MITCHELL | HAMLINE School of Law

Mitchell Hamline Law Review

Volume 47 | Issue 2 Article 7

2021

Transgender Healthcare is Medically Necessary

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TRANSGENDER HEALTHCARE IS MEDICALLY NECESSARY

Molly Nunn[⚧]

I. INTRODUCTION

Americans have dueling and irreconcilable expectations of the healthcare industry. On the one hand, they believe that access to healthcare should be an affordable and accessible entitlement—their privilege as American citizens.[1] On the other hand, when Americans seek treatment, they expect it to be flawless—they demand the best physicians and the best care centers.

However, since the passage of the Medicare legislation in 1965,[2] Americans have been unable to agree on how people should receive

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[1] THE COMMONWEALTH FUND, N.Y. TIMES & HARVARD T.H. CHAN SCH. OF PUB. HEALTH, AMERICANS' VALUES AND BELIEFS ABOUT NATIONAL HEALTH INSURANCE REFORM 6 (Oct. 2019), https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2019/10/CMWF-NYT-Harvard_Final-Report_Oct2019.pdf [https://perma.cc/CF2D-LFDC].

[2] Social Security Amendments of 1965, Pub. L. No. 89–97, 79 Stat. 286 (codified as amended at 42 U.S.C § 1395 (2020)).

healthcare and who should receive it. The Patient Protection and Affordable Care Act of 2010 (ACA),[3] known as "Obamacare,"[4] is the latest healthcare fix. In response, Americans elected Republican Donald Trump—who ran on repealing "Obamacare"—to the presidency just six years later.[5] Now, especially as the COVID-19 pandemic exposes many of the failures within the current United States healthcare systems, Americans are once again debating healthcare and asking, "what should this look like?"[6] Should the federal government create universal single-payer healthcare plans?[7] Or would it be better to cut Medicare and Medicaid spending and reduce the number of insured?[8]

Throughout this debate, one group of Americans has historically lacked a real advocate for their healthcare needs. Until the dawn of the twenty-first century, transgender Americans were not taken seriously, nor had their specific, medically necessary needs met by healthcare providers, insurers, or politicians.[9] Even today, transgender Americans, as a class, experience significant economic and health challenges compared to their cisgender counterparts. Cisgender refers to those whose gender identity matches their sex assigned at birth, i.e., anyone who is not transgender or gender non-conforming.[10] The fundamental purpose of healthcare is to

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[3] Patient Protection and Affordable Care Act, Pub. L. No. 111–48, 124 Stat. 119 (2010).

[4] The *Patient Protection and Affordable Care Act of 2010* is popularly known as "Obamacare" in the United States. *See* 42 U.S.C. § 18001 et seq. (2010).

[5] Jennifer Haberkorn, *Trump Victory Puts Obamacare Dismantling Within Reach*, POLITICO (Nov. 9, 2016), https://www.politico.com/story/2016/11/trump-victory-obamacare-risk-231090 [https://perma.cc/UA5F-945Z] (outlining possible challenges to the ACA under the Trump administration). *See also* Julie Rovner, *The Future of the Affordable Care Act in a Supreme Court Without Ginsburg*, NPR NEWS (Sept. 21, 2020), https://www.npr.org/sections/health-shots/2020/09/21/915000375/the-future-of-the-affordable-care-act-in-a-supreme-court-without-ginsburg [https://perma.cc/4GB6-VWKB] (describing potential outcomes of the Court hearing requests to repeal the ACA in a 6-3 conservative majority Court).

[6] Robert S. Huckman, *What Will U.S. Health Care Look Like After the Pandemic?*, HARV. BUS. REV. (Apr. 7, 2020), https://hbr.org/2020/04/what-will-u-s-health-care-look-like-after-the-pandemic [https://perma.cc/HD4N-APNM] (highlighting several aspects of American healthcare systems that have been under scrutiny since the start of the COVID-19 pandemic).

[7] Dave Davies, *In 'Medicare For All,' Health Care Is Seen as a 'Critical Service,'* NPR NEWS (Dec. 12, 2019), https://www.npr.org/2019/12/12/787398039/in-medicare-for-all-healthcare-is-seen-as-a-critical-service [https://perma.cc/37DP-E9D3].

[8] Peter Sullivan, *Trump Budget Calls for Cutting Medicaid, ACA by about $1 Trillion*, THE HILL (Feb. 10, 2020), https://thehill.com/policy/healthcare/482378-trump-budget-calls-for-cutting-medicaid-aca-by-about-1-trillion [https://perma.cc/A6HT-4GJ4].

[9] Zaria Gorvett, *Why Transgender People are Ignored by Modern Medicine*, BBC (Aug. 16, 2020), https://www.bbc.com/future/article/20200814-why-our-medical-systems-are-ignoring-transgender-people [https://perma.cc/ALV5-26D5].

[10] Liz Entman, *Transgender Americans Experience Significant Economic, Health Challenges: Study*, VAND. U. (Apr. 13, 2020),

enhance a person's quality of life by improving their health, which is crucial for transgender Americans that need medical care for their health. While our elected officials and voting population value healthcare, and many want to make it accessible to every American, transgender Americans have often been forgotten in this debate.[11]

Today, our healthcare system is systematically failing transgender Americans because many transgender patients cannot access gender-affirming healthcare.[12] Insurers view gender-affirming healthcare claims as either medically unnecessary or make the care prohibitively expensive for patients.[13] Presently, few legal remedies address this issue. This Article will discuss how transgender Americans historically interacted with the healthcare system, what kind of care they require, and what policy solutions legal professionals can implement to help transgender Americans get the care they need and deserve.

This argument is broken into several sections. First, I have broken down transgender healthcare (also referred to as gender-affirming care) into four key concepts: what it means to be transgender and diagnosed as transgender, a 120-year history of transgender medicine, the causes of the transgender diagnosis and gender dysphoria, and finally, how providers treat transgender patients. The second section examines the medical necessity doctrine, when payers must reimburse patients and providers, including for traditionally cosmetic procedures, and the patient's right to appeal a denial of coverage. Finally, I address statistically proven barriers to accessing care and how courts can provide a remedy—because there are remedies. By examining the appropriate laws and examining the facts surrounding the medicalization of transgender healthcare, it is clear the law is on the transgender patient's side.

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https://news.vanderbilt.edu/2020/04/13/transgender-americans-experience-significant-economic-health-challenges-study/ [https://perma.cc/3LJS-8DLP].

[11] Bradley Jones, *Increasing Share of Americans Favor a Single Government Program to Provide Health Care Coverage*, PEW RSCH. CTR. (Sept. 29, 2020), https://www.pewresearch.org/fact-tank/2020/09/29/increasing-share-of-americans-favor-a-single-government-program-to-provide-health-care-coverage/ [https://perma.cc/JS4Y-JBBV].

[12] Neda Ulaby, *Health Care System Fails Many Transgender Americans*, NPR (Nov. 21, 2017), https://www.npr.org/sections/health-shots/2017/11/21/564817975/health-care-system-fails-many-transgender-americans [https://perma.cc/46HJ-EP6K]; *see also* Evan Urquhart, *If I Get Sick with COVID-19, Don't Tell My Doctor I'm Transgender*, SLATE (Apr. 24, 2020), https://slate.com/human-interest/2020/04/transgender-health-care-covid-coronavirus-privacy.html [https://perma.cc/4Q7T-RFCF] (detailing the struggle many transgender Americans face when deciding whether to share their gender identity when not central to the treatment as they are seeking to prevent potential discrimination by providers).

[13] Keren Landman, *Fresh Challenges to State Exclusions on Transgender Health Coverage*, NPR (Mar. 12, 2020), https://www.npr.org/sections/health-shots/2019/03/12/701510605/fresh-challenges-to-state-exclusions-on-transgender-health-coverage [https://perma.cc/SCP8-5RZ6].

II. TRANS-IN-A-NUTSHELL

A. What Does "Transgender" Mean?

In the United States, transgender people are everywhere. They are K-12 students, teachers, athletes, health coaches, models, actors, authors, surgeons, soldiers, rock-stars, and even law students, among many other groups.[14] As of 2017, approximately one in every two hundred-and-fifty Americans are transgender, with that number likely to rise in the future.[15] While there is evidence that transgender people have existed for thousands of years across most human cultures, the concept has only recently gained traction in United States' legal circles.[16]

The word *transgender* is an adjective referring to those individuals who suffer from *gender dysphoria*.[17] Gender dysphoria is a medical condition in which an individual feels distress caused by discrepancies between their gender identity and their sex assigned at birth, and the associated gender role and/or primary (i.e., penis or vagina) and secondary

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[14] *See generally* Trace Lysette, *'Transparent' Actress Trace Lysette on Speaking Up About Sexual Misconduct on Inclusive Set*, VARIETY (Feb. 28, 2018), https://variety.com/2018/voices/columns/transparent-actress-trace-lysette-1202712157/ [https://perma.cc/TR86-JM5E]; Halley Bondy, *'I Just Had to Suppress Everything:' What It's like to be Transgender in a Male-Dominated Field*, NBC NEWS (June 21, 2019), https://www.nbcnews.com/know-your-value/feature/i-just-had- suppress-everything-what-it-s-be-transgender-ncna1019636 [https://perma.cc/SA8P-BPHQ]; Alex Morris, *Laura Jane Grace: A Trans Punk Rocker's Fight to Rebuild Her Life*, ROLLING STONE (Sept. 8, 2016), https://www.rollingstone.com/music/music-features/laura-jane-grace-a-trans-punk-rockers-fight-to-rebuild-her-life-111470/ [https://perma.cc/VAB3-BB9S]; Katherine Bernard, *Meet Hari Nef: Model, Actress, Activist, and the First Trans Woman Signed to IMG Worldwide*, VOGUE (June 16, 2015), https://www.vogue.com/article/hari-nef-transgender-model-img-interview [https://perma.cc/5G9U-VK9N]; Johnny Diaz, *7 Questions with Jazz Jennings of TLC's 'I Am Jazz,'* N. Y. TIMES (Jan. 30, 2020), https://www.nytimes.com/2020/01/30/arts/television/i-am-jazz-jennings.html [https://perma.cc/2BGD-7YET].

[15] Ester L. Meerwijk & Jae M. Sevelius, *Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples*, 107 AM. J. PUB. HEALTH 1, 1 (Feb. 2017).

[16] *See* Ariel David, *Ancient Civilization in Iran Recognized Transgender People 3,000 Years Ago, Study Suggests*, HAARETZ (Dec. 30, 2018), https://www.haaretz.com/archaeology/.premium.MAGAZINE-ancient-civilization-in-iran-recognized-transgender-people-study-suggests-1.6790205 [https://perma.cc/ZW6L-K9UU]; GVGK Tang, *Of Gods & Emperors: Trans Experiences in Ancient Rome*, NOTCHES (Nov. 14, 2017), http://notchesblog.com/2017/11/14/of-gods-emperors-trans-experiences-in-ancient-rome/ [https://perma.cc/Y6TB-EW5F].

[17] THE WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, DIAGNOSES RELATED TO GENDER DYSPHORIA 5 (2012) [hereinafter WPATH]. Not to be confused with gender nonconformity, which refers to the extent to which a person's gender identity, role, or expression differs from cultural norms prescribed to people of a particular sex. *Id.*

(i.e., male facial hair) sex characteristics.[18] Gender identity refers to a person's intrinsic sense of being male (a boy or a man), female (a girl or a woman), or an alternative gender.[19]

For example, a transgender woman, like me, has the gender identity of a woman but was born with male primary sex characteristics (e.g., a penis, testicles, prostate, etc.). For transgender men, they experience the opposite; a transgender man has the gender identity of a man but was born with the primary female sex characteristics (e.g., a vulva, vagina, cervix, etc.). A transgender person may experience levels of distress that are clinically significant from their primary and/or secondary sex characteristics, and/or their gender role prescribed by cultural norms.[20]

The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, 5th edition (DSM-5) contains two diagnoses for gender dysphoria: one for adults and the other for children.[21] While the diagnosis for gender dysphoria is contained in the DSM-5, gender dysphoria is *not* considered a mental disorder.[22] Gender dysphoria is listed in the DSM-5 because individuals experiencing gender dysphoria need a diagnostic term to protect their access to care.[23] According to the American

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[18] European Comm., Stanford U. & Nat'l Sci. Found., *Sex,* GENDERED INNOVATIONS IN SCI., HEALTH & MED., ENG'G, AND ENV'T, https://genderedinnovations.stanford.edu/terms/sex.html[https://perma.cc/6KFM-65D3]; WPATH, *supra* note 17, at 5, 96.

[19] WPATH, *supra* note 17, at 96 (citing Robert J. Stoller, *A Contribution to the Study of Gender Identity*, 45 INT'L J. PSYCHOANALYSIS 220, 220–26 (1964), and Walter Bockting, *From Construction to Context: Gender Through the Eyes of the Transgendered*, 28 SIECUS REPORT 3, 3–7 (1999)). Examples of alternative genders include but are not limited to: boygirl, girlboy, genderqueer, eunuch, and for some individuals, just transgender. *Id.*; *see also What Does Transgender Mean?*, AM. PSYCH. ASS'N (Dec. 2014), https://www.apa.org/topics/lgbt/transgender [https://perma.cc/FKA5-W266] (describing another way to view gender wherein gender encompasses the socially constructed roles (men having blue collar job vs. women staying at home), behaviors (masculine vs. feminine), activities (baseball vs. dance), and attributes (blue vs. pink) that a given society considers appropriate for boys and men or girls and women).

[20] Robert L. Spitzer & Jerome C. Wakefield, *DSM-IV Diagnostic Criterion for Clinical Significance: Does It Help Solve the False Positives Problem?*, 156 AM. J. PSYCH. 1856, 1858 (Dec. 1999) (defining clinically significant). Zowie Davy & Michael Toze, *What Is Gender Dysphoria? A Critical Systematic Narrative Review*, 3 TRANSGENDER HEALTH 159, 160 (Nov. 9, 2018) (applying the definition of clinically significant to the definition of gender dysphoria).

[21] Ranna Parekh, *What Is Gender Dysphoria?*, AM. PSYCH. ASS'N (Feb. 2016), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria [https://perma.cc/9NB6-JPVJ] (defining gender dysphoria as used in the medical community); WPATH, *supra* note 17, at 5.

[22] Am. Psychiatric Publishing, *Gender Dysphoria*, (2013), https://www.ca1.uscourts.gov/sites/ca1/files/citations/Gender%20Dysphoria%20Fact%20Sheet.pdf [https://perma.cc/7FDJ-LWXR].

[23] *Id.*

Psychiatric Association, the word disorder was replaced with dysphoria as a diagnostic label because it was "not only more appropriate and consistent with familiar clinical sexology terminology, it also remove[d] the connotation that the patient is 'disordered.'"[24] The World Professional Association for Transgender Health (WPATH) Standard of Care further emphasizes that gender dysphoria is not a mental disorder because a disorder is "a description of something with which a person might struggle, not a description of the person or person's identity."[25]

According to the DSM-5, an individual adult may be diagnosed with gender dysphoria if they display any *two* of the following six symptoms for a *minimum* of six consecutive months:

> [1] A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics)
> [2] A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics)
> [3] A strong desire for the primary and/or secondary sex characteristics of the other gender.
> [4] A strong desire to be of the other gender (or some alternative gender different from one's assigned gender)
> [5] A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender)
> [6] A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).[26]

In children, the DSM-5 lists a higher criterion. A child must display *at least six* of the following eight symptoms for a *minimum* of six consecutive months *and* experience an associated level of significant distress or impairment in function:

> [1] A strong desire to be of the other gender or an insistence that one is the other gender (or some alternative gender different from one's assigned gender)

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[24] *Id.*
[25] *See* Anne Vitale, *Rethinking the Gender Identity Disorder Terminology in the Diagnostic and Statistical Manual of Mental Disorders IV*, TRANSHEALTH (May 28, 2005), http://www.trans-health.com/2005/rethinking-gid-terminology-dsm/ [https://perma.cc/AEZ9-PWEN].
[26] Parekh, *supra* note 21.

> [2] In boys (assigned gender), a strong preference for cross-dressing or simulating female attire; or in girls (assigned gender), a strong preference for wearing only typical masculine clothing and a strong resistance to the wearing of typical feminine clothing
> [3] A strong preference for cross-gender roles in make-believe play or fantasy play
> [4] A strong preference for the toys, games, or activities stereotypically used or engaged in by the other gender
> [5] A strong preference for playmates of the other gender
> [6] In boys (assigned gender), a strong rejection of typically masculine toys, games, and activities and a strong avoidance of rough-and-tumble play; or in girls (assigned gender) a strong rejection of typically feminine toys, games, and activities
> [7] A strong dislike of one's sexual anatomy.
> [8] A strong desire for the physical sex characteristics that match one's experienced gender.[27]

The remainder of this subsection will be dedicated to discussing treatment for transgender children. I will address transgender adults' treatment—from my perspective as a transgender adult and patient—under subsection D.

Children may begin to display "cross-gender" behaviors as young as two; the same age cisgender children start to associate with gendered toys and play.[28] Also, some children may make gender-declarative statements like "I *am* a boy/girl," that are inconsistent with their natal sex and may feel distressed when forced to conform to expectations associated with their natal sex.[29] However, WPATH standards of care also emphasize that children diagnosed with gender dysphoria may not necessarily show symptoms into adolescence or adulthood.[30] The WPATH also does not

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[27] *Id.*
[28] *Id.*
[29] *Id.* The distress transgender children feel is also great. For example, in a 2007 interview with Barbara Walters on ABC, Jazz Jennings—a six-year-old girl diagnosed with gender dysphoria—explained to the American public how debilitating it was for her to exist as a "boy" when she believed she was a "girl." Alan B. Goldberg & Joneil Adriano, *'I'm a Girl'—Understanding Transgender Children*, ABC NEWS (May 8, 2007), https://abcnews.go.com/2020/story?id=3088298&page=1 [https://perma.cc/BX3R-U8RS]. When her parents forced her to conform to traditional dress/pronouns of a boy, her emotional health deteriorated. As a four-year-old, Jazz was so distressed by and aware of her gender dysphoria that her parents needed to seek medical treatment for Jazz. Upon socially transitioning, Jazz's symptoms dissipated. *Id.* As of 2020, Jazz is a healthy 19-year-old woman. *See 20:20 My Secret Self: A Story of Transgender Children* (ABC television broadcast Apr. 27, 2007) (accessible at https://www.youtube.com/watch?v=eJ_BHY5RolA [https://perma.cc/SK2D-FS9F]).
[30] WPATH, *supra* note 17, at 12–17.

allow genital reconstructive surgery ("bottom surgery") on minors, but may, in some circumstances, allow Female-to-Male (FtM) teenagers to receive "top" surgery.[31]

Cross hormone/puberty blocker treatment does not occur until later adolescence.[32] For example, the Jazz Jennings case demonstrates that while Jazz made gender statements contrary to her natal sex, grew out her hair and dressed contrary to her natal sex when she was very young, she did not begin to medically transition until nearly a decade later in adolescence.[33] Furthermore, she did not undergo any irreversible surgical intervention until she was an adult.[34]

Here, what is important to emphasize is that while the medical transition is patient-driven, there are enough safeguards to protect a child from undergoing irreversible gender transition until the patient has had enough life experience to make this decision. In my opinion, as a transgender patient, healthcare practitioners do not medically transition children with gender dysphoria until the child is ready to transition.

B. The Institute for Sexual Science in Berlin, 1926

The cause of gender dysphoria is unknown.[35] However, there are both historical records and recent medical studies that point to innate hormonal anomalies.[36] At the turn of the twentieth century, European physicians started seeing and treating patients who openly, and sometimes secretly, identified as the opposite sex, now recognized as gender dysphoria.[37] In the 1920s, German physician and sexologist Magnus Hirshfeld established the Institute for Sexual Science in Berlin, Germany.[38] These patients wrote to the Institute asking for some form of rudimentary gender-affirming care.[39] These treatments included castration for males and hysterectomy for females.[40] According to Hirschfeld's colleague, Dr. Arthur Kronfeld, patients he castrated reported a "physical reaction and a permanent feeling of harmony and balance."[41] His patients who were

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[31] *Id.* at 21.
[32] *Id.*
[33] Diaz, *supra* note 14.
[34] *Id.*
[35] *See* ROBERT BEACHY, GAY BERLIN: BIRTHPLACE OF A MODERN IDENTITY 170–74 (2014); Sara Reardon, *Science in Transition*, 568 NATURE 446, 448 (Apr. 2019); Chloe Hadjimatheou, *Christine Jorgenson: 60 years of Sex Change Ops*, BBC (Nov. 30, 2012), https://www.bbc.com/news/magazine-20544095 [https://perma.cc/JT8H-7WHG].
[36] BEACHY, *supra* note 35, at 173–75.
[37] *Id.* at 170.
[38] *Id.* at 160.
[39] *Id.* at 175.
[40] *Id.* at 175, 178.
[41] *Id.* at 176.

assigned male at birth lost their secondary sex characteristics, like facial hair, and were then able to live and pass more quickly *and* easily as women.[42] In 1926, gynecologist Ludwig Levy-Lenz began to perform primitive "sex-reassignment" surgeries at Hirschfeld's Institute for Sexual Science. According to German historian Robert Beachy:

> As Levy-Lenz described, "This task [sex reassignment] fell to me, as surgeon of the Institute, and I was able to find a quite satisfactory solution to the problem of creating an artificial vagina and artificial lips of the vulva.... I almost became a 'specialist' in plastic genital operation—a strange calling indeed!" ... The institute developed "ovarian" and "testicular preparations" to be injected as a primitive form of hormone therapy [based on Dr. Eugen Steinbach's discovery of "glandular juices" (i.e., estrogen and testosterone)]. The Institute's X-ray facility was used for depilation or hair removal, though dangerous.... Although experimental and, ultimately, dangerous, these sex-reassignment procedures were developed largely in response to the ardent requests of patients. In one case, Levy-Lenz refused to remove the breasts of a sixteen-year-old because of her age. After she mutilated herself with a razor, "in order to necessitate amputation," Levy-Lenz acquiesced and performed the double mastectomy. As Levy-Lenz claimed in his memoirs, "[N]ever have I operated upon more grateful patients..."[43]

Dr. Hirshfeld and his colleagues resorted to this rudimentary form of gender-affirming healthcare for two reasons: (1) ardent and overwhelming patient requests, and (2) to stop patients from resorting to suicide or self-mutilation in the absence of care.[44] For Hirshfeld, the discovery of "glandular juices," now known as sex hormones, and the successful treatment of transgender patients lead him to believe that gender dysphoria is caused by biology: an innate phenomenon only treated when patients can

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[42] *Id.*

[43] *Id.* at 178 (first alteration in original). *See generally* LILI ELBE, MAN INTO WOMAN: THE FIRST SEX CHANGE (2004); THE DANISH GIRL (Artemis Prod. 2015). *The Danish Girl* is a biographical film of Danish painter Lili Elbe [born Einar Wegener] describing her transition. Her story was novelized by David Evershoff and then adapted in Tom Hooper's 2015 Academy Award winning film *The Danish Girl*. Ms. Elbe was treated by Dr. Hirshfeld and his colleagues. She died in 1931 of complications from her fifth and final gender confirmation surgery, implanting a uterus. Her prior four surgeries were all successful. I can personally attest to and relate with the gratitude of Dr. Levy-Lenz's patients. My doctors and their staff *saved* my life. Specifically, my plastic surgeon Dr. Nicholas Kim. I still feel a gush of emotion whenever I think of him and what he did for me. I am so grateful.

[44] BEACHY, *supra* note 35, at 168–78.

transition from one sex to the other.[45] Further, he advocated for local governments in Germany to allow his patients to dress as the opposite sex in public, otherwise an illegal disruption of the peace, after he verified that they were transgender.[46] His patients were issued "transvestite passes," allowing them to transition publicly without fear of discrimination or prosecution by the courts.[47] Germany carried on this legal protection until 1933.[48]

The Hirschfeld's Institute for Sexual Science was destroyed on May 9, 1933, following Hitler and the Nazi's rise to power.[49] It was destroyed by a mixture of German students and Hitler's personal paramilitary group, the Sturmabteilung (SA).[50] Accompanied by a live brass band, the students stormed the Institute, destroyed all of the medical records of patients, medical questionnaires, and photographs, and confiscated Hirschfeld's entire 20,000 volume library.[51] The entity of Dr. Hirschfeld's library was among the books burned by the Nazis at the infamous May 10th bonfire in Opernplatz, Berlin.[52]

C. Legitimizing Gender Dysphoria—Causes

Researchers in a 2020 medical study on transgender health acknowledged that "[d]espite recent improvements both in social acceptance of transgender individuals as well as access to gender-affirming therapy, progress in both areas has been hampered by poor understanding of the etiology [cause] of gender dysphoria."[53] Over the past twenty years, there have been medical studies attempting to determine the cause of gender dysphoria.[54] However, because western society traditionally rejects

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[45] *Id.* (referring to the early discovery of endocrinology as "glandular juices").
[46] *Id.* at 172.
[47] *Id.*
[48] *Id.* at 241–42; *see also Transparent: Oscillate* (Amazon Studios streaming online video Dec. 11, 2015).
[49] *Id.*
[50] *Id.*
[51] *Id.* at 241.
[52] *Id.* at 241–42; *Timeline of Events: Book Burning*, UNITED STATES HOLOCAUST MUSEUM, https://www.ushmm.org/learn/timeline-of-events/1933-1938/book-burning [https://perma.cc/257Y-U35S].
[53] J. Graham Theisen, Viji Sundarem, Mary S. Filkchak, Lynn P. Chorich, Megan E. Sullivan, James Knight, Hyung-Goo Kim, & Lawrence C. Layman, *The Use of Whole Exome Sequencing in a Cohort of Transgender Individuals to Identify Rare Genetic Variants*, NATURE (Dec. 27, 2019), https://www.nature.com/articles/s41598-019-53500-y [https://perma.cc/KU49-6D5B].
[54] Shawna Williams, *Are the Brains of Transgender People Different from Those of Cisgender People?*, SCIENTIST, n.3. (Mar. 1, 2018), https://www.the-scientist.com/features/are-the-brains-of-transgender-people-different-from-those-of-cisgender-people-30027 [https://perma.cc/D5XT-W4M4].

transgender individuals, research on its cause—which would incidentally legitimize transgender people—is incomplete. These research gaps arise from the inconsistent use of terminology (from around 1950 to 2010), the incineration of Europe's historical record during the Holocaust, and the relatively small number of modern studies.[55]

While researchers have yet to discover a definite cause, studies, such as those described by Sara Reardon of *Nature*, are beginning to provide long-sought insights into the health and well-being of transgender people.[56] Not only do these studies help healthcare providers understand the unique healthcare issues of transgender individuals, but also legitimize gender dysphoria as a medical condition. With the medicalization of transgender healthcare over the past twenty years, there is better access to gender-affirming care than ever before. For example, the University of Minnesota (now M Health Fairview) maintains a Transgender Health Services program, offering comprehensive therapy and assessment, endocrinology staff specialized in hormone-replacement therapy, dermatology specialist in transgender needs and several plastic surgeons focused on gender-affirming reconstructive surgeries.[57] Because these services are all located within the M Health Fairview system,[58] it is easier for transgender patients to access care.

Researchers in multiple studies have discovered trends that connect brain structure differences between males and females and gender identity.[59] For example, the European Network for the Investigation of Gender Incongruence—conducting the most extensive study of transgender people globally—found the brain scans of transgender boys who recently began testosterone therapy looked broadly similar to their cisgender boy counterparts.[60]

Other studies indicate a connection to genetic variations with gender dysphoria.[61] During gestation, all human fetuses experience a "sprinkling" of sex hormones.[62] This "sprinkling" causes the brain to develop either masculinely or femininely.[63] For transgender people, this study demonstrates a block in the estrogen-signaling pathway, which causes

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[55] Reardon, *supra* note 35, at 449.
[56] *Id.* at 446.
[57] *See Transgender Health Services*, U. MINN., https://www.sexualhealth.umn.edu/clinic-center-sexual-health/transgender-health-services [https://perma.cc/9DCJ-BT9A].
[58] *Id.*
[59] Theisen et al., *supra* note 53.
[60] Reardon, *supra* note 35, at 448.
[61] Toni Baker, *Gene Variants Provide Insight into Brain, Body Incongruence in Transgender*, JAGWIRE (Feb. 5, 2020), https://jagwire.augusta.edu/gene-variants-provide-insight-into-brain-body-incongruence-in-transgender/ [https://perma.cc/8U8V-W3HP].
[62] *Id.*; Theisen et al., *supra* note 53.
[63] Baker, *supra* note 61; Theisen et al., *supra* note 53.

the natal male's brain to feminize—meaning the brain expects to be born into a female body—and the natal female to experience the inverse.[64] Because the body's sex organs' development is more precise than brain development, the child will be born with a predetermined sex organ and inverse brain chemistry.[65] However, it is crucial to recognize that these are still indefinite theories. More testing, time, and scientific advancement are required for medical researchers to find a cause, if possible.

D. How Do Providers Treat Transgender Patients?

According to the WPATH standards of care, health professionals can best assist gender dysphoric patients by: (1) affirming their gender identity; (2) assisting the exploration of gender identity expression; and (3) assisting the patient in assessing medical treatment options for alleviating gender dysphoria.[66] This patient-centered approach allows the patient to make gender-affirming decisions corresponding to their unique experience.[67]

The WPATH Standards of Care presents several options for the psychological and medical treatment of gender dysphoria.[68] Care is taken on a patient-to-patient basis, as one patient's gender goals may differ from another. Therefore, what treatment may be medically necessary to one patient, may be different from another:

> [1] Changes in gender expression and role (which may include living part time or full time in another role, consistent with one's gender identity);
> [2] Hormone [replacement] therapy to feminize or masculinize the body;
> [3] [Reconstructive] [s]urgery to change primary and/or secondary sex characteristics (e.g., breast/chest, external and/or internal genitalia, facial features, body contouring);
> [4] Psychotherapy (individual, couple, family or group) for purposes such as exploring gender identity, role, and

[64] Theisen et al., *supra* note 53; *see also* Annika Penelope, *Hello, Estrogen–Farewell, Heteronormative Privilege*, AUTOSTRADDLE (Apr. 27, 2011) [hereinafter Penelope, *Hello, Estrogen*], https://www.autostraddle.com/hello-estrogen-farewell-heteronormative-privilege-8669/ [https://perma.cc/HV26-U5K2] (describing a transgender woman's feelings after starting HRT) ("It's as though after 23 years, I have finally stopped trying to fill up a diesel car with unleaded gas. My brain was made to run on estrogen.").

[65] NAT'L CTR. FOR BIOTECHNOLOGY INFO., *Sex Begins in the Womb*, in EXPLORING THE BIOLOGICAL CONTRIBUTIONS TO HUMAN HEALTH: DOES SEX MATTER? (T.M. Wizemann & M.L. Pardue eds., 2001).

[66] WPATH, *supra* note 17, at 9.

[67] *Id.*

[68] *Id.* at 9–10 (describing the psychotherapy options on the top of page 10); *id.* at 97 (defining internalized transphobia).

> expression; addressing the negative impact of gender dysphoria and stigma on mental health; alleviating internalized transphobia; enhancing social and peer support; improving body image; or promoting resilience.[69]

Additional considerations may be needed for patients on reproductive health care because hormone replacement treatment (HRT) can cause morphologic tissue changes in transgender patients.[70] This means that after some time, unique to each patient, patients undergoing HRT will become infertile.[71]

As the WPATH standards illustrate, the goal of these treatments is to lessen the distress caused by gender dysphoria.[72] For example, as a transgender woman, I take HRT in the form of injectable estrogen. By taking these hormones, my body has feminized (e.g., I went through female puberty). I now feel significantly less distress than I did before HRT treatment. To meet my gender goals and reproductive considerations, my medical provider and I have opted to exercise all four options listed in the WPATH standards. Thus, for me to become a healthy and functioning member of society, I (1) changed my gender presentation from male to female, this included changing my name, pronouns, and clothing choices; (2) began taking estrogen in addition to testosterone suppressing medications; (3) underwent several surgical interventions, including the transformation of my penis into a vagina, and the removal of my brow bossing beneath my eyebrows (I did not require breast augmentation surgery because I grew satisfactory breasts naturally whereby I do not feel distressed by my chest); (4) underwent experimental treatment to freeze my reproductive materials cryogenically; and (5) underwent hundreds of hours of psychotherapy.

For many transgender individuals, describing the feelings of the clinically significant distress we experience to a cisgender audience is

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[69] *Id.* at 9–10.

[70] Ashley V. Alford, Katherine M. Theisen, Nicholas Kim, Joshua A. Bodie, & Joseph Pariser, *Successful Ejaculatory Sperm Cryopreservation After Cessation of Long-Term Estrogen Therapy in a Transgender Female*, 136 UROLOGY 48, 48 (2020), https://doi.org/10.1016/j.urology.2019.08.021 [https://perma.cc/DKG2-6KCR] (discussing testicular tissue changes transgender women may encounter after a prolonged use of HRT. These changes may affect her ability to produce sperm. In addition, I am the patient discussed in this study); *see also* Julie Compton, *Transgender Fertility Study Sheds Light on Testosterone's Impact*, NBC NEWS (Apr. 14, 2020), https://www.nbcnews.com/feature/nbc-out/transgender-fertility-study-sheds-light-testosterone-s-impact-n1182636 [https://perma.cc/PF3M-HN4Y] (discussing the costs of fertility preservation in transgender men and the high costs associated with in vitro fertilization).

[71] Alford et al., *supra* note 70, at 49.

[72] WPATH, *supra* note 17, at 3.

impossible.[73] In fact, the coming out process itself is hard to describe. It can sometimes be both liberating and exciting, along with terrifying.[74]

Personally, I spent years in denial about my transgender reality—I believed that because I could not prove I was transgender, I could not be.[75] At the time I started transitioning, I was a head coach for an American Legion baseball team. I wanted to believe that there was no way that I, a coach of seventeen and eighteen-year-old male athletes—the pinnacle of masculinity—could be transgender. However, I soon learned that this feeling of "it can't be happening to me" is common.[76]

When I was nearing my own tipping point, I discovered a theory common to statistics called the "Null Hypothesis."[77] Here, instead of proving I was transgender, I proved that I was not cisgender because a cisgender person would not have thoughts and feelings about transitioning that I was experiencing.[78] For example, ever since puberty, I have obsessively wanted to grow breasts. When I was twelve, I thought there was something wrong with me because I was not growing breasts. A cisgender male would not believe there is something wrong with them for not growing breasts. Because of this evidence, along with other feelings I had, I concluded that I was likely transgender and should consider seeking treatment.

It was painful to come to terms with this reality and—in all likelihood—I risked the life and career I built to become healthy. I began to medically transition on Halloween night, 2017. At the time, I was a young teacher in a small town near Mankato, Minnesota. By the end of that school term, my teaching contract was terminated, and I made the big decision to study law at Mitchell Hamline School of Law. I continued to transition while

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[73] Zinnia Jones, "*That was Dysphoria?" 8 Signs and Symptoms of Indirect Gender Dysphoria*, THE ORBIT (Sept. 10, 2013), https://the-orbit.net/zinniajones/2013/09/that-was-dysphoria-8-signs-and-symptoms-of-indirect-gender-dysphoria/ [https://perma.cc/PN8P-CUGK].

[74] HUM. RTS. CAMPAIGN FOUND., TRANSGENDER VISIBILITY: A GUIDE TO BEING YOU 3 (Apr., 2014), https://www.bsu.edu/-/media/www/departmentalcontent/counselingcenter/pdfs/safezone%20transgender/hrc-coming%20out%20transgender.pdf?la=en&hash=4FA6FABD8CBDDABCAE54A4727BE1CADF216CBBC0 [https://perma.cc/D6NA-PRJ7] (discussing the coming out process).

[75] *See* Annika Penelope, *I'm Just Your Typical Urban Hipster Femme Twentysomething Trans Lesbian*, AUTOSTRADDLE (Apr. 12, 2011) [hereinafter Penelope, *I'm Just Your Typical*], https://www.autostraddle.com/just-your-typical-urban-hipster-femme-twentysomething-transgender-lesbian-84827/ [https://perma.cc/945P-G4Q5].

[76] *Id.*

[77] Natalie Reed, *The Null HypotheCis*, FREETHOUGHT BLOGS (Apr. 17, 2012), https://freethoughtblogs.com/nataliereed/2012/04/17/the-null-hypothecis/ [https://perma.cc/2SLH-KSRV].

[78] *Id.* (for example, a cisgender person may wonder what it is like to be the opposite sex, but they *would not* obsessively dream about it, or wish/pray they would wake up as the other sex, etc. I used to have dreams where I was a girl, all the way down to my anatomy).

in school and underwent several gender-affirming surgeries, an experimental treatment, and "puberty 2.0." Unlike other ailments, my treatment consisted of new pronouns, a new name, new clothing, new hormones, multiple surgeries, and a new world experience. It was difficult to manage my transition and my studies; however, this was care I needed. Moreover, it saved my life.

Not many people can say they know what it is like to experience life as both a man and a woman. I can. Only transgender individuals can appreciate the impact gender-affirming treatment has on one's life. I lost my job, my familial relationships changed—some for the better, and others for the worst. Dating has become significantly more challenging as partners must be attracted to me and comfortable with my transgender reality.

Writer and transgender woman, Zinnia Jones, describes the distress caused by gender dysphoria prior to transition in the best way. She noted eight indirect signs of gender dysphoria, including:

1. Continual difficulty with simply getting through the day;[79]
2. A sense of misalignment or disconnect with one's emotions;[80]
3. A feeling of just going through the motions of everyday life, as though one is just reading from a script;[81]
4. A seeming pointlessness to your life or lack of purpose;[82]
5. Knowing you are *somehow* different from everyone else, and *wishing* you could be normal like them;[83]
6. A notable escalation of these symptoms during puberty;[84]
7. Attempting to fix this on one's own through various coping mechanisms;[85] and
8. **[A]** ***substantial resolution of these symptoms in a very obvious way upon . . . initiating HRT.***[86]

For me, prior to beginning HRT, I was an insomniac. I had not slept well since beginning puberty. Before puberty, my family described me as a content and delightful child, and then with puberty at around age twelve, I switched. It was like a flame extinguished. I became incredibly depressed and anxious. People described me as being "on edge" and tremendously

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[79] Jones, *supra* note 73.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* (emphasis added); *see also* Annika Penelope, *Ten Things I Wish I'd Known When I Started My Transition*, AUTO STRADDLE (Feb. 12, 2013), https://www.autostraddle.com/ten-things-i-wish-id-known-when-i-started-my-transition-156538/ [https://perma.cc/N4EZ-NVSH]; Penelope, *I'm Just Your Typical*, *supra* note 75; Penelope, *Hello, Estrogen*, *supra* note 64.

stressed. This particular stress was so severe that it would cause my chest muscles to clench up, and I would need to immediately stop what I was doing and grab at the pain in my chest. I even told a doctor about it when I was twenty-three, but the only response was that I was a healthy young *man*.

When I look back and think of my early twenties, I am sometimes surprised I survived. It is true—I was very on edge. It did not take much to irritate me and the years of sleepless nights took their toll. To compensate, I poured my soul into my work, looking for any distraction from the health crisis growing inside me. It was not so much a desire to be a woman that got me to change, although I certainly wanted to be a woman. It was the desire to be healthy and have healthy relationships. I could feel my gender dysphoria creeping into even intimate moments. I could not have sex without feeling like everything was backward. In the end, I knew that if I did not transition, I would die. Either by my own hand or by my body finally giving out, I knew I would not reach a ripe age living in this nightmare.

About three weeks after starting HRT, at age twenty-five, I remember waking up, and for the first time in *years*, I had experienced a good night's sleep. At school, my students and colleagues noticed a change in me. Though they were unaware I was transitioning, my students asked me why I was demonstrably more relaxed. My chest finally stopped hurting. One student even noted that I seemed significantly happier than I was the year before. My family said I appeared far less on edge than they had ever seen me as an adult. It truly was the dawn of peace for my mind and body. It was the first step to living a healthy life and loving life.

* * * *

The WPATH standards list a set of criteria each patient must meet before receiving HRT treatment.[87] Because each patient experiences gender dysphoria differently, unique interventions are applied to each patient to meet their gender goals. In some instances, surgical interventions should be considered reconstructive, as opposed to aesthetic or cosmetic, because they reconstruct an individual's features to resemble the features of the sex with which they identify.[88] It is true that for some patients, particularly cisgender patients, receiving treatments like cosmetic surgeries (e.g., a facelift) would be considered medically unnecessary. However, for the transgender patient, they may become medically necessary because reconstructive surgical intervention is the only way to alleviate the distress caused by gender dysphoria, taken on a case-by-case basis.[89] Specifically, the WPATH standards state:

[87] WPATH, *supra* note 17, at 26–28. *Id.* at 34 (listing criteria for HRT); *id.* at 57–60 (listing criteria for reconstructive surgical intervention for the chest and genitalia).
[88] *Id.* at 58.
[89] *Id.*

> While most professionals agree that genital surgery and mastectomy cannot be considered purely cosmetic, opinions diverge as to what degree other surgical procedures (e.g., breast augmentation, facial feminization surgery) can be considered purely reconstructive. Although it may be much easier to see a phalloplasty or a vaginoplasty as an intervention to end lifelong suffering, for certain patients, an intervention like a reduction rhinoplasty can have a radical and permanent effect on their quality of life, and therefore is much more medically necessary than for somebody without gender dysphoria.[90]

The WPATH criteria for a patient to receive a referral for genital surgery are:

1. Persistent, well-documented gender dysphoria;
2. Capacity to make a fully informed decision and to consent to treatment;
3. Age of majority in a given country [in the United States, 18];
4. If significant medical or mental health concerns are present, they must be well controlled;
5. 12 continuous months of hormone replacement therapy as appropriate to the patient's gender goals (unless the patient has a medical contraindication or is otherwise unable or unwilling to take hormones);
6. 12 continuous months of living in a gender role that is congruent with their gender identity; and
7. [Two referrals from a mental health provider supporting the patient's decision.][91]

These criteria are significant. A patient *cannot* march into a surgeon's office and demand gender confirmation surgery. Nor can a parent demand that their five-year-old have their penis turned into a vagina. The WPATH places such high standards because they want the patient to experience a range of different life experiences and really make sure they know what they are requesting as this surgery is irreversible and life-changing.[92]

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[90] *Id.*

[91] *Id.* at 60. A patient needs the referrals to confirm they are psychologically in control of themselves and can make decisions on their own, not to confirm they are going to therapy. WPATH recommends that patients have regular visits with mental health or other medical professionals, but it is not an explicit criterion.

[92] Joseph J. Pariser & Nicholas Kim, *Transgender Vaginoplasty: Techniques and Outcomes*, 8 TRANSLATIONAL ANDROLOGY & UROLOGY 241, 241 (June 2019);

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To summarize, the WPATH standards of care present providers with several options to successfully treat gender dysphoria. Treatment plans must be individualized to meet each patient's gender goals, culminating in the easement of the clinically significant distress caused by gender dysphoria.[93] Not every transgender patient requires surgery because they may not experience distress caused by their primary and/or secondary sex characteristics. Other patients require reconstructive surgical intervention.

As both Dr. Magnus Hirshfeld and, more recently, Professor Daniel Skinner of Ohio University's Heritage College of Osteopathic Medicine observe, the absence of gender-affirming care presents dire consequences: patients may resort to self-harm and suicide.[94] The most important takeaway from these treatment options, however, is that they work. Appendix D of the WPATH standards details the clinical outcomes of these approaches. In short, a substantial majority of patients who receive care report "improved social and emotional adjustment" and significantly less distress.[95] While we may not know a definitive cause for gender dysphoria, the sheer number of patients seeking this revolutionary—and arguably radical—treatment demonstrates the need for access to gender-affirming care. The common need to transition for transgender individuals has not varied from when the first patient asked for help from Dr. Hirshfeld and Dr. Levy-Lenz, to the day I made my request to Dr. Kim, Dr. Pariser, and Dr. Hsieh.

Surgery-in-motion, *Surgical Reconstruction for Male-to-Female Sex Reassignment*, YOUTUBE (Sept. 12, 2013), https://www.youtube.com/watch?v=R9TGQIP-VLg [https://perma.cc/3C5T-DRPL] (presenting the process and technique for male-to-female gender confirmation surgery). I highly recommend viewing this video which is presented in a safe for-work-fashion.

[93] *See* WPATH, *supra* note 17 at 9.

[94] BEACHY, *supra* note 35, at 176–78 (stating that patients who were *not* offered care threatened or attempted suicide or resorted to self-harm to necessitate gender-affirming treatment); DANIEL SKINNER, MEDICAL NECESSITY 108 (U. Minn. Press 2019) ("In some—even many—cases the specter of suicidality and other forms of self-harm . . . frames mental health justifications for medical necessity of declarations for sex reassignment surgery and hormones therapy.").

[95] WPATH, *supra* note 17, at 107–08; *see also* Reuters, *Sex-Reassignment Surgery Yields Long-Term Mental Health Benefits, Study Finds*, NBC NEWS (Nov. 11, 2019), https://www.nbcnews.com/feature/nbc-out/sex-reassignment-surgery-yields-long-term-mental-health-benefits-study-n1079911 [https://perma.cc/PF5Z-Q4JM].

III. MEDICALLY NECESSARY HEALTHCARE

A. Patients, Providers, and Payers

The American healthcare system has three main characters: patient, provider, and payer.[96] Patients see a provider—usually a doctor or some other healthcare provider—with the visit paid for by either a health insurer, the patient, or some combination of the two. Unsurprisingly, most Americans have some form of health insurance due to the exorbitant cost of healthcare—among other public policy considerations.[97] Most Americans get health insurance through the government, from their employer (i.e., group insurance), or by purchasing private insurance.[98] Generally, for health insurers to justify paying for healthcare services, the care must be considered medically necessary.[99]

Medical necessity is a legal doctrine originally arising under Medicare and Medicaid law and other federal regulations.[100] Medical necessity, as a term of art, is broken into two elements: first, patients/providers must establish that the condition is medical and, therefore, appropriate to receive care.[101] Second, they must prove that it is necessary—that this treatment is the only way to treat the condition

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[96] *The Emerging Patient-Payer–Provider Collaboration*, HEALTHX (Dec. 2015), https://www.healthx.com/wp-content/uploads/Resources/DataSheet/patient-payer-provider-collaboration.pdf [https://perma.cc/5S5Q-VBGX].

[97] U.S. CENSUS BUREAU, PERCENTAGE OF PEOPLE UNINSURED BY AGE: 2017 & 2018 (2018), https://www.census.gov/content/dam/Census/library/visualizations/2019/demo/p60-267/Figure_4.pdf [https://perma.cc/XQ37-ANJT]; Mark Merlis, *Individual Mandate (Updated)*, HEALTH AFFS. (Jan. 13, 2010), https://www.healthaffairs.org/do/10.1377/hpb20100113.974560/full/ [https://perma.cc/XV7B-S54B].

[98] *State Health Facts: Health Insurance Coverage of the Total Population 2019*, KAISER FAMILY FOUND. (2020), https://www.kff.org/other/state-indicator/total-population/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/WXQ4-WH8N].

[99] *See* SKINNER, *supra* note 94, at 105.

[100] *See* Timothy Blanchard, *Medical Necessity and Quality of Care Issues for Compliance Officers*, *in* HEALTH CARE COMPLIANCE ASS'N., HEALTH CARE COMPLIANCE PROFESSIONAL'S MANUAL 29,601, 29, 604–06 (2015). Medicare is the U.S. national health insurance program available to Americans 65 and older and those with specific terminal illnesses. It is the nation's largest healthcare provider and is operated by the Center for Medicare and Medicaid services (CMS). Medicaid is a health insurance program regulated by both individual states and the federal government. *See Medicare Program*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/Medicare/Medicare-General-Information/MedicareGenInfo [https://perma.cc/U8VS-SRUL]; *Medicare*, HEALTH MGMT. ASSOCS., https://www.healthmanagement.com/services/government-programs-uninsured/medicare-program/ [https://perma.cc/3QAA-W37S].

[101] SKINNER, *supra* note 94, at 109.

successfully.[102] This doctrine is the justification a provider needs to produce payment or reimbursement from the payer, such as Medicare or Medicaid.[103] By law, Medicare will not pay for services that are "not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member."[104] Congress subsequently amended this policy to help define what treatments are medically necessary under Medicare so patients and providers could better predict what coverage is available, regardless of location nationally.[105]

Under these amendments, the Centers for Medicare & Medicaid Services delegated Medicare processing contractors to local coverage determinations (LCDs). An LCD determines coverage based on the following standards—in order of preference:

1. Published authoritative evidence derived from definitive randomized clinical trials or other definitive studies, and
2. General acceptance by the medical community (standard of practice), as supported by sound medical evidence based on:
    a. scientific data or research studies published in peer-reviewed medical journals;
    b. consensus of expert medical opinion (i.e., recognized authorities in the field); or
    c. medical opinion derived from consultations with medical associations or other health care experts.[106]

Essentially, this means any given treatment may be considered medically necessary when the medical community accepts the treatment as medically necessary because there is authoritative, clinical evidence. Additionally, this amendment only applies to Medicare recipients and their providers. While these standards are persuasive to medical necessity for other payers, Medicaid and private insurance have their own definitions.[107] Because Medicaid is a joint federal/state program, individual states also develop their own coverage guidelines.[108] For example, Minnesota defines medically necessary as:

> [H]ealth care services appropriate, in terms of type, frequency, level, setting, and duration, to the enrollee's

[102] *Id.*
[103] *Id.*
[104] 42 U.S.C. § 1395y(a)(1)(A) (2020).
[105] Blanchard, *supra* note 100, at 29, 604.
[106] *Id.* at 29, 604–05 (quoting CENTERS FOR MEDICARE AND MEDICAID SERVICES, PUB. NO. 100-08, MEDICARE PROGRAM INTEGRITY MANUAL, § 13.7.1 (2015)).
[107] *Id.* at 29, 605–06.
[108] *Id.* at 29, 605.

> diagnosis or condition, and diagnostic testing and preventive services. Medically necessary care must be consistent with generally accepted practice parameters as determined by health care providers in the same or similar general specialty as typically manages the condition, procedure, or treatment at issue and must:
> 1. help restore or maintain the enrollee's health; or
> 2. prevent deterioration of the enrollee's condition.[109]

Finally, medical necessity requirements for private health insurance (i.e., not government-funded) are only regulated by applicable legislation.[110] This means that any given private insurance agreement is governed exclusively by applicable legislation. For example, Section 1557 of the ACA requires that private insurance engage in non-discrimination practices in line with civil rights protections when participating in the market and/or accepting federal funds.[111] However, private insurance is less regulated than government-sponsored healthcare, principally because taxpayers are not on the hook for the bill.[112]

The Minnesota Supreme Court illustrated this practice in *Linn v. BCBSM, Inc.*, concluding that a private health insurance contract should be interpreted as any contract by its plain meaning.[113] Therefore, the services defined in the specific contract between the private health insurance and the patient—to the point regulated by applicable legislation—are the services the payer is obligated to cover.[114] I will further address the facts and narrative of *Linn* in discussing the patient's right to an appeal.

When an individual chooses a health insurance plan, the plan outlines each package's coverage options.[115] No insurance plan in the United States covers every possible ailment a person could have.[116] Therefore, individuals will select plans that will best cover their foreseeable healthcare

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[109] MINN. STAT. § 62Q.53 subdiv. 2 (2019); *see also* THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH [WPATH] POSITION STATEMENT ON MEDICAL NECESSITY OF TREATMENT, SEX REASSIGNMENT, AND INSURANCE COVERAGE IN THE U.S.A. (Dec. 21, 2016), https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH-Position-on-Medical-Necessity-12-21-2016.pdf [https://perma.cc/U3ZJ-TLWR].

[110] Blanchard, *supra* note 100, at 29, 606.

[111] 42 U.S.C. § 18116 (2018).

[112] *Medicare Fraud Strike Force*, U.S. DEP. HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN. (May 31, 2019), https://oig.hhs.gov/fraud/strike-force/ [https://perma.cc/8X3R-7B9K].

[113] Linn v. BCBSM, Inc., 905 N.W.2d 497, 504 (Minn. 2018).

[114] *Id.*

[115] SKINNER, *supra* note 94, at 20–25.

[116] *Id.*

needs. Alternatively, if an individual receives their healthcare from their employer, the employer may choose a group plan or individual plan. As *Linn* demonstrates, in Minnesota, these agreements do not need to cover every medically necessary treatment if the agreement explicitly excludes it or agrees only to cover part of the costs.[117] However, if the healthcare plan denies coverage based on medical necessity and—at the point of appeal—an external arbiter determines the treatment is medically necessary under Minnesota Statute Section 62Q.53 subdivision 2 (2019), the insurer must cover the cost of care.[118] In this case, the insurer has not violated the law, even though it initially denied coverage of medically necessary care because parties are held to the plain language of their agreements.[119]

At the federal level, there are additional protections. Section 1557 of the ACA explicitly incorporates the civil rights protections against discrimination on the basis of race, color or national origin (Title VI), sex (Title IX though courts frequently look to Title VII in reading Title IX), age (Age Discrimination in Employment Act), and disability (Rehabilitation Act).[120] However, these protections only kick in if the insurer receives funding from the Department of Health and Human Services (HHS), are administered by HHS, or participate in market places with HHS plans.[121] Additionally, Section 1501(b) of the ACA requires all health plans to cover a set of minimum essential services, regardless of the health plan's language.[122]

These practical matters have led to confusion in the health insurance market and, in many ways, contribute to Americans' widespread dissatisfaction with our healthcare system.[123] According to Professor Daniel Skinner, the overarching issue with medical necessity in practice is the decision of how finite resources can be used and ultimately whose needs are favored.[124] Each of the three healthcare characters—patient, provider, and payer—have their own perspective and needs that are at odds with one another.[125] For example, the payer needs to keep costs down and is reluctant to pay for services that they view as "unnecessary" or in instances where another, cheaper alternative treatment exists. This line of thinking contrasts with the patient—the character *needing* treatment—who may want a specific

[117] 905 N.W.2d at 499.
[118] *Id.* at 501.
[119] *Id.* at 502.
[120] Tovar v. Essentia, 342 F.Supp.3d 947, 952 (D. Minn. 2018) (quoting 42 U.S.C. § 18116 (2018), the explicit incorporation of civil rights statutes into healthcare protections).
[121] 42 U.S.C. § 18116 (2018).
[122] 26 U.S.C. § 5000A (2018). Subsection (f)(1)(A) provides a description of mandated minimum benefits.
[123] SKINNER, *supra* note 94, at 23.
[124] *See id.* at 46.
[125] *See id.* at 27–40.

treatment. Finally, the provider may have their own agenda. Professor Skinner notes how some providers order certain tests for African American patients, not because the individual patient presents with textbook symptoms, but because African Americans are at higher risk for certain ailments.[126] For the provider, these tests are medically necessary due to the increased risk a particular patient may have for treatable conditions. In contrast, the provider may argue that—because no symptoms are present in this scenario—tests are medically *unnecessary*.

Unfortunately, there is no straightforward fix and no committee that can write a statute satisfying all parties.[127] Any definitive statute would ultimately disfavor at least one of these characters.[128] Therefore, as it currently stands, the American healthcare system has created the foundation where the doctrine of medical necessity behaves as political gatekeeping to accessing care.[129]

B. Medically Necessary Cosmetic Procedures

When most patients undergo treatment, there is no issue obtaining coverage or reimbursement because the treatment—whether it be surgical intervention, medication, physical therapy, etc.—is evidently medically necessary. For example, suppose I were to see my doctor with complaints of chest pain. If I presented with fatigue and shortness of breath, signs of a heart attack, and my doctor discovered that I had coronary artery disease that requires emergency coronary artery bypass graft surgery (CABG) to prevent my death, denial of coverage by my insurer is unlikely because these instances are considered medically necessary under the law.[130]

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[126] *Id.* at 33 (quoting a 2011 study analyzing physician beliefs about the role of race in medical necessity determinations because African Americans are at higher risk for hypertension and diabetes compared to white populations).

[127] *See id.* at 26.

[128] *See id.*

[129] *Id.* at 16.

[130] 26 U.S.C. § 5000A(f)(1)(A) (2018); 42 U.S.C. § 1395(a)(1) (2018); MINN. STAT. § 62Q.53, subdiv. 2 (2019). Medical necessity analysis is based on Minnesota's definition of medical necessity: CABG is medically necessary for the patient in this scenario because the instances as described fall under MINN. STAT. § 62Q.53, subdiv. 2 (2019). Under this statute, care is medically necessary when: (1) the healthcare service is appropriate to the patient's diagnosis; (2) care is consistent with generally accepted practice parameters; (3) helps restore or maintain the patient's health *or* prevent deterioration of the enrollee's condition. Here, this treatment is medically necessary for three reasons. First, the doctor correctly diagnosed the patient with CAD and prescribed appropriate services. Second, the doctor acted as any doctor in his position would with a patient in this condition and prescribed CAB. Finally, this care likely saved the patient from dying of CAD. Therefore, the insurance company must pay for this treatment because it was medically necessary under MINN. STAT. § 62Q.53, subdiv. 2 (2019).

In contrast, most insurers do not cover "cosmetic" treatments because they are generally not medically necessary.[131] Procedures like a rhytidectomy (i.e., a facelift) done strictly to reduce signs of aging in the face are not considered medically necessary because a facelift in that scenario would not meet the criteria for a procedure to be medically necessary.[132]

There are times, however, where a cosmetic procedure may be considered medically necessary. Generally, if a patient and provider can show that the patient: (1) "suffer[s] from an illness, disease, sickness, injury, or other term connoting a pathological state;" and (2) "[i]ncur an expense related to that condition which is 'medically necessary' to the insured's health," then that treatment must be covered, subject to the terms of the healthcare agreement.[133] Under *Couch on Insurance (3rd edition)*, a "surgery which is truly 'cosmetic' would not be related to a condition that qualifies as 'sickness,' 'disease,' and so forth."[134]

This analysis makes sense: if a patient sought out a rhinoplasty (i.e., nose job) due to disliking how their nose looks, that would be considered cosmetic because that treatment is not related to a condition qualified as a sickness or disease, etc.[135] However, if the nose's cartilage left the nose uneven, leaving the patient to struggle to breathe through their nose, the operation would become medically necessary. By this logic, what is considered a "cosmetic" procedure for one patient, may be considered medically necessary for another. For example, liposuction (removal of excess fat deposits) is a common procedure for those seeking to lose weight for solely aesthetic reasons.[136] In some instances, however, if a patient meets certain criteria, liposuction becomes medically necessary—male patients suffering from gynecomastia (enlargement of male breasts) or problems with metabolism with fat in the body.[137]

Ultimately, there are established paths to demonstrate that certain traditionally cosmetic procedures are medically necessary and, therefore, must be covered by a health insurance plan when appropriate. However,

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[131] Sasha Clary, *Facial Feminization Surgery: What You Should* Know, HEALTHLINE (May 10, 2018), https://www.healthline.com/health/transgender/facial-feminization-surgery [https://perma.cc/CC6C-N6YC].

[132] *See, e.g.*, *Does Medicare Cover Plastic Surgery?*, HEALTHLINE, https://www.healthline.com/health/medicare/does-medicare-cover-plastic-surgery#procedures-that-qualify [https://perma.cc/HRX8-9MYH].

[133] 10A STEVEN PLITT, ET AL., COUCH ON INSURANCE § 144:34 (West Group 3d ed.).

[134] *Id.*

[135] *Id.*

[136] AM. SOC'Y OF PLASTIC SURGEONS, *Liposuction*, https://www.plasticsurgery.org/cosmetic-procedures/liposuction [https://perma.cc/K2MK-PVY8].

[137] *See* Healthwise Staff, *Liposuction,* CIGNA, https://www.cigna.com/individuals-families/health-wellness/hw/medical-topics/liposuction-tf2436 [https://perma.cc/M4W6-HB4T].

that does not mean that traditional understandings of care, wellness, and patient rights will go down without a fight.

C. Patient's Right to an Appeal

The plaintiffs in *Linn* demonstrate a fundamental legal right every patient has regarding the health insurance industry, the right to an appeal.[138] The facts are simple: Linn was denied coverage of experimental cancer treatment because the procedure was deemed medically *unnecessary* by his insurance.[139] Blue Cross Blue Shield of Minnesota refused to cover the procedure because they did not consider the Proton Beam Radiation Treatment medically necessary, and therefore it was not included in their private health insurance coverages.[140] This treatment was denied despite Linn's attending physician's opinion that the treatment would help Linn's cancer. Upon receiving the payer's denial, Linn appealed, first internally with his insurance company, where he was denied again, and then externally. The independent arbiter who reviewed this case overruled the denials and required the payer to compensate the plaintiffs because the treatment was, in fact, medically necessary.[141]

Section 1001(5) of the ACA requires healthcare plans to provide patients the right to appeal a denial of coverage.[142] While this requirement has shown measurable success, providers still lack the power to give patients what their providers have deemed medically necessary care.[143] When facing a denial of treatment, the patient's best hope is for their provider to write a letter to the payer in hopes of persuading them that the care is medically necessary.[144] If that fails, the patient can hire an attorney to bring a legal claim of action compelling the payer to provide coverage as a matter of law, rather than basing coverage on the payer and provider's opinions of what is medically necessary.[145] Because the patient, provider, and payer are now in dispute over the medical necessity of a certain treatment, the appeals process works similar to arbitration in an alternate dispute resolution. In

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[138] Linn v. BCBSM, Inc., 905 N.W.2d 497, 499 (Minn. 2018) (quoting MINN. STAT. § 62Q.73 (2016)); Patient Protection and Affordable Care Act, Pub. L. No. 111–148, §§ 1001(5), 2719, 124 Stat. 119, 137–38 (2010).
[139] *Linn*, 905 N.W.2d at 500.
[140] *Id.*
[141] *Id.*
[142] 42 U.S.C. § 300gg-19 (2018); *see also* MINN. STAT. § 62Q.73 (2016) (requirement at the state level for payers to outline to patients the process of internal and external (to an independent arbiter) a request for appeal).
[143] Pauline Bartolone, *Patients Often Win if They Appeal a Denied Health Claim*, KAISER HEALTH NEWS (Apr. 14, 2014), https://khn.org/news/patients-often-win-appeals-after-insurance-denials/ [https://perma.cc/ACQ5-35L7]; SKINNER, *supra* note 94, at 40–41.
[144] SKINNER, *supra* note 94, at 41.
[145] *Id.*

these instances, it is now up to an independent arbitrator to determine if the treatment is medically necessary and, therefore, must be covered.[146]

It is essential to highlight that while this appeal may signal progress in patients' healthcare rights, it remains a sign that healthcare in America is disjointed and, in many ways, challenging.[147] While it is true that Section 2719 of the ACA requires that the appeal process be "effective," patients using this process must still wait longer to receive the care they deem medically necessary.[148] For example, a minor, transgender patient and their provider may be able to prove that initiating HRT is medically necessary to treat that patient's gender dysphoria as evidenced by the WPATH standards, even though the payer disagrees and denies the request for coverage.[149] In that case, the patient may either pay out of pocket—my HRT costs before gender confirmation surgery were $138 per month—or request an appeal and wait it out. However, given how expensive HRT is and given the expense of litigation, these options may be unobtainable for some families and, accordingly, they leave minors vulnerable. In many cases, the way this scenario plays out has serious consequences. Denial of coverage may: "prolong gender dysphoria and contribute to an appearance that could provoke abuse and stigmatization…as [this] level of gender-related abuse is strongly associated with … psychiatric distress during adolescence, withholding [HRT] is not a neutral option for adolescents."[150]

The right to appeal a decision may mean the difference between a FtM patient growing breasts and requiring—expensive and painful—chest reconstructive surgery, or from experiencing puberty that does not match their gender identity. While I have presented a scenario involving a transgender patient, similar ramifications exist across the entire spectrum of healthcare needs.

The plaintiffs in *Linn* attest to the need for an appeal in the healthcare industry beyond just for transgender individuals. His health insurance contract stopped him from receiving medically necessary treatment for bone cancer that affected his cartilage in the thoracic (mid-back) region of his spine.[151] Whether it is for cancer or gender-affirming care, the right to appeal a determination of medical necessity for insurance coverage can impact an individual's course of treatment and significantly impact their quality of life.

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[146] *Id.*
[147] *Id.* at 42.
[148] *Id.* (quoting 42 U.S.C. § 300gg-19(a)(1) (2018)).
[149] *See* Tovar v. Essentia, 342 F.Supp.3d 947, 951 (D. Minn. 2018) (quoting WPATH, *supra* note 17, at 18–21).
[150] WPATH, *supra* note 17, at 21.
[151] Linn v. BCBSM, Inc., 905 N.W.2d 497, 500 (Minn. 2018).

IV. DISCUSSION

A. Barriers to Healthcare

It is undisputed that issues involving sexuality and gender are both political and controversial.[152] While the court of public opinion is beginning to swing in favor of transgender rights, there are still many organizations and people who vehemently oppose any tolerance of transgender protections or access to healthcare—no matter the quantity of evidence that reflects both need and effectiveness.[153] While voices like these have always existed when a controversial topic arises, they prevent access to essential care for transgender individuals. If these voices are successful, then thousands of transgender Americans will be at an even greater risk of a similar health crisis I experienced—their well-being and livelihood are at risk.

On June 12, 2020, the Trump administration finalized a rollback of LGBTQ patient protections under the ACA.[154] During the Obama

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[152] SKINNER, *supra* note 94, at 13; Michael Ollove, *States Diverge on Transgender Health Care*, PEW (July 17, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/07/17/states-diverge-on-transgender-health-care [https://perma.cc/BFV5-T6JD].

[153] Opponents note evidence of "transgender regret" or Rapid Onset Gender Dysphoria (ROGD). They also make unsubstantiated claims that children as young as three are receiving gender confirmation surgery (as noted above, the WPATH standards do not even allow for children to receive genital reconstructive surgery but may in some circumstances allow FtM teenagers to receive "top" surgery). However, this evidence is unsubstantiated and largely fueled by—in my opinion—partisan hysteria. Opponents use incorrect language like "transgenders," "transgenderism," "transgendered," "shemale," etc. or bring up Christianity as a justification. For examples of their writing, see Stella Morabito, *30 Transgender Regretters Come Out Of The Closet*, FEDERALIST (Jan. 3, 2019), https://thefederalist.com/2019/01/03/30-transgender-regretters-come-closet-new-book/ [https://perma.cc/9DUK-P8R6]; Rod Dreher, *The Insanity of Transgenderism*, AM. CONSERVATIVE (Jan. 10, 2020), https://www.theamericanconservative.com/dreher/the-insanity-of-transgenderism/ [https://perma.cc/9S2F-PQST]; Rebecca Damante, *Fox & Friends Guest Pushes Myth that 3 and 4 year Old Trans Kids are Making "Surgical and Biological Alterations" to Their Bodies*, MEDIA MATTERS FOR AM. (Feb. 6, 2018), https://www.mediamatters.org/fox-news/fox-friends-guest-pushes-myth-3-and-4-year-old-trans-kids-are-making-surgical-and, [https://perma.cc/HDR4-FSGZ]. *But see* Florence Ashley, *There Is No Evidence That Rapid-Onset Gender Dysphoria Exists*, PSYCHCENTRAL (Dec. 4, 2018), https://psychcentral.com/lib/there-is-no-evidence-that-rapid-onset-gender-dysphoria-exists/ [https://perma.cc/LP3K-5AJM] (evidence that disputes ROGD); WPATH, *supra* note 17, at 105–06 (describing the standards for which a child may receive gender-affirming care, including that at minimum, adolescents may receive HRT following appropriate consultation with an endocrinologist experienced in treating transgender children).

[154] Dan Diamond, *Trump Finalizes Rollback of LGBTQ Patient Protections*, POLITICO (June 12, 2020), https://www.politico.com/news/2020/06/12/trump-lgbtq-patient-protections-315819 [https://perma.cc/3Y2D-KEQ3]; *HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions*

administration, HHS directed section 1557 to protect transgender patients from discrimination on the basis of sex.[155] Under the Obama administration, Title VII interpreted the word "sex" to include an individual's sex classification and expanded coverage to thousands of transgender patients and protections from illegal discrimination.[156] Although the Obama-era rule never came into effect, it created better guidance for states to follow and created a more equitable healthcare experience. However, under the Trump administration, these protections were reversed, instead instituting a narrow interpretation of sex, that is, one's biological sex assigned at birth, either male or female.[157] Fortunately, the Monday following this announcement, the United States Supreme Court announced its decision in *Bostock v. Clayton County*.[158] In this landmark case, the Court held transgender people are protected under Title VII from employment discrimination because the word "sex" does include sex classifications—including gender identity—from unlawful discrimination.[159] While it is true that *Bostock* does not extend this protection to the field of healthcare, it does foreshadow how courts might approach transgender health protections. Indeed, in an August 2020 decision, a federal district court issued a stay on President Trump's June order, citing *Bostock* in its reasoning.[160] Furthermore, President Biden rolled back this policy during his first few hours in office. In a January 20, 2021 Executive Order, the Biden presidency adopted the holding in *Bostock,* to be used in all executive agencies—including HHS—to incorporate transgender sex protection under Title VII.[161] I am certain much more debate on *Bostock* will continue.

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in Excessive Costs, U.S. DEP'T HEALTH & HUM. SERVS. (June 12, 2020), https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html [https://perma.cc/3GEZ-KQ2Q]; Masha Gessen, *The Trump Administration's Hateful Message on Health Care for Transgender Americans*, NEW YORKER (June 13, 2020), https://www.newyorker.com/news/our-columnists/the-trump-administrations-hateful-message-on-health-care-for-transgender-americans [https://perma.cc/2CLT-ZUTB].

[155] Gessen, *supra* note 154.

[156] *Id.*

[157] In fact, reporters speculate that President Trump took this action due to his lackluster popular support in the wake of both the Covid–19 pandemic and the racial justice protests following the homicide of George Floyd. *See* Diamond, *supra* note 154.

[158] 140 S. Ct. 1731 (2020).

[159] *Id.* at 1737.

[160] *See* Walker v. Azar, No. 20-CV-2834, 2020 WL 4749859 (E.D.N.Y. Aug. 17, 2020); *see also* Margot Sanger-Katz & Noah Weiland, *Judge Blocks Trump Officials' Attempt to End Transgender Health Protections*, N.Y. TIMES (Aug. 17, 2020), https://www.nytimes.com/2020/08/17/us/politics/trump-court-transgender-rights.html [https://perma.cc/H7BB-D3XM].

[161] Exec. Ord. No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

Concerning gender-affirming care and the medical necessity doctrine, politics are the decisive element.[162] The most significant healthcare obstacle transgender patients face is a public opinion that sways against transgender Americans as a class. Public opinion—and therefore legislation—which delegitimizes both the clinical distress transgender individuals experience because of untreated gender dysphoria, as well as the WPATH aligned treatments that can address this distress, will deny people like me their right to live and pursue a healthy and meaningful life.

Historically (circa 1970), payers could abuse patients' access to mental healthcare because there were no criteria for its medical necessity.[163] A patient and provider would submit a prior authorization form, which insurers denied because the mental health treatment and, in some cases, the diagnosis was not deemed medically necessary.[164] When the DSM was first published, it created a path for patients to receive medically necessary treatment because it allowed providers to codify diagnoses.[165] This essentially medicalized mental health.[166] Notably, by the time DSM-3 was published in 1980, transgender patients had a codified diagnosis, i.e., "gender identity disorder."[167] This is not to say that payers or insurance companies are the enemies—they are an essential cog in the American healthcare system. The enemy is a culture that fails to recognize transgender healthcare as medically necessary and, therefore, worthy of reimbursement.

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[162] Robert Pear, *Trump Plan Would Cut Back Health Care Protections for Transgender People*, N.Y. TIMES (Apr. 21, 2018), https://www.nytimes.com/2018/04/21/us/politics/trump-transgender-health-care.html [https://perma.cc/9VSM-VXSH]; Gessen, *supra* note 154; Emmarie Huetteman, *Shifting Federal Policies Threaten Health Coverage for Trans Americans*, MPR NEWS (Aug. 2, 2018), https://www.npr.org/sections/health-shots/2018/08/02/634583749/shifting-federal-policies-threaten-health-coverage-for-trans-americans [https://perma.cc/A2U6-BJQ3]; Stephen Groves, *Ban on Treatments for Transgender Kids Fails in South Dakota*, A.P. NEWS (Feb. 10, 2020), https://apnews.com/2b4a8263d92caef3b6a645e26d0e3361 [https://perma.cc/6QLT-MREF]; Dan Levine, *A Clash Across America Over Transgender Rights*, N.Y. TIMES (Mar. 12, 2020), https://www.nytimes.com/2020/03/12/us/transgender-youth-legislation.html [https://perma.cc/Y8D2-4PFH]; Nico Lang, *8 States Are Trying to Make the Medical Treatment of Trans Kids a Crime*, VICE (Feb. 5, 2020), https://www.vice.com/en_us/article/g5x5jq/8-states-are-trying-to-make-the-medical-treatment-of-trans-kids-a-crime [https://perma.cc/FM4H-LGE4].

[163] SKINNER, *supra* note 94, at 105–06.

[164] *Id.* at 105.

[165] *Id.* at 109–110.

[166] *See id.* (describing the unique intersection between the medicalization of mental health and the development of medical necessity).

[167] Anne Vitale, *Rethinking the Gender Identity Disorder Terminology in the Diagnostic and Statistical Manual of Mental Disorders IV*, TRANSHEALTH (May 28, 2005), http://www.trans-health.com/2005/rethinking-gid-terminology-dsm/ [https://perma.cc/B5WJ-JM27].

While I have established above that gender dysphoria is *not* a mental condition or disorder, it is codified in the DSM-5 because of the need for a codified diagnosis to access care and because there can be significant mental health concerns associated with distress caused by gender dysphoria.[168]

Nevertheless, significant barriers still exist.[169] As of March 2019, transgender patients report: (1) exclusionary insurance coverage for gender-affirming services; (2) lack of institutional support for transgender cultural competency among healthcare professionals; and (3) lack of education, training, and awareness around aftercare or post-operative care.[170] I can attest to these issues. While I am fortunate enough to have access to phenomenal gender-affirming healthcare, I have still experienced setbacks. When I woke up from my vaginoplasty, I awoke to nurses who referred to me by male pronouns. It was distressing. The following day, while an occupational therapist (OT) was helping me change my bandages (a giant pad over my vulva), my pad fell to the ground, and the OT stated, "his pad fell" to another nurse. When I went in to have hair removal on my penile shaft prior to surgery, a nurse told me that "even ladies get laser hair removal done down there." *As if my legal sex and the very procedures I was receiving were not evidence enough of my gender. These health providers caused me distress because they lacked the training to empathize with patients like me.*

My health insurance policy presently states that any facial feminization surgeries (FFS or facial gender-conforming surgery) are cosmetic and therefore not covered. This is despite the fact that denial is improper under Minnesota Rule 9505.0175, subpart 25, which requires that the appropriate standards of care direct coverage (in my case, the WPATH standards) and not arbitrary decisions.[171]

I confess, however, that I am fortunate compared to other transgender Americans. A 2016 survey of transgender individuals nationally reported six findings:

- 25 percent of respondents experienced a problem with their insurance in the past year related to being transgender, such as being denied coverage for care related to gender transition;
- 25 percent of those who sought coverage for hormones in the past year were denied;

[168] WPATH, *supra* note 17, at 105–06.

[169] *See* AMIDA CARE, BREAKING BARRIERS TO TRANSGENDER HEALTH CARE 4–8 (Mar. 2019), https://www.amidacareny.org/wp-content/uploads/ac-whitepaper_FINAL.pdf, [https://perma.cc/BZ7X-VGRK].

[170] *Id.* at 5.

[171] MINN. R. 9505.0175, subp. 25 (2015); *see* Doe v. Dep't of Pub. Welfare, 257 N.W.2d 816 (Minn. 1977) (reversing denial of coverage for gender confirming surgery).

- 55 percent of those who sought coverage for transition-related surgery in the past year were denied;
- 78 percent of respondents wanted hormone therapy related to gender transition, but only 49 percent had ever received it;
- 42 percent reported that insurance covered only some of the surgical care needed for transition; and
- 21 percent reported that insurance covered transition-related surgery but had no in-network providers.[172]

Additionally, there is evidence that the most significant barriers to access to care are gaps in provider knowledge, on top of costs, and lack of cultural capital when transgender patients are trying to navigate the healthcare system.[173] Despite these numbers, there is a legal remedy to some of these issues. In some federal district and state level courts, there are already protections that may be adopted throughout the United States.[174]

B. Gender-Affirming Care and the Law

There are several federal district and state law cases where the courts rule to expand gender-affirming care coverage.[175] While it is true that a primary barrier to transgender healthcare is provider knowledge and willingness to treat transgender patients, the financial barrier is an injury for which the law can remedy.[176] Indeed, as I address below, both legislation and litigation are moving the United States closer towards coverage for gender-affirming healthcare.

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[172] American Medical Association, *Health Insurance Coverage for Gender-Affirming Care of Transgender Patients*, 1–2 (2019), https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf [https://perma.cc/87KY-YFJ3] (citing SANDY JAMES, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. TRANSGENDER EQUALITY, REPORT OF THE 2015 US TRANSGENDER Survey (2016)).

[173] Joshua D. Safer, Eli Coleman, Jamie Feldman, Robert Garofalo, Wylie Hembree, Asa Radix, & Jae Sevelius, *Barriers to Health Care for Transgender Individuals*, 23 CURRENT OPINION IN ENDOCRINOLOGY & DIABETES & OBESITY 168, 168 (Apr. 1, 2016).

[174] *See* Tovar v. Essentia Health, 342 F.Supp.3d 947 (D. Minn. 2018); Boyden v. Conlin 341 F.Supp.3d 979 (W.D. Wis. 2018); U.S. v. Se. Okla. State Univ., No. CIV–15–324–C, 2015 WL 4606079 (W.D. Okla. July 10, 2015); *see also Federal Case Law on Transgender People and Discrimination*, NAT'L CTR. FOR TRANSGENDER EQUALITY (2020), https://transequality.org/federal-case-law-on-transgender-people-and-discrimination [https://perma.cc/RHV3-HFDA] (listing cases that hold federal sex discrimination laws extend anti-discrimination protections to transgender people).

[175] *See* Prescott v. Rady Children's Hospital-San Diego, 265 F.Supp.3d 1090 (S.D. Cal. 2017); Cruz v. Zucker, 195 F.Supp.3d 554 (S.D.N.Y. 2016); Rumble v. Fairview Health Servs., No. 14–CV–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015).

[176] Safer, et. al, *supra* note 173, at 168.

At this point, most professionals accept that gender confirmation surgery (i.e., FtM phalloplasty, chest reconstruction/double mastectomy, MtF vaginoplasty, vulvoplasty, etc.) are not purely cosmetic and should be covered.[177] However, there are still twelve states which categorically exclude gender-affirming care if the patient is on Medicaid.[178]

Federal and state courts meanwhile have addressed two main issues regarding payer responsibility in access to care: (1) whether section 1557 of the ACA requires insurers to cover gender-affirming treatments when medically necessary; and (2) whether traditionally cosmetic procedures are medically necessary and therefore must be covered.[179]

The common legal conclusion courts use to address the first issue comes from *Price Waterhouse v. Hopkins*—where the United States Supreme Court found that sex stereotyping, assuming someone will act a specific way based on their sex, is a form of sex discrimination under Title VII.[180]

Although this action was brought by a cisgender woman who accused her employer of sex discrimination on the basis that she was not "feminine enough," it has a significant impact on transgender protections under Title VII because transgender individuals suffering from gender dysphoria attempt to change their "primary sex characteristics, secondary

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[177] WPATH, *supra* note 17, at 58.

[178] AMIDA CARE, *supra* note 169, at 3 (identifying Alaska, Illinois, Iowa, Georgia, Maine, Missouri, Nebraska, Ohio, Tennessee, Wisconsin, and Wyoming as the states with explicit bans). In addition, Minnesota statutorily banned coverage to patients on Medicaid until 2016 when a state court found the statute unconstitutional; *see* OutFront Minn. v. Johnson Piper, No. 62-CV-15-7501 (D. Minn. Dec. 17, 2015) (available at https://www.aclu.org/legal-document/outfront-minnesota-v-johnson-piper-order [https://perma.cc/TS2S-GC4J]). Much thanks to the valiant efforts of Attorneys like Phil Duran and staff attorneys at OutFront Minnesota for their advocacy in this decision. *See* Nate Gotlieb, *A Strong Advocate for the LGBTQ Community*, SW. J. (Aug. 1, 2016), https://www.southwestjournal.com/focus/where-we-live/2016/08/a-strong-advocate-for-the-lgbtq-community/ [https://perma.cc/5K6D-LAD5].

[179] *See Tovar*, 342 F.Supp.3d, at 952 (addressing section 1557 of the ACA); *Boyden*, 341 F.Supp.3d at 979 (also addressing section 1557 of the ACA); Minton v. Dignity Health, 39 Cal.App.5th 1155 (1st D. Cal. 2019) (addressing whether traditionally cosmetic procedures are medically necessary); *Cruz*, 195 F.Supp.3d at 554 (also addressing whether traditionally cosmetic procedures are medically necessary).

[180] *Tovar*, 342 F.Supp.3d, at 952 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)). Sex stereotyping occurs when "an employer . . . acts on the basis of a belief that a woman cannot be aggressive, or that she must not be." *Price Waterhouse*, 490 U.S. at 250. The Court went on to add, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251. Ultimately, "sex stereotyping" hurts transgender people in the same way it hurt the cisgender plaintiff in *Price Waterhouse*. Courts have recognized as much and have correctly extended Title VII protections accordingly. *See* Sasha Buchert, Price Waterhouse v. Hopkins *at Thirty*, ALLIANCE FOR JUSTICE (May 1, 2019), https://www.afj.org/article/price-waterhouse-v-hopkins-at-thirty/ [https://perma.cc/G8ZU-RAA3].

sex characteristics and/or their role prescribed by cultural norms" to alleviate their distress.[181] While it is true that Title VII does not explicitly protect transgender individuals as a class,[182] the logic used by the Supreme Court in *Price Waterhouse* has significantly impacted lower court holdings on transgender issues.

In a case concerning a minor child's access to gender-affirming care, a Minnesota federal district court sided with the *Price Waterhouse* argument because "by definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."[183] Therefore, transgender individuals are protected by Title VII.[184] This Court went on to demonstrate that because section 1557 of the ACA explicitly protects individuals under Title IX — and thus by extension Title VII— section 1557 also "prohibits discrimination on the basis of gender identity."[185] The United States Supreme Court agreed again—albeit their decision is limited to employment law—in *Bostock* holding that transgender people are protected under Title VII despite the lack of statutory language with explicit inclusion because a transgender person is an individual who inherently does not conform to traditional sex stereotypes.[186]

Regarding the second issue, on whether procedures are medically necessary and must be covered, transgender patients must often fight against the system.[187] Historically, gender-affirming treatments, such as facial

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[181] Buchert, *supra* note 180.

[182] Civil Rights Act of 1964 § 7 (codified at 42 U.S.C. § 2000e-2 (1964)).

[183] *Tovar*, 342 F.Supp.3d, at 952 (quoting Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ., 858 F.3d 1034, 1048 (7th Cir. 2017)).

[184] *Id.*; *see also* Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes"). *But see* Brooke Sopelsa & Julie Moreau, *Trans Workers Not Protected by Civil Rights Law, Trump Admin Tells Supreme Court*, NBC NEWS (Aug. 16, 2019), https://www.nbcnews.com/feature/nbc-out/trans-workers-not-protected-civil-rights-law-trump-admin-tells-n1043556 [https://perma.cc/WJB5-89JK] (referring to brief citing *E.E.O.C. v. R.G & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018)).

[185] *Tovar*, 342 F.Supp.3d at 953; *see also* Boyden v. Conlin, 341 F.Supp.3d 979 (W.D. Wis. 2018); Flack v. Wis. Dep't. of Health Servs., 328 F.Supp.3d 931 (W.D. Wis. 2018); Stone v. Trump, 280 F.Supp.3d 747 (D. Md. 2017) (holding the Equal Protection Clause of the Constitution protects transgender individuals). *But see* Texas v. United States, 201 F.Supp.3d 810 (N.D. Tex. 2016) (holding Title IX does not encompass gender identity); Johnston v. Univ. of Pitt., 97 F.Supp.3d 657 (W.D. Pa. 2015) (holding Title IX does not encompass gender identity).

[186] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

[187] Alex Dubov & Liana Fraenkel, *Facial Feminization Surgery: The Ethics of Gatekeeping in Transgender Health*, 18 AM. J. BIOETHICS 3, 4 (2018). Essentially, transgender people navigate healthcare delivery systems that did not take transgender care seriously. They are also navigating society that does not view transgender people in a positive or accurate light. Transgender representations in media reflect a negative attitude that mischaracterizes *real* life experiences of transgender people. *See, e.g.*, THE CRYING GAME; ACE VENTURA: PET DETECTIVE; *see c.f., Family Guy: Quagmire's Dad* (20th Century Fox television broadcast

feminization surgery, were considered cosmetic because medical care for transgender patients was deemed "unnecessary, unproven, and unworthy of payment by insurance premiums."[188]

In recent years, however, there is progress because of ACA requirements and professional and accepted standards of care for transgender patients.[189] Because Section 1001(5) of the ACA protects the right for a patient to request, upon denial of coverage, an appeal to either an internal or external arbiter, there is a chance that gender-affirming care will be covered.[190] Furthermore, a 2014 Kaiser Foundation study found that thirty-nine percent to fifty-nine percent of appeals were successful for the patient, although this population extends beyond transgender patients.[191]

This provision is vital for transgender patients because they now have a right to external review when their care is denied. Often, traditionally cosmetic procedures are categorically excluded by healthcare plans, even though these exclusions may be illegal under both Section 1557 of the ACA or considered medically necessary under Medicare or state statute.[192] For example, in New York, Medicaid can only categorically deny specific treatments when it demonstrates good reasons, such as the absence of recognized standards of care or when the treatment is experimental in nature.[193] Because the WPATH standards of care are "recognized"—and in fact, are the leading, international authority of transgender care—traditionally cosmetic procedures may not be categorically excluded as they may be medically necessary to treat gender dysphoria.[194]

In Minnesota, an Administrative Law Judge held in April 2020 that a Minnesota Department of Human Services (DHS) rule categorically excluding "cosmetic" gender-affirming treatments for MinnesotaCare

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May 9, 2010) (showing where central characters ridicule another character for sleeping with a transgender woman and whereby that character is shown uncontrollably puking); THE HANGOVER PART II (Warner Bros. 2011) (showing protagonist puking and experiencing an anxiety attack after discovering he slept with a transgender woman); ZOOLANDER TWO (Paramount Pictures 2016) (showing a scene where a protagonist meets a gender ambiguous character and asks "[d]o you have a hotdog or a bun?" in reference to their genitalia).

[188] *Id.*

[189] 42 U.S.C. § 300gg-19 (2018); WPATH, *supra* note 17, at 2. The WPATH provides clinical standards used by physicians to administer gender affirming care. The ACA requires a payer to reimburse health care services that are medically necessary. Because the WPATH guidelines provide medically necessary standards of care, any denial of coverage must show that the care the patient is seeking is not medically necessary. Because the ACA also gives patients the power to appeal a denial of coverage, transgender patients are now impowered to seek reversal of wrongful denials.

[190] 42 U.S.C. § 300gg-19 (2018).

[191] Bartolone, *supra* note 143.

[192] *See* MINN. STAT. § 62Q.53, subdiv. 2 (2019); 42 U.S.C. § 18116 (2018).

[193] Cruz v. Zucker, 195 F.Supp.3d 554, 557 (S.D.N.Y. 2016).

[194] *Id.* at 563, 571–72.

patients was unenforceable.[195] This Judge found the rule unenforceable because the DHS policy manual must follow the prevailing provider standards, in this case, the WPATH standards of care.[196] He noted that the WPATH standards view medical necessity on a case-by-case basis, whereas the previous rule singled out FFS as medically unnecessary and without evidence.[197] Most importantly, this case memorandum recognized, "Gender dysphoria is a serious medical condition, which, if left untreated or inadequately treated, can cause adverse symptoms."[198]

V. CONCLUSION

When I started this project, I reached out to a friend of mine to get her perspective. She is also transgender, and I consider her a role model in our community. I know she has inspired many transgender individuals. After I described this project to her, I asked her whether more transgender individuals would seek gender-affirming surgery if it were more accessible and cheaper. She agreed immediately. The look on her face is still vivid in my mind—of course more trans people would seek care.

Transgender Americans are fortunate that the tides are turning.[199] Public perspective and knowledge of transgender people is growing, and with that growth comes empathy. I am confident that someday this country will tear down the barriers to gender-affirming care because the states and federal courts have outlined a way forward. Here, I have asserted that transgender individuals suffer from an immutable yet treatable condition. The distress caused by gender dysphoria is alleviated when patients have access to gender-affirming care. The only obstacle is history and xenophobia. However, if we know our history, we will find it is not altogether unkind—thank you, Dr. Hirshfeld. Ultimately, when the public is on board, all variations of medically necessary, gender-affirming care will be accessible. It is right for transgender individuals to access gender-affirming care because transgender healthcare is medically necessary.

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[195] JustUs Health vs. Dep't. Hum. Servs., No. 60-9029-36557, at 3 (Minn. Off. Admin. Hearings Apr. 16, 2020).
[196] *Id.* at 7.
[197] *Id.* at 4.
[198] *Id.* at 3.
[199] *See* Daniel Greenberg, Maxine Naile, Natalie Jackson, Oyindamola Bola, & Robert P. Jones, *America's Growing Support for Transgender Rights*, PRRI (June 11, 2019), https://www.prri.org/research/americas-growing-support-for-transgender-rights/ [https://perma.cc/SST6-6WSC]; Margot Sanger-Katz & Erica L. Green, *Supreme Court Expansion of Transgender Rights Undercuts Trump Restrictions*, N.Y. TIMES (June 15, 2020), https://www.nytimes.com/2020/06/15/upshot/transgender-rights-trump.html [https://perma.cc/SJV2-ZRQX]; Sharita Gruberg, *Beyond* Bostock*: The Future of LGTBQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020), https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/ [https://perma.cc/E3XX-ATDC].