served are more likely to have attained some college education, but less likely to have completed college or a graduate degree. Of NTDS respondents who had served, 48 percent attended some college, compared to 39 percent for those who did not serve. Yet they completed college at a rate of 23 percent, compared to 28 percent for those who did not serve. Nineteen percent of those who served

**Table 1: Demographics of veteran and service member respondents, nonmilitary respondents, and the overall sample**

Demographic Category		Veteran and service member respondents	Nonmilitary respondents	Overall sample
<b>Race**</b>	American Indian or Alaskan Native only	2%	1%	1%
	Asian or Pacific Islander only	1%	2%	2%
	Black only	2%	5%	5%
	Latino/a only	3%	5%	5%
	Multiracial	11%	12%	11%
	White only	82%	75%	76%
<b>Gender**</b>	MTF transgender women	68%	41%	47%
	FTM transgender men	9%	32%	28%
	Male-assigned-at-birth cross-dressers	18%	9%	11%
	Female-assigned-at-birth cross-dressers	1%	4%	3%
	Male-assigned-at-birth genderqueers	2%	3%	3%
	Female-assigned-at-birth genderqueers	2%	11%	9%
<b>Age**</b>	18-24	7%	22%	19%
	25-44	37%	56%	52%
	45-54	29%	13%	17%
	55-64	22%	8%	11%
	65+	5%	1%	2%
<b>Age of transition**</b>	<18	2%	7%	6%
	18-24	6%	35%	29%
	25-44	42%	40%	40%
	45-54	32%	14%	18%
	55+	18%	4%	7%
<b>Outness**</b>	Generally out	52%	61%	59%
	Generally closeted	48%	39%	41%

\*Chi-square test of independence =  $p < 0.05$

\*\*Chi-square test of independence =  $p < 0.01$

**Table 2: Life outcomes of veteran and service member respondents, nonmilitary respondents, and the overall sample**

	Life outcome	Veteran and service member respondents	Non-military respondents	Overall sample
<b>Employment</b>	Lost a job due to anti-trans bias**	36%	24%	26%
	Was not hired for a job due to anti-trans bias**	53%	42%	44%
	Was harassed by someone at work due to anti-trans bias**	54%	49%	50%
	Survived physical violence at work due to anti-trans bias**	9%	6%	7%
	Survived sexual violence at work because of anti-trans bias**	8%	5%	6%
	Was compelled to do sex work, drug sales, or otherwise engage in the underground economy for income**	12%	17%	16%
<b>Educational attainment</b>	No high school diploma**	2%	5%	4%
	High school diploma only**	8%	8%	8%
	Some college**	48%	39%	40%
	College degree**	23%	28%	27%
	Graduate degree**	19%	20%	20%
<b>Housing</b>	Was evicted from a home or apartment due to anti-trans bias*	14%	10%	11%
	Experienced homelessness*	21%	18%	19%
	Owned their own home**	48%	29%	32%
<b>Health</b>	Was refused medical treatment due to anti-trans bias**	24%	18%	19%
	Postponed seeking medical care when sick or injured**	22%	29%	28%
	Is HIV positive**	2%	3%	3%
	Did not know their HIV status**	6%	9%	8%
<b>Police and jails</b>	Attempted suicide	40%	40%	41%
	Was harassed by the police due to anti-trans bias**	22%	28%	27%
<b>Family life</b>	Was put in jail or prison for any reason**	21%	14%	16%
	Was generally rejected by their families due to anti-trans bias**	67%	55%	57%

\*Chi-square test of independence =  $p < 0.05$

\*\*Chi-square test of independence =  $p < 0.01$

completed a master's or professional degree, compared to 20 percent for those who did not serve.

### **Housing**

In terms of housing, NTDS respondents who served in the military are more likely to have been evicted from a home or apartment due to bias (14 percent). Those who served in the military were also more likely to have experienced homelessness (21 percent) than those who did not serve (18 percent). This figure is nearly three times higher than the general population lifetime rate of homelessness (7.4 percent) (United States Congress of Mayors 2006). This high rate of homelessness for transgender veterans is not surprising, given that veterans of all gender identities are disproportionately represented in the U.S. homeless population. According to the U.S. Department of Housing and Urban Development (2011), nearly one in seven homeless adults is a veteran.

However, NTDS respondents who had served in the military were more likely to own their homes (48 percent). This is still much lower than the national average of 67.4 percent reported by the U.S. Department of Housing and Urban Development in the second quarter of 2009, at approximately the same time as the survey was launched (U.S. Department of Housing and Urban Development 2009).

### **Health**

Of NTDS respondents who served in the military, 18 percent go to VA clinics or hospitals to receive healthcare. The majority (58 percent) go to non-VA doc-

tor's offices for their healthcare. NTDS respondents who had served in the military were more likely to have been refused medical treatment due to bias (24 percent). However, they were less likely to have postponed seeking medical care when sick or injured (22 percent).

Respondents who served in the military are less likely to be HIV positive (2 percent) and more likely to know their HIV status. Only 6 percent of those who had served said they did not know their HIV status, compared to 9 percent of their nonveteran counterparts. It should be noted, though, that all of these figures are higher than the general US population rates related to HIV, with a general US rate of 0.6 percent (UNAIDS and WHO 2007).

There was no statistically significant relationship between military service and having attempted suicide.

### **Identification Documents**

Identity documents are a salient part of most Americans' lives and are needed when seeking employment and housing, for driving, and in a variety of other circumstances. Identity documents often list an individual's gender, and people who transition may desire to have their gender corrected on these documents. Military service records provide information about an individual's service in the armed forces, including discharge status. Respondents were asked in the NTDS about their ability to update forms of identification, including military discharge papers (the DD 214, or "Certificate of Release or Discharge from Active Duty," and the DD 215, the docu-



ment used when original information is corrected or updated). Of respondents who had served in the military, only 5 percent said they had attempted to update those documents to match their current name and gender marker and were successful. Another 10 percent said they had tried but been denied, 64 percent said they had not tried, and 21 percent marked “not applicable.” There was no significant relationship between having updated nonmilitary identifications and having served.

### Qualitative Findings from the NTDS

Respondents to the National Transgender Discrimination Survey were provided with the opportunity to write in a response to the following question, Question 70: “Anything else you’d like to tell us about your experiences of acceptance or discrimination as a transgender/gender nonconforming person?” Seventy-four NTDS participants discussed the U.S. military in their responses. Those who chose to respond about the military were predominantly White (73 percent) or multiracial (19 percent), ages twenty-five through fifty-four (74 percent), assigned male at birth (77 percent), and had served in the military (80 percent). Respondents described a variety of experiences, including instances of harassment and sexual assault, and shared their thoughts on public policy regarding transgender military service. In this section, we review these write-in responses to describe experiences of those participants who want to serve in the military, ex-

periences while serving in the military, experiences with identity documents and health care, and requested changes in public policy related to the military.

A few young respondents, all transgender men from the ages of twenty-one to twenty-eight, expressed a desire to join the military and distress at not being able to serve. One young man explained, “I am a patriotic and God-fearing twenty-one-year-old male (of transsexual history) from a military family . . . I want to serve my country, badly, and think about this constantly.” Another young man was denied entry and described his situation, stating, “I scored high enough to go into the military and die for our country as a ranking officer—but I was denied because of my genitals not matching what my gender marker was on my license.” A twenty-eight-year-old transgender man described his dismay at not being able to serve: “What bothers me most is I’ll never get to join the military. That breaks my heart . . . as I grow older I am really beginning to think if I am not able to serve my country like that in some way, it’s going to be one of my regrets in life.” Another young transgender man describes the difficult choice between transitioning and military service: “I have wanted to enlist in the military or take a federal job my entire life . . . and now I am finally having to come to terms with the fact that I will either have to delay my transition for eight or more years, or give up on my dreams.”

In order to serve in the military, eleven respondents described how they hid their gender identity from others,



including delaying transition until being discharged or having retired from the service. One transgender man described how he went back to living as his assigned sex at birth—female—in order to serve in the military after having lived full-time as a man for two years. Others described the personal price they have paid in order to serve in the military. One veteran explained, “I have thirty-five years of service though and throughout my career I have been highly regarded. I feel that many others do not have the experience that I have. But I did pay the price for my success . . . I gave up most of my life and lived a lie.” A current service member stated, “To date I have experienced few instances of discrimination because I have continued to present primarily as my birth gender in order to avoid losing my position in the military. Conversely the sure knowledge that I must do this must qualify as severe discrimination and harassment.” Another current service member, a cross-dresser assigned male at birth, described how the military created distress in not being able to live an authentic life but simultaneously curtailed some potential negative outcomes of that distress. He explained, “Many of the requirements necessary to stay in the military have made acting out and self-medicating with drugs to escape the pain impossible. Without this structure I might not have developed the discipline and strength necessary to overcome my pain.”

Seven respondents described how they suffered verbal, physical, and sexual harassment in the military based on their

gender expression or perceived sexual orientation. One veteran described her experience in the military, stating she “experienced extreme sexual harassment and abuse when in the military.” She described a specific incident with an officer: “I was once verbally and physically bullied by an Army Colonel because I was a ‘freak,’ even though I served four years in the infantry.” One respondent related incidents of harassment she had experienced while serving in the Navy Reserve. She explained, “I was harassed because I was observed with, of all things, shaved arms. The harassment was shunning . . . While on a field exercise, I was silently offered sex contact with my tent mate. I said nothing and did not respond in any way to his overtures. The purpose of this attempt was to obtain the necessary evidence to remove me from military service. It failed.” Another veteran described sexual harassment she endured, based on a misperception of her sexual orientation: “Sexually harassed in the military for being perceived as gay. Actually was pre-out transsexual. Gender behavior nonconformity with societal norms is why I was perceived to be gay—much in the same way that effeminate males are often perceived to be gay.”

Four respondents reported they were raped, and one reported suffering attempted rape while in the military. Four of these respondents reported they were targeted for sexual violence due to their gender nonconformity or gender identity. One Navy veteran attributed her rape to others’ reactions to her gender identity: “My US Navy enlistment was short, two years of a six-year en-

listment because when my gender feelings were discovered I was twice raped at sea.” Another veteran explained, “I was raped twice in the military because I was butch/lesbian/gender nonconforming. The first time was a gang-rape.” One respondent described going AWOL (absent without official leave) subsequent to being raped while in the Marines and told to not report it:

At age sixteen, while in the Marines I was raped in the barracks and when I reported it I was told that I would be dishonorably discharged if I allowed it to become officially reported. No action was taken against the rapist and I was placed back into the barracks with this same person. I went AWOL and remained in that status for twenty-eight years. When I was finally arrested, I lost my high six-figure income job that I had had for twelve years and ended up losing everything and became homeless for about a year. All of this because I was transgender.

One hundred seventeen survey respondents (9 percent) who had served reported they were discharged because of being transgender or gender nonconforming. In Question 70, thirteen respondents described having their positions undermined, being denied promotions, being forced out of the military, or being discharged. A transgender woman working for the Army described how her position was undermined after she transitioned: “Upon my transition, key individuals acted so as to deny me access and communication to fulfill my duties.” She was terminated. Several respondents described situations where they were forced out of the military, but not officially discharged. Another transgender woman

explained, “I served in the US Navy when I figured things out and was told to leave or be dishonorably discharged.” Another respondent found his career path stunted: “Even though I wasn’t forced out of the military ‘officially’ due to my transgender status, because they knew of it and made me seek counseling I knew I had no opportunities to make it a career and left at the first opportunity.” Four respondents reported being discharged or fired from military employment. One transgender man was discharged as mentally unfit to serve under Section 8 for being a lesbian but noted that they intended to discharge him for being transgender but utilized Section 8 to do so.

In Question 70, five survey respondents described their experiences with updating their military records. Two of these respondents outlined problems that arise from having military records that don’t accurately reflect their gender. One veteran explained, “[I was not] able to obtain a new military DD 214 with [my] new name, otherwise [I] cannot use it and prove prior military service, so [I] am denied many services.” Another veteran described his situation that impacted his income and health care:

On the DEERS [Defense Enrollment Eligibility Reporting System] I am listed by my male name with the gender listed as female. I have a court order stating that effective [January 2008] my male name is \_\_\_\_\_ and my gender is male. Still the military refuses to recognize this. This refusal affects the name on my Army retirement check, disability check, and is causing havoc with my military health care.

The VA provides a number of ser-

vices for veterans of the armed forces, including health care services administered through the VHA. Veterans who responded to Question 70 provided a wealth of information about health care they had received both inside and outside of the VA system. Fourteen wrote about specific experiences with VA health care, facilities, doctors, and staff, ranging from very positive experiences to very negative. One transgender woman noted, “I happen to be a disabled war veteran who has a letter from the VA stating that I’m overdue for a mammogram. How cool is that?” Other respondents related positive experiences with the VA when needing job-related physical evaluations and when needing a second opinion on a diagnosis. However, 71 percent of responses about the VA were negative. Eight veterans described distress at not being able to receive transition-related health care services through the VA, including hormones, or experiencing discrimination, including denial of regular health care services, by VA doctors and medical staff. Another transgender woman stated she was raped at a VA hospital.

Eighteen respondents offered their opinions on what public policy changes should take place to improve the military for transgender people who want to serve or are currently serving. The most common public policy suggestion, offered by eight respondents, was to allow transgender people to serve openly in the military. One respondent declared, “I should have the right to risk my life for my country.” Four respondents suggested that the VA and military health

insurance cover transition-related health care. Other public policy suggestions included allowing military records (such as DD 214) to be changed to correct one’s gender, military adoption of anti-harassment measures to protect service members and veterans, federal anti-discrimination protections that cover employment (such as ENDA), and training and education on transgender issues.

The lack of public policies to address transgender military service and the needs of transgender service members and veterans left several veterans dismayed. One veteran declared, “Very angry about serving in the first Gulf war, being a 100 percent service-connected disabled vet and having my rights and benefits . . . being denied.” Another veteran explained, “I’m a combat veteran and am discriminated against because I am ‘nonconforming.’ I earned the right to be myself.” Finally, a Navy veteran asked, “Served twenty years in the Navy, highly decorated, with honor. [I was] protecting America’s rights. WHAT ABOUT MINE?”

## Conclusion

Many transgender people desire to serve their country in the armed forces, yet are not allowed entry or allowed to remain in the service if they wish to live their lives true to their gender identities. Transgender service members and veterans have reported wide-ranging experiences of discrimination, harassment, and physical and sexual assault while serving in the military. Outside of the military, transgender veterans in the NTDS experienced higher rates of

homelessness, incarceration, and family rejection than those who did not serve. Transgender veterans described unique challenges and barriers to obtaining necessary health care and accurate identification documents. The repeal of “Don’t Ask, Don’t Tell” does not provide a public policy solution for these problems transgender service members and veterans experience. Though the VHA has begun to address transgender veterans’ health care concerns, it will be necessary to make additional changes to military policies in order to allow transgender people to serve openly and with honor.

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# The Provocative Human Right to Be

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**Abstract:**

The U.S. government, under the leadership of President Barack Obama, has actively begun to address the plight of lesbian, gay, bisexual, transgender, and queer individuals living in developing, transitional, and conflict-prone countries around the globe. Transgender persons seek to be accepted as full moral agents in the gender identity that they sense at a very profound personal level, and they claim a human right of freedom in the expression of this authentic gender identity. This article illuminates moral justifications that argue for a foreign assistance response from the U.S. government on behalf of transgender persons in less developed countries.

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“Even the definition of who is a man and who is a woman can be contested.”

— Raewyn Connell in *Gender*  
(Connell 2009)

**A**t breakfast on a gloriously sunny Nairobi morning, Barbra and I barely noticed the food on our plates. Our table guest Audrey was holding forth with considerable agitation about the marginalization and misunderstanding of transgender persons within the larger East African gay, lesbian, bisexual, transgender, and intersex (LGBT) movement. While she vented, I marveled that such a conversation was even taking place, seated as I was in the relative security of a small suburban training college campus,

together with civil society leaders of the LGBT movement of the five countries of East Africa. All of the Africans who gathered that early May of 2011 for this conference savored their transitory freedom to be together and express their convictions, knowing just beyond the campus walls the populace was strongly inclined to utterly reject them, or worse. As the conference proceeded, neighboring Uganda’s parliament was considering legislation that would impose the death penalty on gay men in certain situations, gravely penalize lesbian and gay individuals generally, and criminalize anyone advocating for human rights protections for LGBT populations on the basis of “promoting homosexuality.” In the months ahead, similar draconian legislative measures would follow in Nigeria, extreme homophobia would briefly dominate the media in Ghana and Malawi, and gay persons would be arrested in Cameroon.

At that time I was serving as a political appointee of the Obama administration, assigned as the Senior Advisor on LGBT Policy for the U.S. Agency for International Development (USAID). No such position had existed before at USAID, and the fact that I was one of just three openly transgender appointees in this administration made this service particularly significant. For these reasons, my official presence at the Nairobi conference was itself noteworthy, signifying a new policy position within the U.S. government.

President Obama and then Secretary of State Hillary Clinton had elevated LGBT rights in foreign policy, and the

Obama administration's vision regarding LGBT concerns in America and abroad was by then well established. The State Department and USAID (a separate federal agency yet accountable to the Secretary of State) both regarded LGBT concerns as legitimate a human rights category as women's rights, and in her cable nearly a year earlier, Secretary of State Clinton asked those within the U.S. government to identify opportunities for action that would help make LGBT human rights a reality, consistent with this administration's comprehensive and inclusive human rights policy. Among these opportunities for action, my participation in that conference was tangible if modest evidence of USAID's determination to foster, strengthen, and empower a constituency with its own strong leadership in developing countries, supportive of the dignity and human rights claims of LGBT persons. And while any thoughtful person might be mobilized by the compelling human rights arguments that underpin the U.S. government's position, my personal commitment to these principles was irretrievably bound up with what I shared with my two breakfast colleagues: we are all transsexual women.

LGBT issues are often framed in the context of human rights, yet advocating for human rights and the recognition of human dignity immediately raises definitional concerns. What human rights, conceived and defined in what way and by whom, with performance measured in what manner? What does "human dignity" mean, and how should it be articulated, recognized, or measured? And while

it can be strenuously asserted that these and similar moral questions are inseparable from most arguments used to support foreign assistance and international development (and that they're of particular relevance when considering marginalized and at risk populations such as LGBT persons), USAID has never made any formal declaration of a moral or ethical justification for its approach to LGBT concerns. Granted, the State Department does reaffirm the importance of human rights in our foreign policy, the role that human rights played in the founding of the United States, and the central foreign policy goal of promoting respect for human rights as embodied in the Universal Declaration of Human Rights (U.S. Department of State n.d.), yet human rights considerations often fall prey to more "strategic" diplomatic priorities.

The U.S. government's formal reliance on human rights as the preferred framework by which to articulate its moral, ethical, and legal role is arguably more a product of international convention than any deliberate comparison of alternative moral approaches. Globally, there has been a growing convergence between human rights and development thinking along several dimensions, with a renewed focus on economic and social rights. Human rights thinking, as represented by several highly respected moral theories and doctrines, speaks to us eloquently and in detail about human development. As a leading global development agency, USAID has a fundamental interest in articulating what "development" consists of, and explaining to the



public why and how best we Americans and USAID's development partners ought to pursue and sustain development. Human rights theories and the legal architecture of international human rights charters and treaties give us a language to discuss foundational elements of development—human dignity, fairness, freedoms, choice, to name but a few. Human rights concepts and language also raise important issues of moral entitlements and claims that all human beings—by virtue of being human beings—are entitled to; and they say a great deal about how those claims ought to be met, over what time and to what degree, and by whom. Finally, human rights also provide us with a means to justify certain moral minimums and to articulate a conceptual threshold of what it is impermissible to do to human beings: human rights violations.

Translating lofty human rights concepts to tackle the gritty human rights realities of three transsexual women gathered over breakfast at a Nairobi conference isn't simple. Our table guest Audrey's complaint was that the realities and interests of transgender people are frequently misunderstood, inconsistently represented, or sometimes simply ignored by lesbian, gay, and bisexual persons and organizations, and even by many feminists and human rights activists. While the acronym "LGBT" is now growing more common, the actual focus of discourse under that acronym often falls prey to what transgender persons refer to as "dropping the T": when transgender concerns are mistakenly assumed, by those who are not transgender, to be largely aligned with

or identical to the concerns of the lesbian, gay, or bisexual community.

Within a pragmatic human rights discourse, there is no denying that many compelling demands compete for scarce foreign assistance resources in a developing world afflicted by extreme poverty, virulent diseases, repressive governments, and violent conflicts. Faced with these urgent human rights challenges, some ask how development agencies justify appropriating time and resources to address concerns affecting the human rights of LGBT people throughout the developing world, or specifically to consider the priorities of a small community of East African LGBT advocates and leaders. Focusing in further still on but one component of that population—the transgender "T"—raises even more questions. This article will attend to that challenge shortly, but first some definitional hurdles demand attention.

## A Note on Vocabulary

When considering sexual orientation and gender identity, the vocabulary used in LGBT human rights discourse may be unfamiliar. Even words taken for granted deserve reconsideration, as pointed out by the prominent Australian gender researcher Raewyn Connell:

Whenever we speak of "a woman" or "a man", we call into play a tremendous system of understandings, implications, overtones and allusions that have accumulated through our cultural history. The "meanings" of these words are enormously greater than the biological categories of male and female. (Connell 2009)



“Gender” refers to the societal meaning assigned to male and female and to the socially constructed roles, behaviors, activities, and attributes that any given society considers appropriate for men and women. Even this term is open to more nuanced meaning, as the American transgender activist and biologist Julia Serano describes:

Each of us has a unique experience with gender, one that is influenced by a host of extrinsic factors, such as culture, religion, race, economic class, upbringing, and ability, as well as intrinsic factors including our anatomy, genetic and hormonal makeup, subconscious sex, sexual orientation, and gender expression. Together, these factors help determine the gendered experiences we are exposed to, as well as the ways we process and make sense of them. (Serano 2007)

Moving from “gender” to “transgender” is an invitation to confusion and misunderstanding, but Serano unpacks “transgender” when she says that transgender is:

Used primarily as an umbrella term to describe those who defy societal expectations and assumptions regarding femaleness and maleness; this includes people who are transsexual (those who live as members of the sex other than the one they were assigned at birth), intersex (those who are born with a reproductive or sexual anatomy that does not fit the typical definitions of female or male), and genderqueer (those who identify outside of the male/female binary), as well as those whose gender expression differs from their anatomical or perceived sex (including cross-dressers, drag performers, masculine women, feminine men, and so on). (Serano 2007)

It is common to differentiate between “LGB” (lesbian, gay, and bisexual) persons, and those who are “T” (transgender and intersex) by describing the former as having to do with sexual orientation, and the latter to be primarily about gender identity. Yet even with the term “gender identity” there are complications, as noted again by Serano:

With regard to transsexuals, the phrase “gender identity” is problematic because it seems to describe two potentially different things: the gender we consciously choose to identify us, and the gender we subconsciously feel ourselves to be. To make things clearer, I will refer to the latter as subconscious sex. (Serano 2007)

Finally, theorists and writers on transgender concerns frequently use the term “cisgender,” which is simply intended to distinguish between those who are transgender from those who are not. In short, a cisgender person is someone who feels that their gender identity agrees with their recognized sex as assigned at birth. The vocabulary around LGBT issues is much more extensive, frequently in dispute, and far from settled, but the reader should now have sufficient vocabulary to allow me to return to further consideration of human rights.

## **The Inadequacy of Popular Human Rights Frameworks**

Addressing LGBT human rights in developing countries fits seamlessly into the international human rights regime, from the 1948 Universal Declaration of Human Rights to the more recent Yogyakarta Principles on the Application of International Human Rights Law in relation to

Sexual Orientation and Gender Identity. Evolving conceptions of international human rights law include a broad interpretation that proves to be very inclusive of the rights and protection sought by LGBT people around the world. The 2007 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity also provide a human rights protection framework for LGBT individuals, addressing a broad range of human rights standards and their application to issues of sexual orientation and gender identity.

The human rights thinking of the United Nations Development Programme (UNDP), influenced significantly by Nobel Laureate economist and philosopher Amartya Sen, argues that development should be conceived as a process of expanding the real freedoms that people enjoy so that their lives may become more truly “human” (Sen 1999). UNDP, borrowing from Sen, distills its human rights approach into seven fundamental freedoms:

- Freedom from discrimination
- Freedom from want
- Freedom to develop and realize one’s human potential
- Freedom from fear
- Freedom from injustice
- Freedom of thought and speech and participation
- Freedom for decent work (UNDP 2000)

Concerns about the treatment experienced by LGBT persons in developing countries are relevant across all seven categories of the UNDP’s “seven freedoms” human rights framework.

LGBT persons are subject to severe and extensive forms of discrimination, often sanctioned within a country’s legal code. They are frequently subject to loss of employment, housing, and insecurity due to their sexual orientation or gender identity, and until the recent yet still largely nascent mobilization of LGBT human rights civil society advocacy movements they have been denied participation in shaping decisions that most directly affect their well-being. Clearly there are also many justice issues affecting LGBT persons that remain unresolved throughout the world, including in countries with more advanced economies such as the United States.

Missing from the UNDP’s list, however, is any direct reference to “freedom of identity” or a human right simply to be oneself. Is there a human right or other persuasive moral basis upon which transgender persons can be justified in claiming a gender identity contrary to that which was assigned to them at birth? Any moral consideration of gender identity must first begin with an assessment of whether “gender identity” is a moral category. The assertion that multiple and often conflicting relativistic moral values are linked with societal perceptions of masculine and feminine is unchallenged. Disagreements emerge when we consider whether certain universal moral values ought to be assigned to or associated with the standard gender categories, and instrumentally even the act of assignment of gender arguably gives rise to certain moral concerns as Connell says, “Gender is a key dimension of per-

sonal life, social relations and culture. It is an arena in which we face difficult practical issues about justice, identity and even survival.”

### **Moral Dimensions of Gender Assignment and Classification**

As challenging as gender categories and assignments may be in moral terms, the situation gets exponentially more complicated when the basis for gender assignment itself is open to moral questions. Moral disputes start from the question of who has the moral right to assign a person’s gender identity and on what basis, move on to what constitutes “authentic” gender, and include whether gender categories are framed by a binary structure or lie upon a gender continuum. There are some people who reject the notion of gender categories altogether and seek to be respected as dignified but ungendered human beings. Others would make the moral case for a “third gender,” which may or may not be defined to include transgender persons. Still others question whether “transgender” constitutes a rational identity, worthy of respect.

The standard convention adopted around the world is that the state has the responsibility to legally recognize the name and sex of an infant soon after birth, with sex almost always determined on the basis of genitalia. The gender role of the state is not to be underestimated:

The state makes policies concerned with gender issues. As these policies are put into effect, the state regulates gender relations in the wider society. This is not

a minor aspect of what the state does. It involves many policy areas, from housing through education to criminal justice and the military. (Connell 2009)

The state’s role in this context is an adequate and satisfactory convention for cisgender persons but is woefully inadequate for transgender persons where genitals have no bearing on their subconscious sex, although this conflict will not be apparent until the infant is an older child. In the case of some intersex persons where genital manifestations may be indeterminate there is no clear or established convention, but most jurisdictions will adopt a sex marker designation as decided by a physician or by the infant’s parents.

The debate over classification of a transgender person’s sex and gender remains contentious. Many transgender persons who live full time presenting in their perception of their authentic gender (with or without sex reassignment surgery) are classified as “transsexual women” or “transsexual men,” but the term “transsexual” is an adjective, not a noun describing some third gender status. Some persons who accept the “transsexual” label however reject the gender binary and express some comfort in being considered as “genderqueer”—a separate or third gender category. The moral issue here is not the classification itself but the moral right of any individual to express agency through articulating his or her own sense of authentic gender.

Some moral consideration of gender classification is however appropriate. While different in character, the classification of homosexual sexual orienta-

tion offers an illuminating history. In the United States until 1973, gay and lesbian people were classified by the American Psychiatric Association's Diagnostic and Statistical Manual (DSM) as mentally ill. The World Health Organization's International Classification of Diseases (ICD) did not drop this pejorative label until 1990. Yet with respect to gender identity variance (transgender identity), this remains classified as a mental health disorder in both the DSM and the ICD—often providing grounds for employers to justify dismissal when transgender people disclose their status and begin a gender transition. A growing movement in the United States now advocates that the transgender condition should be reclassified as a medical condition, as this would provide a diagnostic category that would accommodate the needs of those gender identity variant people who require medical care for their condition, but without the stigma attached to a mental disorder. Some transgender people reject this too, arguing that “medical condition” also brings unfavorable stigmatization. Instead, such people argue that the moral right of any individual to determine and express their own gender identity is fundamental, requiring no psychiatric or medical justification.

Are individuals to be deemed rational moral agents when they manifest the physical attributes of one sex but consistently claim that their authentic gender is different? If we assume that they are mentally ill, their moral status as dignified human beings entitled to exercise their own agency is gravely undermined. Even assuming that such persons dem-

onstrate consistent rational behavior—as they nearly always do in all other aspects of their lives—is there an inherent human right to gender self-determination? This decision has consequence; many transgender persons insist that the process of satisfying the human rights claim to one's gender identity involves more than a moral assertion to that effect. The transgender person's quest for validation in the claimed identity must be first internalized through a sense of achieving that integrity physically, mentally, and emotionally. Societally, the person who transitions across the gender divide ideally should be able to be perceived by the public as being of the gender that they claim is authentic. This ability to “pass” (a term with unfortunate connotations of a deception being carried out) depends on many factors and is often only accomplished by those few transgender persons with adequate means in more developed countries through access to complicated and expensive medically supported transition procedures. In developing countries, transgender persons who have no access to such transition support may at best only be able to achieve a persona of androgyny or variant gender expression (a “masculine woman” or a “feminine man”) instead of a publicly perceived gender identity that aligns with their own sense of their authentic subconscious sex. An inability to transition one's gender to a point where one is generally accepted in one's claimed and authentic gender identity raises many negative implications; such persons feel trapped in the wrong body. Their ability to participate in public and

economic life depends on “performing” their assigned gender even though they experience this to be a fundamental, existential untruth. Experientially, many transgender persons describe how sustaining this falsehood generates a profound sense of gender dissonance that progressively becomes less and less tolerable. Severe depression and very high rates of suicide come to characterize such a life. In these circumstances, is it a rational choice not to transition gender?

The moral question therefore is not simply one of the human right to claim one’s gender identity; the more familiar human right to access to health (especially health in the sense of wholeness) becomes integral to a transgender person’s exercise of a gender identity claim. In such circumstances, does the state bear any responsibility to share in the costs or to provide other resources to assist the transgender person to overcome the debilitating gender dissonance that they experience, by helping them align mind and body through a process of gender transitioning? In short, ought the desire of transgender persons to achieve gender integrity and overcome dissonance be seen as exerting a moral claim on cisgender persons and public institutions? What if this “desire” is accepted as a need, fundamental to that person’s agency and well-being, and possibly to that person’s ability to stay alive?

### **A Harrowing Journey and the Claim to Moral Agency**

Well-being is the goal of development, broadly speaking, and yet, accurate or even rudimentary data is largely un-

available about transgender people’s well-being, agency, and their overall quality of life. A growing body of anecdotal evidence in more developed societies makes it clear that simple generalizations are inappropriate. Many transgender people appear to experience gender dissonance as a mild irritant or a yearning, and while they may resort to expanding the range of their gender expression (e.g., through cross-dressing) they harbor no intention to physically, socially, and legally cross over to live full-time in a gender other than that which they were assigned at birth. Other transgender people experience gender dissonance more acutely but muster the strength to deny, avoid, or at least defer as long as possible the radical changes that would be entailed in transitioning—changes that impact many more people than just the transgender person (e.g., a spouse, children, parents, siblings, employers, coworkers, and friends). Often this tactic is a recognition that the financial and support resources needed to assist such a transition are inaccessible. Some transgender people pursue a lateral move by rejecting the gender binary of masculine and feminine entirely, although society—particularly in developing countries—makes this stance extremely awkward or even untenable. Cisgender people feel a strong sense of necessity or entitlement to classify others as one gender or the other with no tolerance for ambivalence.

The prospect of life in the “wrong body” is emotionally and psychologically daunting if no alternative appears to be

available, and transgender people in this category probably account for the exceptionally high suicide rates referred to earlier. Those who avoid this tragic end are commonly subject to deep depression and other forms of dysfunction—unless they are able to transition. For those who do transition and become transsexual women or men, consistent accounts indicate that they ultimately achieve a sense of well-being, wholeness, healing, integrity, and agency. The qualifier of “ultimately” is significant, however, as the decision to transition and its subsequent expression frequently generates extreme forms of persecution, economic loss, stigmatization, and emotional disruptions that require enormous stamina, persistence, and comprehensive support resources (e.g., counseling, friends, supportive family and faith community, access to medical supervision, access to legal mechanisms to change name and gender markers, and in some cases access to gender confirming surgery and other related interventions). For those who do, and who succeed in being accepted or at least perceived by their societies as the gender that they know themselves to be, the sense of fulfillment, agency, and future possibilities is profound. These anecdotal accounts—if studied more rigorously—may shed some light on the choice or necessity of transgender persons to transition to transsexual women or men but do they help us to understand what “gender” is or how it is constituted?

### **The Gender Debate**

Achieving a definitive sense of gender is an elusive goal. Gender certainly exists

as something experiential—the gender we experience ourselves as and the gender we perceive others to be, or that we assign to them. Gender has roots in society and is interpreted somewhat differently in differing countries:

Enduring or widespread patterns among social relations are what social theory calls “structures.” In this sense, gender must be understood as a social structure. It is not an expression of biology, nor a fixed dichotomy in human life or character. It is a pattern in our social arrangements, and in the everyday activities or practices which those arrangements govern. (Connell 2009, p. 10)

Philosophers and gender theorists such as Judith Butler have explained gender as something that is produced and performed, or more accurately that is produced through repeated performance. In a controversial article in 1988, and in much more detail in her 1990 book *Gender Trouble: Feminism and the Subversion of Identity*, Butler took the position that gender identity is a “performative accomplishment compelled by social sanction and taboo” (Butler 1988). In her view, gender emerges through a series of “acts” repeated by a person, which is always subject to further changes. To Butler, gender is conceptualized as repetitive social fictions that are created and built up over time, which in turn are embodied as “truth” or “natural” through the performance of what she termed “social scripts.”

From Butler’s perspective, gender is performative but gender doesn’t express any inner sense of subconscious sex as described by Serano and most trans-

sexuals. Butler rejects the notion that any sense of subconscious sex or any essential “gendered core” exists in a body’s being, for an “essential” core identity would mean that a person constituted this identity and expressed it through accessing a set of preexisting characteristics that are inherent to that body.

Serano roundly rejects Butler’s performative argument:

I would argue that social gender is not produced and propagated because of the way we as individuals “perform” or “do” our genders; it lies in the perceptions and interpretations of others. I can modify my own gender all I want, but it won’t change the fact that other people will continue to compulsively assign a gender to me and to view me through the distorted lenses of cissexual and heterosexual assumption. . . . Cissexual academics eagerly cite aspects of gender-variant lives that support their claims that gender is primarily constructed, while ignoring those aspects that undermine their cases. For example, many academics have focused on the transsexual transition process to argue that gender does not arise “naturally,” but that it is learned, practiced, and performed. However, these same academics tend to overlook (or dismiss outright) the fact that most transsexuals experience a lifelong self-knowing that they should be the other sex. This self-knowing exists despite the overwhelming social pressure for a person to identify and behave as a member of their assigned sex, which strongly suggests that there are indeed natural and intrinsic gender inclinations that can precede and/or supersede social conditioning and gender norms. (Serano 2007)

My own life similarly offers a rebuttal to the claims of Butler, but also to those who argue that our bodies provide the

essential, biological, “natural” explanation of what constitutes gender. Despite more than five decades of repetitive (and I would argue very persuasive) performance of a male script, I completely failed performatively to constitute a sustainable male gender. And despite a similar exposure to the reality of male hormones, male chromosomes, and a demonstrably male physical body, my gender dissonance remained and progressively became more unbearable. Serano’s alternative explanation—that each person possesses a subconscious sex that transsexuals come to discern in ways that cisgender persons cannot—resonates entirely with my lived experience.

In most developing countries, the gender identity dialogue is not articulated in terms of “performative” versus “natural” terms but is instead culturally imposed and not subject to revision on any terms. Rigid societal strictures determine that you are the sex and gender that your genitals marked you to be at birth, and any attempt to deal with internal gender dissonance by rejecting your biological sex assignment and redefining your gender identity is perceived by members of such societies as wrongheaded, delusional, or dangerous. In many if not most traditional societies in the developing world, gender roles are highly proscribed and define important power relationships. Challenges to such social gender structures are deemed unacceptable, and transgender persons’ appeals for understanding, support, or some modicum of acceptance are generally unsuccessful.

Other than the basic struggle to stay



alive, there can hardly be a more compelling claim to moral agency than the demand to be accepted in the basic identity that you know yourself to be. The existential assertion “I am” takes on particular meaning for transgender persons, whose presentation of that “I” is frequently rejected as implausible, inconvenient, embarrassing to others, irrational, spurious, ridiculous, immoral, in violation of traditional cultural values, or simply as being patently absurd. The compulsion to be recognized in the only gender identity that feels authentic leads many transgender people to take enormous risks in their public presentation, and to such persons (and I was one of them) there is no acceptable option such as that endured by many gay and lesbian couples who live their deep affections discretely closeted. Cross-dressing in public is seldom discrete, but persisting in the public presentation of a gender that one knows to be wrong is among the most excruciating experiences of gender dissonance known to transgender persons. In time, for many of us, such duplicity is simply unsupportable. It is neither an exaggeration nor melodramatic at that juncture to describe the necessity to transition as a matter of life or death for many transgender persons.

Given these conflicting bases for gender assignment, expression, recognition, or even substance, and the consequences of not recognizing the identity claims of transgender persons, do any grounds exist upon which it can be argued that the U.S. government should recognize and be responsive to the identity claims of transgender per-

sons, for example through USAID’s programming and policies?

## **Responding to the Needs of Transgender People in the Developing World**

USAID places progressively more emphasis on human rights; recently the agency took institutional steps to address human rights more comprehensively. While other moral theories, in particular the “capability approach,” arguably offer a more elegant and compelling account of the critical importance of moral agency to the achievement of a “truly human” or dignified human life, human rights-based moral approaches similarly attempt to define a threshold set of conditions below which the sanctity of human quality of life, the possibility for a meaningful and fulfilling life, and the very concept of human dignity all stand in jeopardy. Transgender persons face significant human dignity hurdles in obtaining human rights protections or enjoying human rights freedoms with respect to identity, no matter how these rights and freedoms are articulated. In many developing countries their transgender status is at the very least heavily stigmatized and in too many cases is criminalized or conflated with unrelated issues of sexual orientation. These situations are exacerbated by the lack of access in many less affluent countries to basic information about the transgender phenomenon, the inability of many transgender persons to achieve a presentation in public that sufficiently (i.e., persuasively)



articulates their own sense of gender authenticity, and the often total lack of psycho-social, medical, financial, emotional, community, or family support for those who feel the necessity to transition. The risk of an unsuccessful transition in such circumstances is very high, and the consequences for that failure can be life threatening.

Many transgender persons in developing countries suffer harsh lives devoid of the profound satisfaction of being themselves. Many are left to survive in the rough and often violent world of sex work or in other menial low-status pursuits. Critics sometimes argue that gender expression is itself superficial and prone to exaggeration or deception. Transgender persons are frequently accused of being too obsessed by their bodies, their presentation, and their overzealous attempts to model gendered behavior that stands in contrast to their assigned gender. When transgender people in developing countries yearn for gender-confirming surgery, they are dismissed as seeking “cosmetic” treatments that are of negligible priority when contrasted with other health and social needs—even though the only known and demonstrated cure for gender dissonance is gender-confirming surgery. This procedure is now sophisticated and highly successful but cost-prohibitive for anybody who is forced to pay out of pocket. The dismissal of such interventions as frivolous or cosmetic by cisgender persons demonstrates how poorly understood the significance of appropriately gendered bodies is to the achievement of human agency.

Bodies cannot be understood as just the objects of social process, whether symbolic or disciplinary. They are active participants in social process. They participate through their capacities, development and needs, through the friction of their recalcitrance, and through the directions set by their pleasures and skills. Bodies must be seen as sharing in social agency, in generating and shaping courses of social conduct. (Connell 2009)

While the costs per procedure of gender confirming surgery is prohibitive, the incidence of transgender persons within the general population is exceptionally low and among this small group only some persons experience gender dissonance to such a degree that gender confirming surgery is recommended. While it may be unrealistic to argue that the state should subsidize or cover the costs of gender confirming surgery and related interventions when compared to the moral demands of other equally serious medical needs affecting more numerous or more severely unhealthy sections of the population, it isn't unreasonable for the state to demonstrate its commitment to the moral rights and freedoms of its transgender citizens by seeking ways to defray these gender confirming surgery costs, to offer opportunities for financing and long-term, low-interest repayments, or to find other ways to assist transitioning transsexual men and women with viable trajectories toward bodily integrity and health. Similarly, USAID's strong advocacy position on diversity arguably can be interpreted to signify that the state is morally obligated to make appropriate efforts to normalize the reality of trans-

gender status within its cisgender population. While no policy position can be deduced beyond that point, USAID's health programming priorities would seem a good platform from which to encourage the medical and counseling professions in developing countries to learn how best to support transgender citizens and perhaps even to encourage such countries to consider providing that support at affordable levels to the very few people affected.

Finally, due to stigmatization and rejection, many transgender persons in developing countries are denied the basic services that they need to live meaningful, productive lives. The state clearly has a moral obligation to these citizens—as it does to all citizens—to work toward improving their access to these basic services (i.e., security, health, education, employment, legal recognition of name and gender).

USAID already enjoys a deserved reputation for demonstrating caring concern for the most vulnerable people in developing countries and is currently in the initial stages of embracing new initiatives in inclusive development that explicitly include LGBT persons. The moral claims of transgender people within the larger marginalized LGBT community in developing countries are no exception. As described in this article, the basic claim to have one's gender identity respected, recognized, and protected is fundamental to the exercise of human agency by transgender people. On that basis, USAID should at a minimum clearly articulate support for the moral validity of such claims while simulta-

neously encouraging its development partners and the governments of countries in which USAID operates (through policies, programs, and public outreach) that these moral claims are deserving of respect. Respecting such claims will require working toward achievable measures to improve the well-being of those currently excluded: transgender persons in developing countries.

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# In the Shadows

## The Difficulties of Implementing Current Immigration Policies in Adjudicating Gender-Diverse Asylum Cases in Immigration Courts

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### **Abstract:**

In order to protect national interests, the REAL ID Act of 2005 was enacted to help prevent terrorists from coming into the United States. The act curbed abuses to the existing asylum system. Changes stemming from REAL ID heightened the credibility and corroboration standards for asylum and provided immigration judges more discretion in denying asylum claims. However, the application of REAL ID to lesbian, gay, bisexual, and transgender (LGBT) asylum claims reveals how asylum law fails to both recognize and adequately offer protection to LGBT asylum seekers. This article highlights the problems and suggests solutions to the difficulties of implementing current immigration policies when adjudicating gender-diverse asylum claims.

## Introduction

As the world continues to globalize, one would expect countries like the United States to be more hospitable and sensitive to the needs of refugees seeking asylum within its borders. However, after the September 11 terrorist attacks, U.S. asylum law became even more exclusionary. In response to the attacks, Congress passed the REAL ID Act of 2005 (Cianciarulo 2006). The publicity surrounding the enactment of REAL ID focused on preventing terrorists from entering the country; however, using national security concerns to rationalize restrictive immigration policies is unsound given that there are other avenues available to terrorists and that additional procedural barriers to obtaining asylum can be burdensome. U.S. asylum law was revised to curb abuses of the immigration system by asylum seekers who have false claims (Wasem 2011). As a result, REAL ID heightened the credibility and corroboration standards for asylum and provided immigration judges more discretion in denying asylum claims (White 2006). The Board of Immigration Appeals (BIA), the administrative body that reviews decisions by immigration courts, annually “publishes approximately 50 decisions out of the roughly 4,000 cases . . . [that] serve as binding precedents for immigration judges” (Jenkins 2009). This small number of published cases makes it difficult to determine or analyze systemic trends. Moreover, the BIA

and immigration courts do not track the number of lesbian, gay, bisexual, or transgender (LGBT<sup>1</sup>) individuals seeking asylum, the disposition of those cases, or the treatment of such cases after REAL ID went into effect. Thus, the U.S. immigration court system’s treatment of the LGBT community remains unclear and largely invisible.

REAL ID, if not amended or repealed, may be detrimental to many LGBT asylum applicants. Some, if not many, of the rejected LGBT asylum claims are genuine claims of fear of persecution. The United States needs to reform its current immigration system because it is unnecessarily expensive and inefficient, and it forces certain individuals to come to terms with their identities as LGBT or HIV-positive even though they may not be prepared to do so (Immigration Policy Center 2011; Morton 2011). In order to address the challenges REAL ID has created for LGBT asylum claims, I argue that the U.S. immigration system should better comport with international law and adopt the Yogyakarta Principles, which apply international human rights law standards to sexual orientation and gender identity issues (International Commission of Jurists [ICJ] 2007).

While research has been done on the effects of REAL ID on the adjudication of LGBT asylum cases, little attention has been paid to how REAL ID can force someone to publicly self-identify as LGBT (i.e., “come out”) while he or she is still struggling to deal with his or her identity. Coming out can be a traumatizing experience for most people

who are not prepared to fully disclose their sexual and gender identities in public, but it can be even more traumatizing for refugees seeking asylum

REAL ID's heightened credibility and corroboration requirements and allow for greater judicial discretion.

## While recognition of belonging to the LGBT community is a legitimate basis for seeking asylum, current asylum law fails to distinguish nuances within the LGBT community.

from sexually repressive cultures (Santos 2012). The goals of this article are to inform the legal profession, particularly immigration attorneys and judges as well as other legal advocates, about adjudicating LGBT asylum claims and to show how immigration proceedings, particularly the far-reaching, detrimental effects of the credibility and corroboration requirements under REAL ID, can force unnecessarily traumatic experiences on LGBT asylum seekers. The application of REAL ID to LGBT asylum claims reveals how asylum law fails to recognize and offer protection to LGBT asylum seekers and how it violates their rights to privacy and to a fair trial. Adopting the Yogyakarta Principles can help address these flaws. This article provides an overview of current U.S. asylum law and discusses how REAL ID is symptomatic of the immigration system's current problems in the context of transgender asylum claims. It then goes on to discuss the role of international law, through the Yogyakarta Principles (or, the Principles), in shaping the adjudication of U.S. transgender asylum cases and how the Principles could be used to address

### **Current State of Affairs: Corroboration and Credibility Problems with the REAL ID Act**

#### ***Current U.S. Asylum Law as It Applies to Transgendered Asylum Seekers***

Obtaining asylum in the United States is not a given right to foreign nationals but rather a discretionary form of relief granted by the U.S. government to those who satisfy the definition of a refugee. To satisfy the definition of a refugee, there must be proof that an individual suffered past persecution or has a well-founded fear of future persecution on account of a protected ground, which is limited to race, religion, nationality, membership in a particular social group, or political opinion (Neilson and Morris 2005). LGBT asylum applicants almost always claim a fear of persecution based on membership in a particular social group. While recognition of belonging to the LGBT community is a legitimate basis for seeking asylum, current asylum law fails to distinguish nuances within the LGBT community. For example, courts

have inappropriately treated applicants who identify as transgender women as “gay men with female sexual identities” (*Hernandez-Montiel v. Immigration and Naturalization Service* 2000). The United States has yet to officially recognize transgender applicants as belonging to a distinct “particular social group” (*Matter of Acosta* 1985).

An asylum applicant is required to file an application within one year of arrival in the United States. Many LGBT applicants miss this one-year deadline because they do not know that they can qualify for asylum based on fear of persecution because of sexual orientation or gender identity (Neilson and Morris 2005). Others miss the deadline because they are still struggling to define their identities. Having an HIV-positive diagnosis further complicates the problem of effectively coming forward with one’s asylum application because some HIV-positive individuals choose to remain discreet about their HIV status for fear of even greater persecution than that experienced because of their LGBT status alone.

If an applicant fails to file the asylum application in a timely manner, the applicant could still remain in the country through a grant of withholding of removal. A granting of withholding of removal, however, does not mean that the transgender applicant is free to stay in the United States indefinitely (Birdsong 2008). An applicant may be removed if the United States determines that conditions in the applicant’s home country have improved such that the claim for fear of persecution is essentially defeated (Neilson and Morris 2005, 247-248).

Transgender applicants who have been granted withholding have been threatened with removal back to their country of origin because some part of that country has recently granted its gay citizens the right to marry. In determining changed country conditions, courts rely heavily on the U.S. State Department’s country reports (Hinger 2010; Wasem 2011). Signs pointing to an increased social acceptance of the gay community in a particular country could adversely affect one’s application for asylum and withholding of removal.

With transgender women still being treated as members belonging to the social group of “gay men with female sexual identities,” the United States continues to fail to distinguish the diversity within the LGBT community. Courts should distinguish gay men from transgender women in characterizing their membership in a particular social group because this creates problems, particularly when an asylum applicant’s country of origin passes laws protecting individuals who are gay but not individuals who are transgendered.

### **REAL ID: Credibility and Corroboration Problems**

REAL ID includes provisions that are particularly damaging to transgender immigrants in the context of asylum claim. For example, REAL ID increased the burden of proof requirements—applicants must demonstrate “a clear nexus between the persecution and a protected ground” (Gehi 2009). It must be shown that the applicant’s claim of persecution based on sexual orienta-

tion is at least one of the central reasons for the persecutor's motivation to act against the applicant (Cianciarulo 2006; *Immigration and Naturalization Service v. Cardoza-Fonseca* 1987; *Voci v. Gonzales* 2005). This becomes problematic in mixed-motive cases, in which the applicant was persecuted on account of other additional nonprotected grounds and immigration judges can question whether there really was persecution based on sexual orientation and/or gender identity. REAL ID also requires applicants to augment their personal statements with documents that corroborate their claims of abuse, which can be very difficult for those who are running away from family and authorities who want to hurt them because of their sexual orientation and gender identity.

At the time of REAL ID's drafting, legislators "did not anticipate an asylum applicant fleeing persecution on account of his or her sexual minority status" (Conroy 2009). Floor debate on REAL ID was sparse, and legislators enacted REAL ID as a protective measure against terrorists entering the country. Because of the limited discussions in the legislature, courts are given more discretion in making decisions regarding sexual orientation and gender identity

asylum cases. REAL ID exacerbates this problem because it allows the biases of judges to be factored in when deciding an applicant's asylum claim. Judicial decisions largely determine how REAL ID is applied to transgender asylum cases and other LGBT cases.

Under REAL ID, the trier of fact must consider the totality of the applicant's circumstances. However, REAL ID places great significance on the applicant's demeanor, candor, and responsiveness. It allows statements the applicant made to be compared at any time, regardless of whether or not they were made under oath. These factors can be negatively influenced by the applicant's limited English proficiency, socioeconomic background, continued fear of persecution, and fear of coming forward to authorities because of a prior history of discrimination and persecution. Furthermore, it "permits negative credibility determinations based on minor inconsistencies and inaccuracies, regardless of whether the mistake goes to the heart of the applicant's claim" (Emergency Supplemental Appropriations Act 2005). REAL ID further fails to provide judges with a standard of how much weight should be given to inconsistent statements, omissions, and

REAL ID also requires applicants to augment their personal statements with documents that corroborate their claims of abuse, which can be very difficult for those who are running away from family and authorities who want to hurt them because of their sexual orientation and gender identity.



demeanor. It wholly eliminates any presumption of credibility or benefit of the doubt for asylum applicants at the initial asylum hearing.

The credibility issues sexual minorities face depend on the facts of each asylum case. For some gay applicants, credibility becomes an issue when the immigration judge does not believe the applicant to be gay (*Shahinaj v. Gonzales* 2007). Credibility becomes an issue for a transgender asylum applicant once the immigration judge requires evidence to corroborate the applicant's asylum claim (*Ornelas-Chavez v. Gonzales* 2006).

Under REAL ID, an asylum applicant must provide evidence of persecution on account of a protected ground that a judge deems to be reasonably available. Corroborating evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain it (Conroy 2009). However, failure to provide evidence may result in the applicant not meeting the burden of proof (*Matter of S-M-J* 1997). REAL ID does not impose any standard of reasonableness to judges when they determine whether corroboration is necessary or the provided evidence is sufficient (Cianciarulo 2006). As a result, immigration judges can require corroboration in any form whatsoever—"unreasonable requests for evidence shift the burden to the applicants to show that it is reasonable that they do not have the evidence" (Turney 2011).

In the case of transgender women classified as gay men with female sexual identities, a credible fear of persecution would be difficult to corroborate under

the current asylum system particularly if the persecutor is characterized as a private actor (Harbeck 2010). Reporting a crime to state authorities is not necessary if the applicant "can demonstrate that doing so would have been futile or that contacting the authorities would have subjected him to further abuse" (*Ornelas-Chavez v. Gonzales* 2006). However, in a recent decision by the United States Court of Appeals for the Ninth Circuit, an HIV-positive transgender woman was denied asylum because she failed to sufficiently explain why reporting the sexual abuse to the authorities would have been futile or would have put her at risk of harm (*Castro-Martinez v. Holder* 2011). The applicant chose not to report the sexual abuse to the authorities despite laws against it because the applicant believed that doing so would be futile. The Ninth Circuit, in accordance with REAL ID, held that "it was not unreasonable for the BIA to perceive [the applicant's] explanation for not contacting the authorities to be less than persuasive" (*Castro-Martinez v. Holder* 2011). In other cases, courts have described persecution by state authorities as isolated, rogue acts to justify the denial of asylum (*Joaquin-Porras v. Gonzales* 2006).

Another problem transgender asylum applicants face is changed country conditions. Adjudicators often rely on country conditions reports in determining whether to grant the applicant asylum. In *Velez v. Attorney General*, the respondent submitted additional evidence as part of the motion to reopen the respondent's case (360 Fed.



App'x 103 2010). Evidence showed that sexual minorities in Colombia, especially transgender prostitutes and non-governmental organization activists, are sometimes victims of violence and social cleansing. In *Velez*, the Eleventh Circuit held that a gay Colombian respondent “failed to provide material evidence of changed country conditions,” and therefore, the “BIA did not abuse its discretion in denying [the respondent’s] motion to reopen” and petition for review (360 Fed. App'x 103, 104, 2010).

In the transgender asylum context, this kind of adverse corroboration finding is problematic because courts often confuse the issue of persecution and transgender status. Decriminalization of homosexual conduct, legalization of same-sex marriage, recognition of civil unions, and adoption rights for LGBT parents can factor into changed country conditions claims (Harbeck 2010). These improvements in life for lesbian, gay, and bisexual individuals have been used to undermine asylum claims made by transgender individuals wrongly classified as gay men with female sexual identities. In *Castro-Martinez* (2011), the court upheld the denial of a transgender woman’s asylum claim and noted “the ongoing improvement of police treatment of gay men and efforts to prosecute homophobic crimes.” Courts should also be careful in addressing this confusion between improved country conditions for gay men and for transgender individuals because social gains for one group does not necessarily entail improved treatment of another group.

There are instances where condi-

tions affecting the LGBT community should be applied to transgender asylum applications and there are instances where they must be distinguished. Courts should be familiar with the distinction when making this call. In *Velez*, the respondent submitted additional evidence as part of the motion to reopen the respondent’s case. The court, for example, should have found that the respondent met the burden of proof in proving persecution (even though the new evidence showed violence in Colombia targeting transgender citizens) on account that the gay respondent is considered a sexual minority and was subjected to similar violence generally experienced by transgender individuals (360 Fed. App'x 103, 104, 2010). On the other hand, legal protections for same-sex couples and other factors showing improved country conditions for gays and lesbians should be weighed lightly in a transgender asylum case because a transgender applicant will probably experience different, if not greater, violence from that experienced by gays and lesbians. Unlike gay men, transgender women who challenge stereotypical gender norms can have more social visibility and therefore be more susceptible to harm and violence (Turner 2007).

### **Eliminating Bias: The Use of the Yogyakarta Principles in Addressing the Challenges of REAL ID in Transgender Asylum Cases**

This section discusses the importance of international law and its role in shap-

ing U.S. asylum law and the adjudication of transgender asylum cases, particularly through the adoption of the Yogyakarta Principles. This section also provides a critique of how the United States has failed to keep up with international standards. The current asylum system gives discretion for bias that hinders efforts to provide culturally appropriate guidelines for handling sexual orientation and gender-based asylum applications. Implementation of the REAL ID provisions that undermine transgender asylum cases departs from REAL ID's original purpose of protecting the country from terrorists. REAL ID excludes those that international human rights laws are designed to protect. This section discusses the application of the Yogyakarta Principles to the adjudication of transgender asylum cases in the United States and how the Principles offer possible solutions to the credibility and corroboration problems that REAL ID poses.

### **A Brief Introduction to the Yogyakarta Principles**

In November 2006, a group of international human rights law experts met in Yogyakarta, Indonesia, to draft what is now known as the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (ICJ 2007). The Principles restate existing international human rights law, but also seek to codify developing elements of the law that are helpful for victims of discrimination and that have not yet achieved binding status. To date, “the

Principles have already attained a high degree of influence” and are used in United Nations Human Rights Council’s proceedings and in overturning discriminatory laws in some countries, incorporated into foreign and domestic policies of a number of countries, debated by regional human rights bodies in Europe and South America, and included in a number of United Nations agencies and human rights rapporteurs (Brown 2010). Despite their growing influence in the international community, the Principles “remain relatively unknown among grassroots human rights activists in most countries, and almost entirely unknown within the United States” (Brown 2010). One possible reason why the Principles remain largely unknown in the United States is the country’s increasing focus on same-sex marriage to the exclusion of other issues affecting LGBT individuals (*New York Times* n.d.).

### **General Application of the Yogyakarta Principles in Transgender Asylum Cases**

The Principles are by no means perfect. Some states are “reluctant to embrace the Principles completely because of the extent of the obligations they ask states to assume” (Brown 2010). Some of the rights the Principles relevant to this article assert “have never been addressed by authoritative interpreters of international law” and therefore lack binding authority (Brown 2010). At the very least, immigration courts, judges, and asylum officers should find the Principles as persuasive authority. The

United States has already incorporated, to a limited extent, some of the rights the Principles assert, such as Principle 23, which holds that:

Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel, or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman, or degrading treatment or punishment, on the basis of sexual orientation or gender identity. (ICJ 2007)

While the United States recognizes the right to seek asylum, other rights have not been put into practice in all areas of U.S. immigration and refugee law, especially after REAL ID went into effect. One argument for the adoption of all the Principles despite the obligations to ensure effective protection from sexual orientation and gender identity discrimination goes to considerations in determining whether a transgender asylum applicant has a fear of future persecution. In assessing the clear probability of future persecution, a judge must account for whether any of the Principles would be violated should the applicant be returned to his or her country of origin. If the goal is to make changes in the law, then the United States should recognize and adopt some, if not all, of the Principles. The Principles could be “voluntarily adopted for use by states as policy, or even law, via legislation or through the courts” (Brown 2010). The Principles could be used to challenge oppressive legal standards, to develop new

government policy, to seek a responsive government, to educate the public, or to build a movement (Quinn 2010, 87). At the very least, the United States should adopt the following principles highlighted in this section to protect LGBT individuals with legitimate asylum claims.

### **Yogyakarta Principle 3: The Right to Recognition Before the Law**

The Principles provide that “[e]veryone has the right to recognition everywhere as a person before the law” (ICJ 2007). Transgender asylum applicants “shall enjoy legal capacity in all aspects of life. Each [applicant’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. . . . No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity” (ICJ 2007). The *Hernandez-Montiel* case is an example of the current asylum system’s failure to recognize transgender applicants as individuals belonging to a distinct social group. The court in *Hernandez-Montiel v. Immigration and Naturalization Service* (2000) did recognize that a person’s sexual identity is “immutable” and so “fundamental to one’s identity that a person should not be required to abandon [it].” In doing so, it became an important development in asylum law “because it defines [membership in a] ‘particular social group’ in a way that embraces individuals who are actually persecuted—even if they fail to qualify for asylum under the statute’s other enumerated categories”

(Birdsong 2008). At the same time, it characterized a transgender applicant as a gay man with a female sexual identity. While the court in *Hernandez-Montiel* defined transsexualism in a footnote, it concluded that the court “need not consider in this case whether transsexuals constitute a particular social group” (2000). This decision reflects the confusion that courts have over the issue of transsexuals and transgender individuals and the court’s reluctance to deconstruct the homosexual-heterosexual binary. Although transgender asylum seekers have succeeded in some cases, there are currently no published decisions that recognize transgender individuals as belonging to a particular social group (Neilson and Morris 2005). In addition, Leonard Birdsong (2008) has argued that most of the “published cases are decisions where asylum is denied, which creates a system in which it is nearly impossible . . . to discern clear standards necessary to establish a successful asylum claim.” As demonstrated in *Hernandez-Montiel*, “[e]ach asylum claim seeks to demonstrate the fixity of the protected group and the individual’s inclusion therein” (2000). Expanding the particular social group category “has been least successful where characteristics appear as matters of choice without deep personal and societal significance”

(Hinger 2010). However, identifying oneself as transgender “is universally recognized as inherent, rather than chosen” and warrants recognition as a separate category for a particular social group (*In re Heilig*, 816 A.2d 68, 78 (Md. 2003)). *Hernandez-Montiel*’s precedent is problematic because it created a standard that fails to meet the needs of those who do not fit neatly into a particular protected ground.

Not recognizing transgender individuals as members belonging to a particular social group creates problems under the current asylum system. For example, the problems gay applicants face under current asylum law become conflated with the problems transgender women face (Morgan 2006). Current U.S. asylum law should recognize transgender applicants as a particular social group given their common immutable characteristic that should not be required to change because it is fundamental to their individual identities (Marouf 2008). Failing to do so renders the community invisible to the asylum system. Defining one’s sexual and/or gender identity has already been proven difficult given the fluid nature of human sexuality. Adjudicators have confused the transgender experience of oppression with that experienced by gay applicants. Judges fail to see the risk

Defining one’s sexual and/or gender identity has already been proven difficult given the fluid nature of human sexuality. Adjudicators have confused the transgender experience of oppression with that experienced by gay applicants.

of persecution in transgender applicants from countries where treatment of gays appears similar to that experienced by those in the United States (Hinger 2010). As previously discussed, this is problematic when a transgender individual is characterized as a gay man with a female sexual identity and the judge uses legalization of same-sex marriage in the applicant's country of origin as grounds for denying that applicant's asylum claim. Even though the asylum process is facially neutral, immigration officials and judges are empowered to make "decisions based on racialized sexual stereotypes and culturally specific notions of homosexuality, thus discriminating against those who do not conform" (Morgan 2006).

Lumping all sexual minorities into one social group also creates a problem when the decision to transition from one gender to another occurs once the applicant is in the United States. Using "homosexuality" or "gay" as a blanket term for all LGBT asylum applications is detrimental to transgender applicants and to those who are still struggling with their own identities because these individuals do not fit neatly in the homosexual-heterosexual binary (Moon 2008). The United States asylum system should respect the privacy rights of a transgender applicant and recognize the applicant's right to declare his or her own perceived sexual identity (ICJ 2007). "Recognizing the complexities of cases and focusing on the social norms enforced through persecution, rather than relying on assumed categories of identity can allow for broader protections

under [U.S.] asylum law" (Hinger 2010). By co-opting a transgender applicant into a particular social group of gay men who identify as females, the transgender applicant is forced to conceal, suppress, or deny the applicant's sexual orientation and gender identity, thus shielding heterosexuality from "the anxiety of variability" (Hinger 2010). As the Principles assert, no transgender applicant should be "subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity" (ICJ 2007). Furthermore, imputing a gay identity to transgender applicants for the purposes of fitting such applicants in a defined particular social group invites asylum officers and judges to ask the wrong questions in the asylum process. The National Center for Transgender Equality and the Transgender Law Center have criticized asylum officers for asking transgender applicants "questions about their sex lives or their 'coming out experiences'" (Benson 2008). Such questions are irrelevant to the asylum process for all transgender applicants, whether or not they identify as gay.

To this end, asylum officers and immigration judges should be willing "to receive and rely on additional sources of information" in order to depict a more nuanced reflection of alternative perspectives on gender nonconformity information that would provide protection to transgender individuals and transsexuals in the context of asylum law (Hinger 2010). These sources include, but are not limited to, the Yogyakarta Principles, the United Nations High Commissioner for Refugees

(UNHCR) Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (2008) (which incorporates the Yogyakarta Principles), and country condition reports of organizations other than the Department of State. Adopting the Yogyakarta Principles is superior to adopting UNHCR's Guidance Note because the Principles provide additional obligations for states to comply with in order to successfully implement the rights asserted within each Principle. Furthermore, the Principles hold accountable violators of these rights. Such obligations and accountability are not addressed in the Guidance Note.

### **Yogyakarta Principle 6: The Right to Privacy**

In addition to the right to recognition before the law, transgender applicants also have the right to privacy and to declare their own perceived sexual identity. Yogyakarta Principle 6 holds that “the right to privacy ordinarily includes . . . decisions and choices regarding both one’s own body and consensual sexual and other relations with others” (ICJ 2007). Although there are no provisions in the U.S. Constitution regarding the right to privacy and to bodily integrity, the U.S. Supreme Court has placed constitutional protection on an individual’s right to privacy in several occasions (see *Griswold v. Connecticut* 1965; *Roe v. Wade* 1973). Just as consenting adults enjoy the freedom to engage in private sexual acts, so should transgender asylum applicants enjoy the right to assert their own perceived gender identity. Un-

fortunately, the constitutional right to privacy has not found an avenue to reassert itself in the asylum context. Failure of the current asylum system to recognize transgender applicants as belonging to a separate particular social group has led many judges referring to applicants based on their biological sex and imputing a gay identity to such individuals. In *Hernandez-Montiel*, for example, the court used the male pronoun throughout the proceedings to refer to the applicant who was clearly a transgender woman (2000). By referring to the applicant based on his or her birth sex, the courts are forcing the applicant to adopt an identity that conflicts with his or her gender expression and perceived gender identity, which lie at the heart of the applicant’s asylum claim. Marybeth Herald and Julie Greenberg (2005) argue that this “imposition undermines [the applicant’s] right to personal dignity and autonomy” and could adversely affect the applicant’s credibility given that some transgender applicants have a genuine fear of authority based on past persecution. The transgender community is diverse; many transgender individuals do not self-identify as gay. To legally categorize a transgender individual as “same sex sexual orientation with opposite sex sexual identities” as *Hernandez-Montiel* did violates the individual’s right to privacy and bodily integrity” (Neilson and Morris 2005). The transgender community encompasses a broad range of sexual orientations, and some transgender individuals self-identify as heterosexual. At least two subsequent cases in the Ninth Circuit repeated the mischaracterization

of transgender women as belonging to the social group of gay men with female sexual identities (*Reyes-Reyes v. Ashcroft* 2004; *Ornelas-Chavez v. Gonzales* 2006). In both these cases, the court used pronouns based on the applicants' birth sex.

### **Yogyakarta Principle 8: The Right to a Fair Trial**

The Principles also provide that “[e]veryone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, in the determination of their rights and obligations in a suit at law and of any criminal charge against them, without prejudice or discrimination on the basis of sexual orientation or gender identity” (ICJ 2007). Unlike the right to privacy, the right to a fair trial is explicitly guaranteed under the U.S. Constitution. However, research has shown that there are still judge-to-judge disparities in asylum decisions (Wasem 2011). Asylum decisions that immigration officials make lack transparency (Morgan 2006). Standards should be put in place requiring asylum officers and judges to evaluate evidence from a culturally neutral standpoint. Consistency in defining and interpreting U.S. asylum laws is greatly needed (Birdsong 2008). Problems and inconsistencies persist in asylum adjudications for a number of reasons, including lack of definitions for certain statutory words. Currently, the terms “persecution” and “member of a social group” are not defined in the statutes. Instead, court opinions provide the interpretations of these terms. These are the same courts that do not

apply asylum laws consistently and are given great discretion to enforce the tough credibility and corroboration provisions of REAL ID.

REAL ID allows more room for biases and stereotypes to influence a decision in granting or denying an applicant's asylum claim. It invites and fails to prevent such prejudice (Conroy 2009). The current asylum system needs better-trained immigration judges and asylum officers to minimize the risk that the findings based on these biases will remain law on appeal. For training and education purposes, immigration authorities should also continue utilizing external agencies that are in a better position to advocate for the rights of LGBT applicants. They need to understand the diversity within the LGBT community and how LGBT individuals, particularly transgender applicants, fit in the current asylum system. The increased burden of proof requirement under the REAL ID is challenging for many transgender asylum applicants. For example, the “lack of employment opportunities forces many transgender individuals into sex work,” which make these individuals more vulnerable to be profiled and arrested by police officials in countries where prostitution is illegal or where there is a high criminalization of sex work (Gardon 2009). In Mexico, the persecution of transgender women is well documented (Prieur 1998). To find that country conditions have improved for transgender individuals because gays are becoming more socially acceptable denies these individuals their self-identity and allows preju-



dice to adversely impact their asylum claims. In *Kimumwe v. Gonzales* (2005), the Eighth Circuit upheld the immigration judge's and BIA's finding that the gay applicant's problems with authorities in Zimbabwe "were not based simply on his sexual orientation, but instead resulted [from] his engaging in prohibited sexual conduct." Although this case does not involve a transgender applicant, it presents "analogous issues and difficulties that a transgender applicant would face under a court's scrutiny and analysis" (Jenkins 2009). The vagueness of the laws against disturbing public order encourage "harassment, detention, extortion, and bribery" of sexual minorities by the police (Prieur 1998). These laws against disruption of public order are used as a pretext for the harassment of some sexual minorities. Once detained (either in the United States or in the country of origin), LGBT detainees face increased vulnerability to abuse (Turney 2011). Use of vague laws as a means of persecuting sexual minorities is problematic because this invites courts to distinguish between persecution based on the applicant's sexual orientation and/or gender identity and persecution based on the applicant's conduct.

## Conclusion

Courts are slowly acknowledging that transgender individuals are a protected minority, but these individuals largely remain invisible. "[I]f one is not recognized as existing by the law, one is not protected by the law" (Vade 2005). REAL ID created "significant impedi-

ments by inviting bias, improper inferences, illogical valuations of evidence, and unrealistic expectations for corroboration" (Vade 2005). The sad reality is that REAL ID creates barriers for an already vulnerable population while ignoring other likely immigration routes available to potential terrorists (Cianciarulo 2006). The current American asylum system does not have any room for expressions of variability, particularly in the areas of sexual orientation and gender identity. It does not recognize transgender individuals as belonging to a distinct social group, independent of self-identified sexual orientation, and fails to provide transgender applicants a fair trial for asylum applications. One of the ultimate challenges in implementing the Yogyakarta Principles in post-REAL ID asylum law is that "securing protection in an individual case sometimes creates precedents that make it more difficult to prevail in future asylum claims, and that limit conceptions of gender and sexual orientation within the broader movement for human rights" (Hinger 2010). This is in light of the fact that most published cases are decisions where asylum is denied. Rather than establishing case precedent that only addresses what an improper asylum claim is, the BIA should publish cases or other guidance demonstrating what a successful asylum claim would look like. With limited case precedent, the question remains open as to how an adjudicator would decide a transgender asylum case based solely on the individual's transgender identity. Adopting the Yogyakarta Principles would allow

for broader protections under U.S. asylum law and would allow such cases to be decided in a fair and inclusive manner. The current asylum system should also compile statistical data regarding transgender asylum cases to address this problem (Morgan 2006). Without the ability to disaggregate statistics, it would be difficult to know exactly how REAL ID has affected the outcomes of transgender asylum applications. With today's increasing presence and discussion of different LGBT issues, the United States must recognize and address the many difficulties of implementing current immigration policies in adjudicating gender-diverse asylum cases.

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## Endnote

1. While the *LGBTQ Policy Journal* uses the acronym “LGBTQ” to refer to lesbian, gay, bisexual, transgender, and queer individuals, “LGBT” is used in this article as a technical term in alignment with established U.S. legislation and regulation.

# Creating Inclusive Policy Reform for LGBT Older Adults with HIV

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## **Abstract:**

Recent policies affecting lesbian, gay, bisexual, and transgender (LGBT) older adults and people living with HIV promise a new era of reform. From California Congresswoman Barbara Lee's antidiscrimination HIV-related bills and the sweeping changes of the Affordable Care Act to U.S. Senator Michael Bennet's LGBT Elder Americans Act and the federal administration's recent regulations, guidance, and rules regarding hospitalization, housing, and social services for LGBT older adults, LGBT older adults and people living with HIV stand to gain an unprecedented recognition of rights. While these policy changes represent significant progress, policy makers and advocates must be mindful of how these various policies intersect and affect marginalized communities. Through inclusive policy reform, policy makers can ensure that their policies sufficiently address the needs of all LGBT elders.

This article begins by describing recent policies regarding stigma and resources regarding LGBT older adults and people living with HIV. It then provides context

for such policy reform by exploring the demographics of LGBT older adults with HIV to highlight the immense importance of policies addressing some of the barriers for this community. It concludes by proposing several strategies for inclusive policy reform, including inclusive legislative drafting of bills, informal and formal rule making, increased research, mandatory cultural competency trainings for health care staff, and increased community education.

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**L**esbian, gay, bisexual, and transgender (LGBT)<sup>1</sup> older<sup>2</sup> adults face numerous obstacles with aging. Isolation, poverty, and discrimination can create barriers that many older adults already face in obtaining affordable housing, health care, and social services. LGBT seniors with HIV must navigate these obstacles while encountering stigma and ignorance about HIV transmission and treatment.

From 2010 to 2012, several important policy efforts raised attention to issues pertaining to HIV and LGBT seniors. In July 2012, U.S. Congresswoman Barbara Lee introduced a bill—Ending the HIV/AIDS Epidemic Act of 2012—to increase federal resources addressing HIV and to expand efforts to end stigma and discrimination against people with HIV (H.R. 6138 2012). Lee had introduced a similar bill in 2011—the Repeal HIV Discrimination Act—to create incentives and support for states to reform their HIV-specific laws that criminalize people with HIV (H.R. 3053 2011). Ad-

ditional policy reforms to bring greater funding and resources for HIV prevention, treatment, and research in the United States have further buttressed Lee's HIV-related bills. The Patient Protection and Affordable Care Act, which will become fully effective in 2014, brings additional policy reform for persons with HIV, including antidiscrimination provisions, prohibitions on higher insurance rates based on preexisting conditions (Carroll 2012), and prohibitions on insurers from placing dollar limits on one's benefits (Hyman 2012).

In July 2012, the Institute on Aging issued guidance to service providers to consider sexual orientation and gender identity when assessing which populations have the greatest social need for services and funding. This guidance followed the announcement in 2010 by U.S. Department of Health and Human Services Secretary Kathleen Sebelius to award \$900,000 to establish the National Resource Center on LGBT Aging through 2013. In August 2012, the Centers for Medicare & Medicaid Services (CMS) announced plans to review federal nursing home regulations to improve quality and safety standards for residents. In September 2012, U.S. Senator Michael Bennet also introduced a bill—the LGBT Elder Americans Act of 2012—to amend the Older Americans Act of 1965 to recognize the unique needs of LGBT older adults. This bill would have provided national, state, and local organizations with information and technical assistance to effectively serve LGBT seniors and would have increased funding for research about and

services to LGBT elders by explicitly defining LGBT older adults as a population of greatest social need. While the bill died in committee, it is expected to be reintroduced in the 113th Congress.

These important legislative and administrative efforts represent significant political changes, moving issues for people with HIV and LGBT older adults in a positive direction. However, any such efforts addressing HIV and/or LGBT older adults must be mindful of how these two areas intersect and affect marginalized communities.

### **HIV and Aging: A Demographic Story for LGBT Persons**

Few population studies collect data regarding sexual orientation and/or gender identity. However, current data estimates that LGB people aged sixty-five and older number 1.5 million and will double to three million by 2030 (SAGE and MAP 2010, 2). Another publication estimates that the population of LGBT elders in the United States will balloon to a range between two million and seven million people by 2030 (Grant 2010, 26).

Based on current HIV transmission information, by 2015, approximately 50 percent of all Americans living with HIV will be aged fifty and older (Fredriksen-Goldsen et al. 2011, 41). Many newly diagnosed people aged fifty and older are “late testers,” meaning they likely had HIV for years before their diagnosis (National Institute on Aging n.d.). One national study by the

## **HIV and Aging for LGBT Older Adults: What Policy Makers Should Know:**

- By 2013, the population of LGBT older adults will reach between two million and seven million people.
- By 2015, approximately 50 percent of all Americans living with HIV will be aged fifty and older.
- LGBT older adults with HIV are more likely to live alone and rely on nonbiological “families of choice” for caregiving.
- LGBT older adults with HIV are more likely to suffer from depression.
- Of LGBT older adult respondents to a University of Washington survey, 71 percent reported stigma based on both age and HIV status.

Gay Men’s Health Crisis (2010, 5) found that adults over the age of fifty at risk for HIV were 80 percent less likely to be tested for HIV than at-risk adults twenty to thirty years of age, which may provide some explanation for the late testing. Because of advances in HIV-related medication and treatment, people with HIV and AIDS are living longer, too. Now the number of individuals living with AIDS who are older than fifty is double the number of individuals with AIDS under age twenty-four (SAGE and MAP 2010, 31). These statistics

highlight the large number of older adults living with HIV. Because of the immense stigma still attached to HIV, however, many people remain unaware of the startling numbers of older adults living with HIV.

Since LGBT communities of color and transgender women face even higher rates of HIV transmission than the general population, older transgender adults and LGBT people of color are more likely to have HIV than their white cisgender<sup>3</sup> peers. For example, older African-Americans are twelve times as likely and Latinos are five times as likely as their white peers to have HIV (Gay Men's Health Crisis 2010, 3). While

and transphobia in the medical and legal community combine with ageism to create a dangerous reality for many elder LGBT persons of color and transgender women living with HIV.

While HIV impacts individuals' health, it also leaves many people in a state of poverty. A 2011 study of LGBT older adults in Chicago, Illinois, reported that LGBT older adults with HIV were more likely to access Medicaid and food stamps (49 percent and 41 percent, respectively) compared to LGBT older adults without HIV (16 percent and 18 percent) (Brennan-Ing et al. 2011, 8). A similar study from 2010 found that LGBT older adult respondents with

## Racism, sexism, homophobia, and transphobia in the medical and legal community combine with ageism to create a dangerous reality for many elder LGBT persons of color and transgender women living with HIV.

35 percent of transgender women respondents to a San Francisco study had HIV, 65 percent of those who were also African-American had HIV (Gay Men's Health Crisis 2010, 6). Ronald Johnson, an African-American gay man with HIV, noted in an interview for the *Gray-ing of AIDS* that "the racial disparities in health care . . . make the ability to take advantage of the medications an issue of race" and added that societal disparities "continue to play out in the AIDS epidemic" (Heinemann and Schlegloff n.d., 19). Yet, many policies ignore this reality. Racism, sexism, homophobia,

household incomes at or below two hundred percent of the federal poverty level reported higher rates of HIV than those above two hundred percent of the poverty level (Fredriksen-Goldsen et al. 2011, 44). These statistics highlight how LGBT older adults with HIV are more likely to require financial assistance for health care and basic necessities.

A majority of older LGBT also adults live alone (Brennan-Ing et al. 2011, 18). LGBT older adults have higher rates of social isolation and feel more unwelcome in health care and community settings than do the wider population (SAGE



and MAP 2010, iii). A majority of LGBT older adults with HIV who responded to a 2011 survey reported being single, and they also reported relationships that were significantly shorter than those of respondents without HIV (Brennan-Ing et al. 2011, 17). These relationship differences become even more significant as LGBT persons age. Biological families provide approximately 80 percent of long-term care in the United States, and more than two-thirds of adults who receive long-term care at home depend on biological family members as their only source of assistance (SAGE and MAP 2010, ii). However, nearly two-thirds of LGBT older adult respondents to a 2010 survey reported that they consider their friends “chosen family” (MetLife 2010, 3). LGBT elders are four times as likely to depend on a friend as a caregiver (MetLife 2010, 3). Depending on friends for caregiving support creates problems as friends age and also require caregiving assistance (Brennan-Ing et al. 2011, 11). LGBT older adults, however, who are more likely to be single, live alone, and rely on single-generation friends or “families of choice” for caregiving will be more likely to require institutional long-term care (SAGE and MAP 2010, ii). Research also shows a correlation between social isolation and higher depression, poverty, rehospitalization, delayed care-seeking, poor nutrition, and premature mortality (SAGE and MAP 2010, iii).

LGBT older adults are also more likely to suffer from chronic health conditions and poor health compared to their heterosexual peers. For example, gay and bisexual male respondents to California

Health Interview Surveys from 2003 to 2007 reported higher rates of hypertension, diabetes, psychological distress, and physical disability than their heterosexual peers (Wallace et al. 2011, 3). Older lesbian and bisexual women also had higher rates of psychological distress symptoms and physical disability than similar aging heterosexual peers (Wallace et al. 2011, 4). A recent study examining the mental and physical health of transgender older adults found that transgender older adults have a significantly higher risk of poor physical health, disability, depressive symptomatology, and perceived stress compared to non-transgender participants (Fredriksen-Goldsen et al. 2013, 1). A study by the National Center for Transgender Equality (NCTE) also reported that between 33 and 39 percent of older transgender adults responding to a national survey had attempted suicide (Grant et al. 2011, 82). A SAGE (Services and Advocacy for GLBT Elders) and NCTE study reported the figure much higher—at 71 percent (SAGE and NCTE 2012, 18). The same report also found that older transgender adults were twice as likely to have experienced physical or verbal domestic violence than LGB peers (SAGE and NCTE 2012, 9). Transgender persons, especially older adults, are also less likely to seek medical intervention or assistance from caregivers (Knauer 2009, 15). For example, when famous jazz musician and transman Billy Tipton died from a bleeding ulcer in 1989, reports surfaced that he had not seen a doctor in fifty years, presumably because an examination would have revealed his

trans status (Knauer 2009, 15).

LGBT older adults with HIV have unique health care needs that account for multiple chronic illnesses—such as cardiac disease, diabetes, and arthritis—in addition to HIV. Older LGBT adults with HIV are also more likely to suffer from depression; one study reports that they suffer twice the rate of depression as their peers (Brennan-Ing et al. 2011, 24). According to the Centers for Disease Control and Prevention (2010), men who have sex with men have a higher risk of HIV, especially in communities of color. Another study found that over 25 percent of transgender women tested positive for HIV/AIDS, with even higher rates among African-American transgender women (Grant 2010, 74). Because doctors are less likely to assume older adults are at risk of HIV, they are less likely to test them for the virus, and thus HIV is often detected later in older adults (Grant 2010, 74). Research suggests that LGBT older adults with HIV, particularly individuals without intergenerational informal caregiving, will encounter numerous obstacles navigating health care as they age (Brennan-Ing et al. 2011, 11).

Years of discrimination, criminalization, and immense stigma compound these health problems by dissuading many LGBT older adults from disclosing their sexual orientation and/or gen-

der identity beyond a very tight circle of friends, if at all. Many LGBT elders grew up during the Lavender Scare in the 1950s (Redman 2012, 444), an era in which same-sex attraction could result in involuntary commitment to a mental hospital with electroshock therapy and perhaps even a lobotomy, employment termination, loss of parental rights, police harassment, and possible jail time (Knauer 2012, 290). Fear of inadequate health care in long-term facilities further prompts many LGBT elders who were “out” to return to the closet upon entering a facility (Persinger 2010, 141).

Stigma about sexual orientation and gender identity often adds to stigma against HIV to create immense barriers for LGBT older adults with HIV. For example, reports of health aides in long-term care facilities wearing gloves when opening doors or when making the beds of LGBT elders without HIV, due to an erroneous fear of contracting HIV, highlight the reality experienced by many LGBT older adults with HIV or those perceived to have HIV (Hovey 2009, 110). Approximately 20 percent of people with HIV who responded to the AIDS Community Research Initiative reported that HIV stigma made them feel that “staff didn’t like people like them” (Brennan-Ing et al. 2011, 8). Such fears are not unfounded. For example, when a long-term care facility in

Fear of inadequate health care in long-term facilities further prompts many LGBT elders who were “out” to return to the closet upon entering a facility.

Little Rock, Arkansas, learned that Dr. Robert Franke, a seventy-five-year-old retired university provost and minister, had HIV, the facility promptly evicted him (*Franke v. Parkstone Living Center* 2009). According to court documents, nursing staff threatened that the facility would turn him over to Adult Protective Services if he had not moved out of the nursing home “by the end of the day” (*Franke v. Parkstone Living Center* 2009). Older LGBT participants with HIV who responded to the Aging and Health Report confirmed that Dr. Franke’s experience was not unique, reporting higher rates of denial of health care access or inferior care (Fredriksen-Goldsen et al. 2011, 43).

Many persons with HIV internalize stigma through feelings of shame, guilt, anger, fear, and self-loathing (*Gay Men’s Health Crisis* 2010, 23). In a University of Washington study of older adults living with HIV, 96 percent of respondents reported an experience with HIV stigma, and 71 percent reported stigma based on both age and HIV status (*Gay Men’s Health Crisis* 2010, 23). Stigma prevents many LGBT older adults with HIV from communicating their diagnosis to others. One study reported that more than half of the people between fifty and sixty-five years of age with HIV practiced “protective silence,” or refused to tell other people about their HIV diagnosis to protect themselves against HIV-related stigma (Heinemann and Schlegloff n.d., 22). A 2006 study of older adults with HIV found that many participants failed to disclose their HIV status to all of their

sexual partners, including 16 percent who failed to disclose their status to any of their sexual partners (Karpiak et al. 2006, 29). The immense stigma attached to HIV, especially among LGBT older adults, prompts many individuals to fear negative repercussions and further social isolation from disclosure.

### **Strategies for Inclusive Policy Reform for LGBT Older Adults with HIV**

Several efforts could help ensure that LGBT seniors, including elders of color and transgender older adults, are included in policy reform. First, lawmakers must recognize the importance of intersecting identities when developing policies regarding LGBT elders and people living with HIV. Laws must not only reflect the needs of our diverse communities but also be responsive in providing funding and support for communities that are often left invisible from policy reform—especially communities of color and transgender older adults. Second, administrative agencies can issue guidance and engage in formal rule-making procedures to provide inclusive protections for LGBT older adults, including LGBT older adults with HIV. Third, increased research can focus on the intersecting needs of LGBT older adults with HIV. Fourth, policy reforms can include efforts to mandate inclusive cultural competency training for health care staff—and provide important funding to implement these requirements. Finally, increased community education within the LGBT community and the

general population about the needs of LGBT older adults, including the needs of LGBT older adults with HIV, will help increase awareness and a deeper understanding as to why inclusive policy reform is necessary.

### **Legislative Reform**

Legislators and policy makers must consider intersecting identities when drafting and revising current legislation. For example, while Congresswoman Lee's HIV-related legislation provides important support for people with HIV and represents one of the first attempts to eradicate criminal laws that penalize people based on their HIV-status, neither bill addressed how HIV affects older adults. For example, Ending the HIV/AIDS Epidemic Act of 2012 notes that HIV rates increase among young people between the ages of thirteen and twenty-nine, especially young men of color who have sex with men, but fails to acknowledge HIV transmission rates for older people, let alone older LGBT people (H.R. 6138 2012). With increasing technologies allowing persons with HIV to live longer and newer cases of HIV diagnoses among older adults, policy reform addressing HIV should include provisions addressing HIV among older adults, including LGBT elders.

Senator Bennet's LGBT Elder Americans Act of 2012 provided another possibility for policy reform for LGBT older adults. The bill would have codified guidance by the Administration on Aging (AoA) issued in July 2012 to consider LGBT older adults as a population of "greatest social need." This

step would have created new funding sources for services to LGBT seniors. The bill would also have provided for data collection regarding discrimination against LGBT older adults and increased resources for LGBT elders, caregivers, families, and service providers through the permanent creation of the National Resource Center on LGBT Aging (S. 3575 2012).

However, similar to Lee's HIV-related legislation, Bennet's LGBT Elder Americans Act of 2012 failed to include any reference to HIV and how LGBT older adults with HIV have specific unmet needs. Senator Bennet, and possibly other lawmakers, will likely reintroduce the LGBT Elder Americans Act in the 113th Congress; if they do, the bill would benefit not only from mentioning how HIV affects LGBT older adults but also from including some kind of educational and programmatic revisions that address HIV-related stigma that older adults, particularly LGBT older adults, experience. The language included in the LGBT Elder Americans Act of 2012 may have been sufficiently broad to include such revisions; however, a more specific amendment would better achieve this goal and help provide even stronger justification as to why LGBT older adults are indeed a population of greatest social and economic need.

Because many LGBT older adults with HIV represent racial and ethnic minorities, implementation of the recent policies must provide both visibility and resources to the diverse communities of LGBT older adults living with HIV. Thus, some portion of fund-

ing stemming from bills like Lee's HIV-related legislation or Bennet's LGBT Elder Americans Act, or some similar legislation in the future, should address the needs of LGBT elders of color living with HIV. Given the extraordinarily high rates of HIV among older transgender women of color, such a focused priority is critical. Similarly, as portions of the Affordable Care Act become effective through 2014, policy makers, service providers, and advocates must remain mindful of how this complex set of health care reforms provides new services to many LGBT older adults, particularly from marginalized communities of intersecting identities.

### **Administrative Reform**

While inclusive legislative reform represents an important strategy to ensure better protection for LGBT older adults with HIV, other avenues can lead to policy reform—including change through executive departments and administrative agencies. For example, the AoA (or another appropriate entity) could issue guidance or engage in formal rule making to codify language in the Code of Federal Regulations recognizing that LGBT older adults, including those from racial and ethnic minority communities and/or transgender communities and those living with HIV, comprise a population of “greatest social need.”

The CMS similarly could engage in formal rule making (or encourage guidance) after any review of the federal nursing home regulations to expressly acknowledge that LGBT older adults enjoy the same resident rights outlined

through the 1987 Federal Nursing Home Reform Act (Centers for Medicare & Medicaid Services 1987). Additionally, CMS could propose an antidiscrimination provision that includes both sexual orientation and gender identity and requires nursing aides to participate in cultural competency trainings.

Moreover, CMS could strengthen the current regulations by providing an inclusive definition of “family” throughout the regulations. While other administrative regulations have broadened the definition of family in hospital contexts (and thus could potentially be applied in other contexts including nursing homes), current nursing home regulations do not include an inclusive definition of family and may leave many LGBT older adults without anyone legally allowed to provide support and guidance to the nursing home on their behalf. Because LGBT older adults, particularly transgender residents, persons of color, and persons living with HIV, often bear the brunt of multiple forms of prejudices, regulations that expressly recognize the applicability of these rights to LGBT persons should acknowledge the diversity of residents that may identify as LGBT. Such recognition will not only create more visibility for communities with intersecting identities, it will increase awareness that will hopefully lead to better and more culturally competent research and care.

### **Research**

More research on the needs of LGBT seniors, including the complex social,

health, housing, and social service needs of LGBT seniors of color, would tremendously buttress any legislative and administrative endeavors addressing LGBT older adults by providing empirical data. Very little research currently exists on LGBT seniors. In fact, a 2011 report by the Institute of Medicine concluded that “researchers still have a great deal to learn” (Institute of Medicine 2011, 1). The report found that researchers have failed to adequately address the needs of LGBT elders, bisexuals, transgender persons, and racial and ethnic minorities in the LGBT community (Institute of Medicine 2011, 1).

In late March 2013, a group of researchers released a study in the *Gerontologist* that represented one of the first studies to address transgender older adults’ physical and mental health, but noted in the study’s conclusion the need for longitudinal studies “to better understand the health trajectories of transgender older adults over time” (Fredriksen-Goldsen et al. 2013, 12). A handful of studies and surveys are currently underway regarding LGBT seniors, including a study of LGBT seniors in San Francisco by the LGBT Senior Task Force and a national study on the health of LGBT older adults by researchers from the University of Washington (Espinoza 2011, 2). Still, more local, state, and national studies exploring the needs of all LGBT seniors would strengthen any LGBT-inclusive policy efforts by providing the necessary data to justify increased funding and resources for this intersectional population of greatest social need.

### **Cultural Competency Trainings**

Increased cultural competency of nursing facility staff could dramatically decrease the instances of harassment, discrimination, and maltreatment by residents based on their intersecting identities. Seth Kilbourne, executive director of Openhouse, noted in an interview that “mainstream service providers often say they do not serve any LGBT elders and therefore have no problems related to cultural competency around LGBT issues” (SAGE and MAP 2010, 34). However, because many LGBT older adults fear disclosure of their sexual orientation and/or gender identity, staff are often unaware of their LGBT residents’ needs and are unprepared to address harassment as it arises. A national 2010 survey further confirms that few service providers for older adults are prepared (or even recognize the needs) of LGBT seniors. Fewer than 8 percent of three hundred and twenty area agencies and state units on aging surveyed offered services targeted to LGBT older adults and a mere 12 percent even conducted outreach to this population (Knochel et al. 2010). Staff lacking the training or sensitivity to respond to harassment may increase social isolation by improperly targeting or separating an LGBT resident who is the victim of harassment. For example, in response to frequent harassment by other residents and their family members, staff moved an openly gay man to a floor for patients with severe disabilities and/or dementia, and he subsequently hanged himself (SAGE and MAP 2010, 36).

Mandatory cultural competency trainings could ensure that staff have the



proper tools to respond to harassment. In 2008, California passed a bill mandating LGBT cultural competency training for licensed health professionals who have constant interaction with seniors in nursing homes and senior care facilities (Equality California 2008). A lack of funding and oversight has resulted in somewhat of a hollow victory for this bill, as many service providers are unaware of this mandate or unwilling to spend the time and resources to train their staff (Meyer 2012, 516). As a result, California Senator Christine Kehoe introduced a broader bill in 2011 that would have mandated regulatory boards that license or certify health care professionals to require continuing education on LGBT cultural competency in health care (Equality California 2011). While the governor subsequently vetoed the bill after it passed the Senate (Bill Analysis 2011), both bills represent policy efforts and increased dialogue to include cultural competency trainings for health care providers.

Any policy efforts to increase cultural competency among health care staff should include language recognizing that LGBT older adults straddle many communities, and thus any cultural competency training program should address how to respond to the needs of all LGBT seniors, including older LGBT adults with HIV. Similarly, any cultural competency trainings must recognize the complex ways in which intersecting identities interact to create multiple forms of oppression. An elderly African-American transsexual with HIV may experience discrimination because

of age, race, gender identity, and HIV status. Health care providers must be prepared to acknowledge the needs of all LGBT seniors.

### **Community Education**

Inclusive legislative policy, administrative reform, research, and cultural competency trainings would undoubtedly help improve support, services, and protections for LGBT older adults with HIV. Still, another important piece for ensuring inclusive policy for LGBT older adults with HIV is to encourage and engage in inclusive community education. Community advocacy provides not only the kindling but often the spark that ignites policy reform. Organizations like SAGE and FORGE Transgender Aging Network are engaging in important policy and community education to improve the lives of LGBT older adults. Community education is important for changing the hearts and minds of the LGBT community and the larger general population. By increasing awareness about the “demographic story” for many LGBT older adults, especially LGBT older adults with HIV, advocates will be better armed with the knowledge to persuade policy makers to implement inclusive policies about LGBT older adults with HIV.

### **Conclusion**

LGBT older adults and people living with HIV face immense stigma, discrimination, and lack of resources.

New policies, regulations, and guidance signal the dawn of a new era of dialogue, action, and recognition of the



needs of LGBT older adults and people living with HIV, including resources and policies addressing stigma and discrimination based on sexual orientation, gender identity, age, and HIV status. To be truly effective, any policy reform must acknowledge how HIV-related policies and policies regarding LGBT older adults intersect and address specific needs for LGBT older adults with HIV, a growing population in the United States. Effective policy reform must also recognize and address how marginalized communities, including people of color and transgender women, are uniquely affected by policies regarding LGBT aging and HIV. Very little research exists regarding LGBT older adults, and even less research exists regarding the intersecting identities of LGBT older adults with HIV. While much work lies ahead on the road to full and equal recognition for LGBT older adults with HIV, recent policy efforts suggest significant change in the ways in which mainstream society, policy makers, and even the LGBT community views the needs. Such change must be accompanied by inclusive policy reform addressing the diverse needs of this community to yield the best results for equal access and justice for all LGBT older adults living with HIV.

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## Endnotes

1. In the rest of this journal, the acronym LGBTQ is used to incorporate a broad range of the sexuality spectrum, but this article uses the phrase “LGBT older adults” because this is the term used by practitioners who serve this population. The acronym “LGBT” refers to lesbian, gay, bisexual, and transgender individuals. However, it is important to note that some older adults do not identify with this label and instead prefer labels like “men who love men” and “women who love women,” among others.

2. Unless otherwise specified, this article uses the words “older,” “elder,” and “senior” interchangeably to represent a population of people fifty years or older. While the age groups represented in this category have varying needs, research has been extremely limited on LGBT older adults and older adults with HIV and has focused mostly on people fifty years or older.

3. Cisgender describes individuals whose gender identity matches the gender assigned at birth.

# Social Media, Ethics, and Exposing Private Information About LGBTQ Users

Leone Kraus

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## A More Connected World Is a Better World

In a May 2010 opinion post for the Washington Post, Facebook CEO and founder Mark Zuckerberg wrote in response to the public's growing concern over user privacy:

Six years ago, we built Facebook around a few simple ideas. People want to share and stay connected with their friends and the people around them. If we give people control over what they share, they will want to share more. If people share more, the world will become more open and connected. And a world that's more open and connected is a better world. (Zuckerberg 2010)

In theory, Zuckerberg's notion sounds ideal. However, the content that users share can have unintended consequences for those in the lesbian, gay, bisexual, and transgender (LGBT) communities—consequences that can't be fixed through enhanced privacy settings on social media platforms alone.

An October 2012 article in the Wall Street Journal discussed this phenomenon.

Bobbi Duncan, a student at the University of Texas, had her sexual orientation exposed when, after joining the university's Queer Chorus, she and another classmate were added to the choir's Facebook page without their consent or knowledge (Fowler 2012). The addition of her name to the group was blasted to Bobbi's entire Facebook network. Like many people, Duncan had been savvy about her privacy settings, preventing members of her network from seeing content that would expose her LGBT identity. However, a loophole in Facebook's privacy settings alerted Duncan's Facebook network that she was added to the group, leading her father to discover that his daughter was a lesbian and causing a significant disruption in their relationship.

### **Behaving Ethically on Social Networks**

Duncan's experience exposes an issue that goes beyond privacy. As with most new technologies, the rapid evolution of social media has introduced new challenges to which our culture must adapt, including issues not just of privacy but of ethics.

When new technologies are introduced, there is often a delay between the use of such technologies and the development of appropriate standards for their use; for example, the use of cell phones and texting during a movie or dinner date. When these standards are not yet developed, one must rely solely on one's own judgment, morals, and values to guide behavior.

"Ethics" refers to what we ought to

do when it comes to making decisions that are right, fair, and just. The ethics of human communication assess the right and wrong ways to engage in communication with those in our networks. Each of us has the ability to communicate with individuals or groups in our networks, but our communication may have intended or unintended consequences for ourselves, for the person or group we are in communication with, and for the person or group for whom the communication is about. Our communication becomes more complex and requires more scrutiny when social media is involved. For example, in 2010, Rutgers University student Tyler Clementi took his own life shortly after his sexual encounter with another man was broadcast via Internet video to his peers at school (Foderaro 2010). What it means to use good judgment or to behave ethically is very much in play when discussing social media, a relatively new set of technologies with pitfalls made slowly apparent to its users.

Although social media platforms like Facebook have implemented solutions that protect an individual's own privacy, they have done little to protect those about whom content is being shared. For instance, a Facebook user has the ability to upload pictures of friends without getting the friends' consent. Even with increased control of content posted on a user's wall, select posts on Facebook are often visible to large groups of people before they are vetted or even noticed by the person affected by this information, as in the case of Bobbi Duncan.

## Exposing LGBT Identities Without Consent

Exposing private information can have unintended consequences, particularly for the LGBT community, a minority population that frequently faces discrimination but is in the somewhat unusual situation of being able to choose to conceal or disclose their status of belonging to this group.

I conducted a survey to explore the phenomenon of how frequently content that exposes LGBT identities is shared on social networks. More than half of survey respondents, 55 percent, reported that their LGBT identity had been exposed through social media; of those, only 18 percent said that their peer asked for proper consent before posting. Of those who said that proper consent had not been obtained, 4 percent indicated that they had faced negative repercussions, such as damaged family relationships, due to their sexual/gender identity being exposed without consent on social media platforms.

At this time, it is not standard etiquette to request permission from a person before posting content about them. And while this may only affect, or negatively affect, a small percentage of overall users, the consequences of these actions can be, and have been, severe for some LGBT individuals.

## Misunderstandings of State-Level LGBT Rights

Not only are some users of social media cavalier about sharing content, but few are informed about the laws that exist

to protect the LGBT community. Users are often misinformed about the legal protections that exist—at times assuming wrongly that there are existing protections, while just as often assuming wrongly that there are not.

Respondents were asked about several basic rights and laws that affect the LGBT community, including workplace nondiscrimination, hate crimes and protections from acts of violence, nondiscrimination and anti-bullying laws in schools, and relationship recognition, including marriage, civil unions, and domestic partnerships. There were notable numbers of people who incorrectly assumed that their home state did or did not have protections within each of these key areas (see Table 1).

While at first review these statistics may appear minimal, they bring to light the limited awareness and inaccurate understandings surrounding legal protections for members of the LGBT community. For instance, a user in New York, where residents are protected by many LGB rights (not including transgender rights), may share content that exposes the LGBT identity of a user in Alabama, where these rights do not exist, potentially causing the individual in Alabama to have her safety, job, family ties, or other important life areas put at risk. This scenario highlights the significance of encouraging users of social media to think about the content that they are sharing as well as the negative consequences that the exposing content may have on their LGBT peers, even if they live in a state where LGBT rights are the norm.

**Table 1: Respondents’ understanding of LGBT rights in their current state of residence. This survey was conducted before Maine, Maryland, and Washington passed same-sex marriage.**

	Protections for LGB persons		Protections for transgender persons	
	Stated “I have these protections” when their state does not	Stated “I do not have these protections” when their state does	Stated “I have these protections” when their state does not	Stated “I do not have these protections” when their state does
Workplace protection laws	6%	1%	5%	8%
Hate crimes laws	16%	18%	6%	10%
Anti-bullying or safe school laws	4%	12%	4%	16%
Same-sex marriage rights laws	2%	12%	N/A	N/A

**Is a More Connected World a Better World?**

Let’s recall Zuckerberg’s quote in the Washington Post, where he states, “If people share more, the world will become more open and connected. And a world that’s more open and connected is a better world” (Zuckerberg 2010). In many ways, this idea does hold true. Content that is shared on social platforms serves as a communication tool, which can in turn educate others on cultural and societal differences within their networks. However, as we’re reminded by Tyler Clementi, Bobbi Duncan, and the limited state of LGBT rights across all fifty states, we do not live in a completely tolerant society and much more

still needs to be done in order to increase acceptance of those in the LGBT community. Even though social media users may be exposed to LGBT messaging via photos, events, comments, shared news articles, and so on, it does not mean that society at large is ready to protect those who identify as LGBT.

Because of this, two critical solutions need to be explored:

1. Beyond robust privacy settings for users, social media platforms need to provide ethical guidelines at time of sign-up and at various touchpoints so users are continuously exposed when they use the platforms. These guidelines should encourage users to question whether or not they have permission to post content that may expose

private information about their peers. This could be in the form of prompting questions such as, “Does this piece of content expose something about someone that you’re not sure is public information?” or “Do you know all the people you’re sharing in this content, whether tagged or not tagged? Does the piece of content you’re about to share violate someone’s privacy?” While this will not remove the issue completely, the continuous exposure to guidelines and messaging surrounding the importance of thinking about how your post may affect others could, over time, lead users to think more about their actions.

2. Users of social media need to understand more deeply the ramifications of what it means to expose the LGBT identities of their peers and need to question whether or not posting content that would expose their peer’s identity is ethical. The violation of privacy is not solely a platform issue, it is also a user issue. By deepening the understanding of ethical behavior on social platforms, we may see a decrease in instances where private information is shared without consent. This could be done by putting an emphasis in schools’ curriculums or offering a series of workshops and webinars that more broadly exposes users to the implications of unintended content shares. Also, social platforms like Facebook, Twitter, or Tumblr could host informative webinars that cover the ethics surrounding posting content that violates a user’s privacy by exposing LGBT identities. By exposing users to the ethical ramifications, both in their daily life and on social platforms,

we may begin to see a shift in how users share content that may expose the LGBT identities of their peers and the people around them.

Because social media platforms are evolving to allow users to share more information, not less, with their online communities, putting the risk of exposing private information of LGBT users at the forefront, it is critical that solutions to this growing phenomenon come to life. The exposure of private information, as it pertains to being LGBT in the United States, could cost individuals their job and home and be a threat to their overall safety and security, but that exposure could also have even more damaging effects for those who live internationally in areas where being LGBT could cost you your life. Our social technology has grown rapidly, but the development of these platforms and the education and ethics of how users behave needs to catch up.

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# Reproductive Justice Is an LGBTQ Issue

Laura Nixon

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**I**n fall 2012, my colleague and I interviewed more than a dozen law students for summer clerkships at our organization, the National Center for Lesbian Rights. When a student learned that I was a Reproductive Justice Fellow at a LGBTQ organization, she asked for my advice on a situation at her law school. She was trying to start a chapter of Law Students for Reproductive Justice, and her efforts were being blocked by the administration. Seeking support from the campus LGBTQ student organization, she was rebuffed by one of the leaders who told her, "These are not our issues."

The emergence of the reproductive justice movement over the past fifteen to twenty years has both challenged and revitalized reproductive rights advocacy and activism in the United States. Emphasizing the needs of low-income women and women of color, the movement was developed to address the abortion-cen-

tric framework of traditional reproductive rights advocacy. This traditional framework was sorely inadequate in understanding the intersection of race, class, and sexuality in reproduction and access to health care. The new conceptual framework—reproductive justice (Asian Communities for Reproductive Justice n.d.)—answered this inadequacy by calling for multi-issue analysis and organizing across the thread of reproduction: from contraceptive equity to abortion access to eugenics of welfare family caps to racial disparities that target poor women of color in the child welfare system (Romero and Fuentes 2010; Oregon.gov n.d.). Reproductive justice can be described in shorthand as considering all the factors that affect the right to have children, to not have children, and to parent the children we

starkly divergent trends in their legislative successes and policy achievements. For example, in 2011 and into 2012, the reproductive rights movement faced an unprecedented number of state legislative attacks (Guttmacher Institute 2013) while the LGBTQ movement started to see success on some previously intractable issues, such as marriage equality (New York Times 2012) and legal protections for transgender people (Quinones 2012). These divergent trends are underscored by how little organizational collaboration exists between the LGBTQ rights movement and the reproductive health and rights movement. This is despite the fact that the movements' legal histories are intertwined and reinforcing and more puzzling in light of the considerable number of lesbians and bisexual women who have

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have.

Despite the emergence of the reproductive justice movement, much of the lesbian, gay, bisexual, transgender, and queer (LGBTQ) movement has not embraced this framework to become strong advocates for reproductive rights and health. The lack of a strong alliance is reflected in the two movements'

led as advocates in the reproductive health, rights, and justice movements. Standout exceptions include organizations like the National Latina Institute for Reproductive Health and Forward Together, which have integrated reproductive health issues affecting LGBTQ people into their advocacy and organizing for several years. However, the ma-

majority of the mainstream LGBTQ organizations have neglected to advocate on reproductive justice issues as stakeholders as opposed to as allies.

There are compelling reasons for the LGBTQ movement to better integrate reproductive rights and health issues into its sphere of advocacy. A true reproductive justice agenda for LGBTQ organizations should: incorporate advocacy on contraceptive equity and abortion access into LGBTQ advocacy and understand and address the specific reproductive health and rights issues facing transgender people. LGBTQ people should not have to look to another movement for advocacy on some of the most critical and sensitive issues in our lives. Instead, the LGBTQ movement should embrace those issues as an integral part of its agenda. Below are two of the main reasons why.

### **Contraceptive Equity and Abortion Access Impact the LGBTQ Community**

Lesbian and bisexual women are significantly impacted by battles over contraceptive equity and abortion access, and they also lead as advocates on these issues. Reproductive health issues for lesbians and bisexual women extend beyond achieving parenthood through access to adoption, second-parent adoptions, and affordable reproductive technologies. In fact, though it may seem counterintuitive, several studies have documented that young lesbians are significantly more likely to experience an unintended pregnancy

than their heterosexual peers (Robson 2011). This is because LGBTQ youth are particularly vulnerable to the inadequacies of abstinence-only sex education, sexual abuse, substance abuse, and homelessness and are disproportionately both victims of sex trafficking and involved in sex work. Researchers have also suggested that heterosexist surveillance and harassment may lead young lesbians and bisexual girls to have unprotected heterosexual sex to mask their sexuality. An unintended pregnancy rate so disproportionately high places access to contraception, emergency contraception, and abortion care directly within the orbit of reproductive rights and health issues facing lesbian and bisexual women.

Moreover, for women in the LGBTQ community, the connection between these two movements is not simply theoretical. Lesbians and bisexual women are leaders and staff in major reproductive rights organizations, organizers of clinic defense against anti-abortion protesters, and volunteers for abortion funds. What accounts for the considerable number of lesbians and bisexual women leading on these controversial issues? This may have grown from the professional opportunities for social justice advocacy available to White lesbians and bisexual women in the 1970s and 1980s when the women's rights movement was well developed and the LGBTQ movement was not. In addition, advocates like myself view lesbians and women exercising their abortion rights as parallel forces of resistance to rigid feminine gender roles. As legal

scholar Ruthann Robson pointed out:

Lesbians and women who have abortions share the mantle of women-who-would-be-independent-from-men: they have their rhetorical culmination in the lesbian as “man-hater” and the selfish “mother” aborting “male fetuses.” Such rhetoric contributes to sexual rights advocates and reproductive rights advocates distancing ourselves from the most radical implications of our theorizing. In such theorizing, lesbians have a stake in the reproductive rights of all women. (Robson 2010)

This has been more fully embraced in the reproductive justice movement than in the LGBTQ movement. The reproductive justice movement has affirmatively provided professional opportunities and organizing space for lesbian and bisexual women of color, as demonstrated most recently by the powerful campaign by Strong Families, which centers on the voices of LGBTQ people of color, celebrating and making visible their histories of resistance on the recent fortieth anniversary of *Roe v. Wade*.

### **Reproductive Health Needs of Transgender People Must Be Addressed**

Transgender people face unique barriers to reproductive justice, as set forth in a 2012 fact sheet by the National Center for Transgender Equality (National Center for Transgender Equality 2012). Alarming, many transgender people report being denied health care by providers outright. In national surveys, such as by the National Gay and

Lesbian Task Force (2011), somewhere between 19 to 27 percent of transgender people report having this experience. With regard to reproductive health, some transgender men who have sex with men report being more concerned about unintended pregnancy than sexually transmitted infections (National Center for Transgender Equality 2012). Moreover, surveys have revealed that as many as half of trans men respondents did not obtain an annual pelvic exam for reasons ranging from past experiences with (or anticipation of) mistreatment, misinformation, discomfort with the gendered nature of this care, or lack of financial resources (National Center for Transgender Equality 2012). For these reasons, our LGBTQ and reproductive movements should be working together to rethink how reproductive health care is conceptualized. This includes everything from questioning the inclusiveness of the phrase “war on women” to ensuring that women’s health centers are — in name and in fact — welcoming to transgender people.

Lastly, requirements that people undergo sex reassignment surgery before being allowed to change the gender marker on driver’s licenses or birth certificates essentially requires that they be sterilized in order to obtain accurate identification documents (Spade 2008; WPATH 2011). While fertility may not be at the forefront of someone’s mind when seeking to obtain sex reassignment surgery or accurate identification documents, the consequences of sterilization requirements are far-reaching and may be irreversible. Given that

such consequences may only be circumvented by expensive fertility preservation measures, this is an issue that significantly impacts low-income transgender people who are disproportionately people of color. Given the history of how states have carried out coerced sterilization against marginalized women of color and people with disabilities, this situation should be a profound reproductive justice concern for LGBTQ advocates (Mustufa 2011).

Reproductive justice issues are “our issues.” We cannot abandon our vulnerable LGBTQ community members in this peak climate of attacks on reproductive freedom. LGBTQ people have reproductive health needs and rights outside the scope of securing parenthood. Many of these reproductive health issues disproportionately impact young people, low-income people, and people of color. Therefore, it is no surprise that organizations with a strong race and class analysis in their work, like the National Latina Institute for Reproductive Health and Forward Together, have embraced this intersectionality. The LGBTQ movement would greatly benefit from following their lead.

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