

NAT’L LGBT BAR ASS’N MICHAEL GREENBERG WRITING COMPETITION

The ADA’s Exclusion of Gender Dysphoria: An Analysis of the Rift Between Jurisprudence and Mental Health

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I. INTRODUCTION

Medicine is a creature born of innovation and growth, constantly striving to make progress in diagnoses and treatments. Unfortunately, when medicine crosses paths with the legal world, it is common for jurisprudence to lag behind medical advancements. There is no hard and fast rule explaining when, and if, scientific discovery should influence related laws. Indeed, scientific and medical advancements “do not in and of themselves call for revisiting older legal outcomes.”¹ Without direct answers, what relevant professionals consider sound medical proof gets lost in the sea of stare decisis.² In particular, there is a chasm between the law and mental health.

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1. Sheila Jassanof, *Serviceable Truths: Science for Action in Law and Policy*, 93 TEX. L. REV. 1723, 1731 (2015).

2. *Id.*

The Americans with Disabilities Act of 1989 (ADA) seeks to bridge some of these gaps by providing broad protections for people who have mental, as well as physical, illnesses.³ In fact, the ADA was created to make up for the limited reach of the Rehabilitation Act of 1973.⁴ The ADA prohibits disability discrimination in employment, public services, and accommodations—including those that private entities operate—and telecommunications for the hearing or speech impaired.⁵ On the surface, the ADA appears to be a comprehensive statute affording protections for a once legally vulnerable population.

However, the ADA has a rather disjointed connection to medicine. A psychiatrist may consider one condition a mental illness, but the law may not.⁶ While the Equal Employment Opportunity Commission (EEOC) follows the definition of “disability” as stated in the ADA, it also explicitly states that a person must “have a disability as defined by the law” in order to bring a claim.⁷ The EEOC’s statement is a prime example of the confusion surrounding the statute. Doctors, researchers, and psychologists normally come to mind first when one thinks of the entities responsible for defining illness. This Article examines what a legal disability looks like and what, if anything, is wrong with that definition.

In 1980, the American Psychiatric Association recognized “gender identity disorder” as a mental illness,⁸ and in 2013, it renamed the illness as “gender dysphoria.”⁹ Gender dysphoria is the incongruence between the gender an individual is born with and the gender the individual identifies with.¹⁰ For example, a transgender¹¹ person may be born

3. 42 U.S.C. § 12102 (1) (2012).

4. 136 CONG. REC. H2411 (daily ed. May 17, 1990) (statement of Rep. Martin). In particular, the ADA extends protection to individuals in the private sector while the Rehabilitation Act only covers those entities that receive federal funds. 29 U.S.C. § 791 (1994).

5. 136 CONG. REC. H2411-12 (daily ed. May 17, 1990) (statement of Rep. Martin).

6. *Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/types/disability.cfm> (last visited Nov. 15, 2016).

7. *Id.*

8. *Transgender Today*, AM. PSYCHOL. ASS’N (Apr. 2013), <http://www.apa.org/monitor/2013/04/transgender.aspx>.

9. *Gender Dysphoria*, AM. PSYCHIATRIC ASS’N (2013), <http://www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf>.

10. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) 451, 453 (5th ed. 2013).

11. This Article sometimes uses the term “transgender” when referring to gender dysphoric individuals. However, a person does not have gender dysphoria just because they identify as transgender. As with any other mental illness, there are certain clinical requirements for a diagnosis of gender dysphoria. Those requirements are explained in this Article. This Article does not endorse any belief that rejection of gender norms or adoption of an unconventional gender identity alone link to mental illness.

female but identify strongly as male.¹² However, while clinicians recognize gender dysphoria as a mental illness, the ADA excludes it from its protections.¹³ Even though the medical definition of “mental disorder” was not drafted to meet legal standards¹⁴ and this definition does not necessarily control the law, this exclusion is questionable.

Part II of this Article analyzes the background of the ADA and the purpose of the statute. Part III discusses mental illness and its various definitions across disciplines while exploring gender dysphoria in depth. Part IV analyzes analogous case law and the new realm of law involving gender dysphoria. Part V raises public policy concerns and discusses those that most closely match the initial purposes of the ADA. Finally, this Article concludes by stating that the ADA should no longer exclude gender dysphoria from its definition of disability.

II. PROTECTING A VULNERABLE POPULATION

The public perception of mental illness carries heavy stigmas, many of which the media perpetuates.¹⁵ The average person develops his perspective of mental illness from popular culture rather than a medical

12. *See id.* at 452. There are six manifestations of gender incongruence in adolescents and adults recognized by clinicians, and a person must experience at least two in order to be diagnosed with gender dysphoria. These manifestations include:

- (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).

13. 42 U.S.C. § 12211(b)(1) (2012).

14. *Cautionary Statement for Forensic Use of DSM-5*, AM. PSYCHIATRIC ASS'N, <http://dsm.psychiatryonline.org/doi/full/10.1176/appi.books.9780890425596.CautionaryStatement> (last visited Nov. 15, 2016). “[I]t is important to note that the definition of mental disorder included in DSM-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals.”

15. OTTO F. WAHL, *MEDIA MADNESS: PUBLIC IMAGES OF MENTAL ILLNESS* 2-3 (1997). Wahl provides an in-depth analysis of perceptions of mental illness, ranging from overt and covert representations in the media to the terminology that often portrays certain illnesses as immoral or conflates two different mental illnesses, such as schizophrenia and dissociative identity disorder. The examples he provides of social stigmas facing those with mental illness are truly shocking, and the fact that they have the ability to shape attitudes about illness proscribes a need for comprehensive protections to this community.

treatise.¹⁶ Mental illness pervades our entertainment world, ranging in depictions from insane men who lust for murder to people with intellectual disabilities, such as autism.¹⁷ Given society's perceptions of mental illness, it is no wonder that the government perceived a need to protect people with mental disabilities.

The purpose of the ADA is to eliminate discrimination against people with disabilities.¹⁸ "Elimination" is a strong word; it implies the use of aggressive means to stop discrimination.¹⁹ So it is no wonder that in the 2008 amendments of the ADA, Congress criticized the United States Supreme Court for interpreting the statute too narrowly.²⁰ Rather than eliminating discrimination, Supreme Court and lower court decisions were "eliminating protection for many individuals whom Congress intended to protect."²¹ Congress intended to protect any "qualified individual."²²

A plaintiff must overcome three burdens to establish himself as a "qualified individual" and pursue a claim for employment discrimination under the ADA.²³ The first is a showing that he suffers from a disability as defined by the ADA.²⁴ This first burden is addressed in depth later in Part III of this Article. The second burden is a showing that he can perform the essential functions of his job.²⁵ In order for an individual to establish a case, he must be able to perform his job duties either with or without accommodations.²⁶ If even after receiving reasonable accommodations the individual cannot perform the requirements of his position, he cannot bring a claim under the ADA.²⁷ Courts consider an employer's determination of essential duties or functions, but courts also exercise their own judgment in deciding whether those duties are in fact

16. *Id.*

17. *Id. at 3.*

18. 42 U.S.C. § 12101 (2012).

19. *See id.*

20. ADA Amendments Act of 2008, 122 Stat. 3553 § 2(a)(3)-(a)(8) (2008). Congress rejected the reasoning in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), where the Court stated that disability is "to be interpreted strictly to create a demanding standard for qualifying as disabled."

21. ADA Amendments Act of 2008, 122 Stat. 3553 § 2(a)(4) (2008).

22. 42 U.S.C. § 12111 (8) (2012).

23. *Id.*

24. 42 U.S.C. § 12102 (1) (2012).

25. 42 U.S.C. § 12111 (8) (2012).

26. *Id.*

27. *Id.*; see also *Melendez-Santana v. P.R. Ports Auth.*, 296 F. Appx 98 (1st Cir. 2008) (holding that because the employee could not perform the essential functions of his job even with reasonable accommodations, he was not a "qualified person" under the ADA).

essential.²⁸ The third element is a showing that the employer's actions—such as termination of employment—were due to the individual's disability.²⁹

The reach of the ADA is not limited to employment. An individual may also qualify for a claim of discrimination in public services if he: (1) has a disability, and (2) with or without reasonable accommodations, is eligible to receive services or participate in public entity provided activities.³⁰ A disabled person may also bring a claim against private entities that discriminate in the provision of public accommodations.³¹ An example of such discrimination is failure to provide handicap accessible entries for a business open to the public. By including public accommodations owned by private entities, the ADA expanded beyond the Rehabilitation Act's limit of federally funded entities.³²

These elements exemplify the broad approach Congress took when enacting the ADA. By refusing to pigeonhole what it means to be impaired³³ and by checking the courts' attempts to constrain the congressional intent of the ADA,³⁴ Congress furthered its objective to provide legal redress to disabled people.³⁵ The ADA began with a noble agenda. Nevertheless, in its path to provide protection for those who society has cast aside, the ADA still manages to exclude a population who, in this time, need its security the most.

III. DEFINING MENTAL ILLNESS

The struggle in defining mental illness is not from lack of definitions but rather from not knowing which definition is proper. Congress chose to define disability in the ADA “in favor of broad coverage” for qualified individuals and “to the maximum extent permitted.”³⁶ Therefore, there is no precise characterization in the law of either physical or mental illness.

28. 42 U.S.C. § 12111 (8) (2012).

29. 42 U.S.C. § 12112 (2012).

30. 42 U.S.C. § 12131 (2) (2012).

31. 42 U.S.C. § 12182(a)(1) (2012).

32. 136 CONG. REC. H2411 (daily ed. May 17, 1990) (statement of Rep. Martin).

33. See 42 U.S.C. § 12102 (2012) (using broader language to define “disability” in three categories).

34. ADA Amendments Act of 2008, 122 Stat. 3553 § 2(a)(3)-(a)(8) (2008).

35. *Id.*

36. 42 U.S.C. § 12102 (4) (a) (2012).

The EEOC defines a mental illness as “[a]ny mental or psychological disorder.”³⁷ Both definitions appear to yield to psychological and medical terminology, which is no different in its breadth as it describes mental illness as “a wide range” of conditions.³⁸ The best approach appears to be analyzing whether a condition qualifies as a mental illness on a case-by-case basis. Nevertheless, even this approach requires some sort of methodology or guide in determining what a mental illness is legally.

While the EEOC provides its general definition of mental illness, it also defers to medical guides, specifically the American Psychiatric Association’s (APA) Diagnostic and Statistical Manual of Mental Disorders (DSM).³⁹ The EEOC refers to the DSM as an “important reference by courts” as well as medical professionals.⁴⁰ The current edition of the DSM, the DSM-5, extensively outlines various mental illnesses, diagnostic criteria, and public health statistics.⁴¹

Despite the thorough and reliable nature of the DSM-5 in defining psychiatric conditions, certain mental illnesses that the DSM-5 recognizes are not recognized under the ADA.⁴² In particular, the DSM-5 defines “gender dysphoria” as a mental illness, replacing the former terminology of “gender identity disorder.”⁴³ The APA took a purposeful

37. 29 C.F.R. 1630.2(h)(1) (2012). The full definition of disability is

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Though it provides examples, it has the same broad, limitless reach of the definition provided in the ADA.

38. *Diseases and Conditions: Mental Illness*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/mental-illness/basics/definition/con-20033813> (last visited Nov. 15, 2016).

Mental illness refers to a wide range of mental health conditions—disorders that affect your mood, thinking and behavior. Examples of mental illness include depression, anxiety disorders, schizophrenia, eating disorders and addictive behaviors. Many people have mental health concerns from time to time. But a mental health concern becomes a mental illness when ongoing signs and symptoms cause frequent stress and affect your ability to function.

39. *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Mar. 25, 1997), <http://www.eeoc.gov/policy/docs/psych.html>.

40. *Id.*

41. AM. PSYCHIATRIC ASS’N, *supra* note 10.

42. 29 C.F.R. 1630.2(h)(1) (2000).

43. *Gender Dysphoria*, *supra* note 9.

step in removing the word “disorder” from the name in order to give transgender individuals a diagnostic term that “won’t be used against them” in work, social, and legal settings.⁴⁴ The DSM-5 refers to the word “disorder” as stigmatizing and contradictory to the purpose of ensuring protection and treatment for this clinical condition.⁴⁵ However, the ADA does not take this same stance on protection for those with gender dysphoria. Instead, it explicitly excludes them under the old term of “gender identity disorder.”⁴⁶

A. *Gender Dysphoria’s Misrepresentation in the ADA*

The ADA groups gender dysphoria⁴⁷ with “other sexual behavior disorders.”⁴⁸ In contrast, the DSM-5 lists gender dysphoria as separate “from Sexual Dysfunctions and Paraphilic Disorders” and provides it with its own chapter.⁴⁹ This is where medicine and law collide. The DSM-5 differentiates gender dysphoria from other sexual disorders by describing it as “strong desires to be treated as the other gender or to be rid of one’s sex characteristics.”⁵⁰ Conversely, paraphilic disorders involve sexual desires that cause great distress, including, but not limited to, desires for non-consentable or unconsented sex.⁵¹ These are two vastly different conditions that the ADA erroneously seeks to label under the broad, umbrella term of “other sexual behavior disorders.”⁵² Other conditions not considered disabilities for purposes of the ADA—transvestism, pedophilia, voyeurism, and exhibitionism⁵³—are in fact paraphilic disorders.⁵⁴ The only non-paraphilic disorder listed besides

44. *Id.*

45. *Id.*

46. 42 U.S.C. § 12211(b)(1) (2012).

47. Although the ADA uses the antiquated term of gender identity disorder, this Article will continue from this point to only use the term gender dysphoria, including in reference to the ADA, in order to provide clarity and cohesion in the analysis.

48. 42 U.S.C. § 12211(b)(1) (2012).

49. *Gender Dysphoria, supra* note 9.

50. *Id.*

51. *Paraphilic Disorders*, AM. PSYCHIATRIC ASS’N (2013), <http://www.dsm5.org/Documents/Paraphilic%20Disorders%20Fact%20Sheet.pdf>. The DSM-5 explains that there is a distinction between a paraphilic disorder and an atypical sexual practice or desire. Consenting adults who engage in atypical sexual activities are not automatically labeled with a mental disorder. Eight conditions fall under paraphilic disorders: “exhibitionistic disorder, fetishistic disorder, frotteuristic disorder, pedophilic disorder, sexual masochism disorder, sexual sadism disorder, transvestic disorder, and voyeuristic disorder.”

52. 42 U.S.C. § 12211(b)(1).

53. *Id.*

54. *Paraphilic Disorders, supra* note 51.

gender dysphoria is transsexualism,⁵⁵ terminology replaced by gender dysphoria in the DSM, making this listing redundant.⁵⁶

Paraphilia involves sexual pleasure, usually from acts considered deviant by society.⁵⁷ Its definition may vary depending on the culture at the time and what people believe is taboo.⁵⁸ Nevertheless, a constant element of paraphilia is sexual desire.⁵⁹ In contrast, gender dysphoria is a pervasive dissonance between a person's assigned, or natal, gender and his expressed or experienced gender.⁶⁰

Sexuality and gender are two different concepts.⁶¹ While sexuality refers to romantic attraction, gender is how an individual chooses to convey sex in his culture.⁶² Gender expression may include how a person dresses or communicates—essentially his conformity to gender roles.⁶³ The ADA's conflation of these two different aspects of human biology and sociology is incorrect and has consequences. In particular, society tends to reject notions of sexuality, labeling them as taboo. Placing gender dysphoria in the realm of sexuality rather than gender expression suggests that transgender individuals are sexual deviants.

Paraphilic disorders include sexual interests that cause serious threats to others.⁶⁴ Including gender dysphoria in a group of conditions that involve illegal activities paints transgender individuals as dangerous or criminals. Thus the grouping of gender dysphoria with paraphilic disorders lends itself to a harsh social stigma. Verbal harassment against transgender individuals is already prevalent.⁶⁵ Even more frightening are

55. *Id.*

56. *Gender Dysphoria*, *supra* note 9; see *Gender Identity Disorder in Adolescents or Adults*, INT'L FOUND. FOR GENDER EDUC., http://www.ifge.org/302.85_Gender_Identity_Disorder_in_Adolescents_or_Adults.

57. Michelle A. McManus et al., *Paraphilias: Definition, Diagnosis and Treatment*, F1000PRIME REP. 5:36 (2013).

58. *Id.*

59. *Id.*

60. Mohammed A. Memon, *Gender Dysphoria and Transgenderism*, MEDSCAPE (Feb. 26, 2016), <http://emedicine.medscape.com/article/2200534-overview>.

61. *Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation*, AM. PSYCHOL. ASS'N, <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (last visited Oct. 6, 2016).

62. *Id.*

63. *Id.*

64. *Paraphilic Disorders*, *supra* note 51.

65. Walter O. Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103 AM. J. PUB. HEALTH 943, 946 (2013). The prevalence of verbal harassment in a sample of 1093 transgender participants was higher than any other stigma experience. Transgender women constituted 57.5% while 42.5% were transgender men. Various types of stigma were included in two, ten-item scales, and the results showed a median of two stigma experiences per participant.

the presence of physical and sexual abuse or assault against transgender people.⁶⁶ What is more, the government, through the ADA's representation of gender dysphoria, essentially endorses this stigma. Not only does the ADA's definition contravene psychiatric expertise, but it also poses real social concerns. Primarily, policymakers may find an unwarranted need to protect their citizens from transgender individuals. In turn, those individuals have no recourse to fight back.

As of February 2016, the Human Rights Campaign reported the existence of forty-four state anti-transgender bills.⁶⁷ In March 2016, the North Carolina legislature infamously passed an act that prohibits transgender individuals from using public bathrooms corresponding to their expressed genders.⁶⁸ The act requires individuals to use restrooms based upon their biological sex, which it defines as "the physical condition of being male or female, which is stated on a person's birth certificate."⁶⁹ While the bill cites statewide consistency in commerce regulation as an overarching purpose for the act,⁷⁰ it still discriminates against those with gender dysphoria by limiting a public accommodation. If the ADA did not exclude gender dysphoria, gender dysphoric North Carolinians may have a valid protection against this law.

B. Substantial Limitations of Gender Dysphoria

Under the ADA, mental illness alone is not enough to bring a claim; the mental illness must substantially limit a major life activity.⁷¹ A major life activity is one that an average person can do with little or no difficulty.⁷² The ADA does not give specific examples of major life activities, but the EEOC has provided a non-exhaustive list.⁷³ Working need not be substantially limited if the illness limits another major life

66. *Id.* at 947. Among the participants, 23.6% experienced physical abuse as a result of transgender stigmas, and 14.9% experienced sexual abuse or assault as a result of stigmas.

67. *Anti-Transgender Legislation Spreads Nationwide, Bills Targeting Transgender Children Surge*, HUM. RTS. CAMPAIGN FOUND., <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/HRC-Anti-Trans-Issue-Brief-FINAL-REV2.pdf> (last visited Oct. 6, 2016). The forty-four anti-transgender bills include twenty-nine relating to bathroom and locker room usage as well as sports, two health-related, three pertaining to marriage, two pertaining to general discrimination, two pertaining to birth certificates, and five pertaining to religious rights.

68. H.B. 2, 2d Spec. Sess. (N.C. 2016).

69. *Id.*

70. *Id.*

71. 42 U.S.C. § 12102 (1) (A) (2012).

72. *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, *supra* note 39.

73. *Id.* Major life activities varies. A mental impairment might limit "learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, or working" as well as sleeping.

activity instead.⁷⁴ Where no other major life activity is involved, courts analyze the person's ability to work.⁷⁵

The issue with the ADA's definition of mental illness and the EEOC's non-exhaustive list of major life activities is that they may guide courts to exclude valid limitations that are not as concrete as speaking or performing manual tasks. For example, it is easier for courts to identify more measurable behavioral and emotional difficulties, such as those with learning or interpersonal relationships.⁷⁶ However, it is much more difficult to assess thoughts and emotions associated with mental illnesses, such as the feelings of imminent threat associated with anxiety disorders.⁷⁷ For transgender individuals, it is even more difficult for courts to find the presence of a substantial limitation.

Because substantial limitations reference what the average person can do,⁷⁸ there is a higher burden for a transgender person to demonstrate his limitations. A transgender man may be a woman by biological standards, but it is important for him to dress as a man to feel comfortable and secure.⁷⁹ That does not mean that he has difficulty getting dressed but rather that he is more emotionally stable when choosing to dress a certain way.

Using the average person standard, a court may find that there is no substantial limitation of a major life activity because he can perform the act of dressing himself. Thus, if his employer insists that he must dress as a woman to conform with his natal gender, he may be emotionally scarred, but have no legal recourse.⁸⁰ By continuing to ignore psychiatric expertise and the nature of gender dysphoria, the ADA does a disservice to many Americans requiring its protections.

74. *Id.*

75. *Id.*

76. See Gloria A. Simpson et al., *The Impact of Children's Emotional and Behavioural Difficulties on Their Lives and Their Use of Mental Health Services*, 23 PAEDIATRIC & PERINATAL EPIDEMIOLOGY 472, 476 (2009). This study provides an example of how parents are able to observe certain limitations associated with their children's mental health issues. Many mental health studies in adults involve self-reporting. For the purposes of this Article, it is important to illustrate what is observable to a third party, and not all self-reports reflect that.

77. See Michelle G. Craske, *What Is an Anxiety Disorder?*, 26 DEPRESSION & ANXIETY 1066, 1068 (2009).

78. *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, *supra* note 39.

79. *Transgender-Specific Issues*, OFF. FOR VICTIMS CRIME, http://www.ovc.gov/pubs/forge/transgender_physical.html#gender (last visited Nov. 15, 2016).

80. The example of dressing in the workplace is an illustration in order to give a concrete, relatable viewpoint of the struggles transgender individuals face in finding their identity and how the outside world may not be able to easily perceive that. Most likely, an employer telling an individual he or she must dress in a manner to conform to certain stereotypes would be barred under the Supreme Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

IV. MENTAL ILLNESS IN THE LAW

There is currently no relevant case law challenging the exclusion of gender dysphoria from the ADA's protections.⁸¹ However, there is case law involving mental illness that demonstrates how courts use accepted medical practices in their reasoning. In *Hall v. Florida*,⁸² the Court addressed a Florida statute that defined intellectual disability⁸³ as applied to the case of a criminal defendant. The statute provided that no one with an IQ above seventy had an intellectual disability.⁸⁴ The Court found that this rule deviated from accepted medical practice for two reasons: (1) unlike medical professionals, the Florida courts did not consider evidence other than the IQ test; and (2) the rule relied on IQ scores as precise when in fact, they are indicative of a range and not a fixed number.⁸⁵ The Court relied heavily on the DSM-5 in its reasoning and, though it acknowledged that medical expertise does not dictate the law, it stated that courts cannot disregard this type of evidence.⁸⁶

The Court further stated that determining an intellectual disability in the legal realm "is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework."⁸⁷ The Court viewed the medical community as particularly helpful in the case, and it chastised the Florida court for contradicting a "unanimous professional consensus."⁸⁸ While *Hall* dealt specifically with intellectual disability, the Court's reasoning speaks to the importance of the DSM-5 in the law's treatment of mental health. Few medical professionals work in the legal

81. See Stephanie Francis Ward, *Gender Identity Disorder Should Be Protected by ADA, Transgender Plaintiff Argues*, ABA J. (Jan. 21, 2015, 4:30 PM), http://www.abajournal.com/news/article/gender_identity_disorder_should_be_protected_by_ada_argues_transgender_plai/. A transgender individual filed a lawsuit against her employer in the U.S. District Court of the Eastern District of Pennsylvania for discrimination under both Title VII of the Civil Rights Act and the ADA. Her complaint argued that the exclusion of transsexualism violated the Equal Protection Clause of the Fourteenth Amendment. No opinion has been issued presently.

82. *Hall v. Florida*, 134 S. Ct. 1986 (2014).

83. See James C. Harris, *New Terminology for Mental Retardation in DSM-5 and ICD-11*, 26 CURRENT OPINION PSYCHIATRY 260, 260 (2013). "Intellectually disability" was formerly known as "mental retardation."

84. *Hall*, 134 S. Ct. at 1994. In particular, the statute required that the IQ test yield results that are "two or more standard deviations from the mean score" in order for the person to have an intellectual disability.

85. *Id.* at 1995.

86. *Id.* at 2000 (citing *Kansas v. Crane*, 534 U.S. 407, 413 (2002)). The Court in *Kansas* noted that bright-line rules are not always the most efficient ways to enforce "the Constitution's safeguards of human liberty in the area of mental illness and the law." However, the Court stated that psychiatry may inform but does not control legal findings. *Crane*, 534 U.S. at 413.

87. *Hall*, 134 S. Ct. at 2000.

88. *Id.*

system. Therefore, legislatures and courts aren't always adept at defining mental illness, and the Court seems to recognize this.

There is conflict between the Court's view of mental health opinions and how Congress addresses them in the ADA. It is apparent that the ADA is not framed against the backdrop of the DSM because of its flawed conflation of very separate mental illnesses. Also, its use of the word "transsexual" when "transgender" is more appropriate stands opposite the Court in *Hall*. The Court chose to acknowledge the evolution of mental health terminology by replacing "mental retardation" with "intellectual disability" in its opinion.⁸⁹ So, while the Court took the opportunity to adhere to a development in mental health research, Congress seems to have opted to ignore it. If an ADA case involving gender dysphoria were to reach the courts, they would face a difficult decision: follow the Supreme Court's deference to medicine or apply Congress' archaic law.

While the courts have not addressed a case involving gender dysphoria in the ADA context, they have recognized the significance of gender dysphoria as a medical illness. The United States Court of Appeals for the Fourth Circuit recently considered a Title IX case involving a transgender student who was banned from his high school's boy's bathroom based on his natal sex.⁹⁰ The court acknowledged the student's gender dysphoria diagnosis as "a medical condition characterized by clinically significant distress caused by an incongruence between a person's gender identity and the person's birth-assigned sex."⁹¹ The Fourth Circuit reversed the district court's denial of a preliminary injunction because it found that the district court should have considered his evidence that being forced to use the girls' bathroom would cause psychological harm.⁹²

While this case ultimately hinged on the interpretation of 34 C.F.R. § 106.33⁹³ and not gender dysphoria itself, it is still an excellent illustration of how courts are guided by psychiatry. The court spoke about the district court's ability to "consider and credit sound contrary evidence" from the medical field regarding gender dysphoria.⁹⁴ That the

89. *Id.* at 1990. "Previous opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon."

90. *G. G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) *cert. granted in part*, No. 16-273, 2016 WL 4565643 (U.S. Oct. 28, 2016).

91. *Id.* at *715.

92. *Id.* at *724-25.

93. *Id.* at *723.

94. *Id.* at *727.

court acknowledged gender dysphoria as a mental illness and accepted medical evidence in support of that proposition conflicts with the ADA's exclusion of gender dysphoria. The Fourth Circuit case boils down to an issue of accommodation for a student with a medically diagnosed mental illness. If the student had depression or attention deficit disorder and requested a reasonable accommodation at the school, it is likely that the ADA could have protected him. Instead, the ADA fails him by not even allowing him to bring a claim under the statute. There is no protection for this student who remains exposed to heavy judgment and stigma from the community.⁹⁵

Further, the United States Courts of Appeals for the Second,⁹⁶ Eighth,⁹⁷ and Seventh⁹⁸ Circuits have identified gender dysphoria as a "serious medical need." Each of these cases dealt with the Eighth Amendment rights of transgender inmates. In the foundational case from the Seventh Circuit, the court reversed the dismissal of an inmate's claim under 42 U.S.C. § 1983.⁹⁹ The inmate was diagnosed with gender dysphoria and underwent approximately nine years of hormonal estrogen treatments prior to incarceration.¹⁰⁰ After incarceration, the prison denied the inmate all hormonal and psychiatric treatments, causing severe withdrawal.¹⁰¹ Not only did the court state that the inmate had a serious medical need, but it also stated "that the defendants were deliberately indifferent to that need," giving rise to a valid Eighth Amendment claim.¹⁰²

Incarcerated individuals have substantially limited liberty interests as compared to free people.¹⁰³ So the fact that courts can recognize the severity of disregarding the medical needs of transgender inmates speaks

95. *See id.* at *716. At a school board hearing, the student faced enormous community backlash for his desire to use the boy's bathroom. "Speakers again referred to G.G. as a 'girl' or 'young lady.' One speaker called G.G. a 'freak' and compared him to a person who thinks he is a 'dog' and wants to urinate on fire hydrants."

96. *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000). "We assume for purposes of this appeal that transsexualism constitutes a serious medical need."

97. *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988). "We have also recognized that transsexualism is a very complex medical and psychological problem. We therefore conclude that transsexualism is a serious medical need."

98. *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987). "There is no reason to treat transsexualism differently than any other psychiatric disorder. Thus contrary to the district court's determination, plaintiff's complaint does state a 'serious medical need.'"

99. *Id.* at 410.

100. *Id.*

101. *Id.*

102. *Id.* at 413. While the court stated that the plaintiff was not necessarily entitled to hormone treatment therapy, she was entitled to some sort of medical attention for her gender dysphoria.

103. *Hewitt v. Helms*, 459 U.S. 460, 467 (1983).

volumes. What courts' attention to this population demonstrates is that gender dysphoria is not just a lifestyle that people want to be accepted; it is a condition that requires treatment.¹⁰⁴ If a prison's indifference to a transgender inmate's medical needs can rise to cruel and unusual punishment, then the ADA's refusal to assist these individuals is irresponsible to say the least.

By excluding gender dysphoria as a mental illness, the ADA is falling behind the already slow progress courts have made to keep up with medical advancements. While transgender individuals have received some protections from the courts, the ADA is in the best position to safeguard their rights. It is a clear deterrence from discrimination that would not only provide transgender individuals with a cause of action but accommodations as well. Citizens with gender dysphoria need more than legal protections; they need humanitarian ones. A transgender man should be able to dress as a man, be acknowledged as a man, and given the same treatment as any other man in this country.

V. THE PUBLIC POLICY OF PROTECTING THOSE WITH GENDER DYSPHORIA

As stated in Part II of this Article, the ADA was designed to protect the mentally ill, a group that society has historically stigmatized.¹⁰⁵ Congress pointed to the various forms of discrimination used against this population, citing the "antiquated attitudes" of society as the motives driving such discrimination.¹⁰⁶ Congress also urged that no disability should fall in disfavor simply "on the basis of prejudice, ignorance, myths, irrational fears, or stereotypes."¹⁰⁷ Nonetheless, Congress has only furthered the disfavor of gender dysphoria. By rejecting the transgender community as worthy of its safeguards, the ADA—in spite of its own policy—encourages the ostracizing of this victimized group.

A. *The Persecution of the Transgender Population*

The transgender community faces high levels of violence, harassment, and discrimination.¹⁰⁸ A study by the Institute of Medicine found that "the marginalization of transgender people from society is

104. *Fields v. Smith*, 712 F. Supp. 2d 830, 862 (E.D. Wis. 2010).

105. 42 U.S.C. § 12101 (2012).

106. ADA Amendments Act of 2008, 154 CONG. REC. 6058 (2008).

107. *Id.*

108. See Eve Glicksman, *Transgender Today*, 44 MONITOR ON PSYCHOL. 36 (2013).

having a devastating effect on their physical and mental health.”¹⁰⁹ This effect includes high rates of depression, anxiety, and suicide.¹¹⁰ The prevalence of suicide among the United States population overall is 4.6%.¹¹¹ For transgender individuals, the prevalence is 41%.¹¹² Those who experienced housing discrimination, bullying or harassment at school, and negative, anti-transgender work experiences had an elevated prevalence of suicide attempts.¹¹³

Such high suicide rates indicate a social need. While there is an internal need in the transgender community for psychological counseling and family support, there is a much stronger, external factor at play here: lack of acceptance.¹¹⁴ Negative actions against transgender individuals go beyond verbal harassment. One United States study shows that 37% of transgender participants experienced employment discrimination while 19% experienced physical abuse.¹¹⁵ In 2013, 72% of hate violence homicide victims were transgender women.¹¹⁶

This is the prime definition of a vulnerable population, a population Congress sought to protect by enacting the ADA. Gender dysphoric people are denied accommodations at school and work and are subjected to more discrimination than the average person. Congress should recognize the ADA's original purpose and strive to eliminate this injustice against the transgender population. Removing the exclusion of gender dysphoria from the ADA would be a beneficial step towards the acceptance this group needs.

B. Causing Stigma by Allowing a Mental Illness Status

There is debate among concerned individuals over whether medical professionals should consider gender dysphoria a mental illness at all. The transgender community opposes placement in a category of

109. *Id.*

110. *Id.*

111. Anne P. Haas et al., *Suicide Attempts Among Transgender and Gender Non-Conforming Adults*, WILLIAMS INST. (Jan. 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>.

112. *Id.*

113. *Id.*

114. Glicksman, *supra* note 108.

115. Bocking, *supra* note 65.

116. *Hate Violence Against Transgender Communities*, NAT'L COALITION ANTI-VIOLENCE PROGRAMS, http://www.avp.org/storage/documents/ncavp_transhvfactsheet.pdf (last visited Nov. 15, 2016).

“mentally disordered.”¹¹⁷ Such placement is often compared to the former categorization of homosexuality as a mental illness, which sought to label that group as sick rather than just different.¹¹⁸ Interesting enough, some of this criticism is because gender dysphoria is excluded from the ADA anyway, making it hard for critics to see what protections can possibly come from classifying gender dysphoria as a mental illness.¹¹⁹ Classifying it in the DSM-5 has led to excluding gender dysphoria “from identity-based protective legislation available to gay, lesbian, and bisexual people.”¹²⁰ Ultimately, opponents of the mental illness classification are faced with a double-edged sword. Treating gender dysphoria as a mental illness may lead to social stigma but without the legal benefits and protections that generally come with other mental illnesses.

Though critics acknowledge that there is some possible benefit to treating the underlying distress of gender dysphoria, treatment does not accurately address the social norms associated with gender.¹²¹ In fact, social norms themselves are another argument for not including gender dysphoria in the realm of mental illness.¹²² Like homosexuality, gender dysphoria is argued to be a deviation from norms rather than mental illness.¹²³ Unlike homosexuality, however, gender dysphoria comes with treatment options, such as hormone therapy or surgery.¹²⁴ While removing gender dysphoria from the DSM-5 may eliminate stigma, it may also eliminate these treatment options for those who seek them.¹²⁵

The possibility of increasing stigma is a fair argument against classifying gender dysphoria as a mental illness. Certainly, it serves no useful purpose to cause this vulnerable population more harm than it is already subjected to. Nonetheless, if the ADA were to remove gender dysphoria from its exclusions, the transgender population would gain another means of protection. If discriminatory practices against the gender dysphoric were barred by the ADA, the outcome is more likely positive than negative. As it stands, nothing protects the transgender

117. Alice Dreger, *Why Gender Dysphoria Should No Longer Be Considered a Medical Disorder*, PAC. STANDARD (Oct. 18, 2013), <https://psmag.com/why-gender-dysphoria-should-no-longer-be-considered-a-medical-disorder-f3f9211a707a#.wwwvzq2a7j>.

118. *Id.*

119. *Id.*

120. *Id.*

121. Annie Zhao, *Should ‘Gender Dysphoria’ Be Classified As A Mental Illness?*, 3 COMPOS MENTIS 65, 67 (2015).

122. *Id.* at 68.

123. *Id.*

124. *Id.*

125. *Id.*

community from further harassment and discrimination. For such an at-risk population, a safeguard under the ADA is better than no safeguard at all.

Furthermore, removing gender dysphoria from the ADA's exclusions is not the same as permanently listing it as a mental illness within the Act. Because Congress refused to enumerate a list of mental illnesses, they allowed this realm of law to remain broad and malleable, giving courts the ability to recognize changes in medicine over time.¹²⁶ If, like homosexuality, the psychiatric community no longer considers gender dysphoria a mental illness, courts will be able to accept that change and not apply the ADA in such cases. Removing this exclusionary provision from the ADA would not eternally bind gender dysphoria as a mental illness. Instead, it would allow it to be considered one as long as necessary for the public good.

VI. CONCLUSION

The medical community recognizes gender dysphoria as a mental illness. The drafters of the ADA sought to provide protections for those with mental illness in a broadly worded statute. The exclusion of gender dysphoria from the ADA's reach is not only contrary to Congress' intent, but it is also disengaged from the medical expertise that courts have time and again attached importance to. Furthermore, this exclusion attaches the stigma of criminality to a population that is ultimately defenseless against discrimination. The ADA has the real potential of insulating this exposed population from prejudice and mistreatment. Congress should remove gender dysphoria from 42 U.S.C. § 12211(b)(1) in an effort to eliminate discrimination against the gender dysphoric.

126. ADA Amendments Act of 2008, 122 Stat. 3553 (2008).