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Gender-Affirming Health Care, Autonomy, and Bias in Insurance and the Law

Margaret (Meg) Butler*

Publications focusing on health-related issues for gender nonconforming and transgender people raise two primary concerns. The first is the difficulties that transgender people face in accessing quality gender-affirming health care. Difficulties range from experiencing discrimination, bias, and prejudice when seeking garden-variety medical care (e.g., treatment for a sore throat) to identifying a supportive medical team to provide specialized care (e.g., hormone treatment). The second major concern relates to laws related to health insurance and medical care.

Sources that catalog the verbal and physical abuse that transgender and gender nonconforming people face when seeking medical care often suggest remedies, such as improved anti-discrimination laws and policies. Other sources raise the concern that anti-discrimination laws may lack teeth to be enforceable and that a change in the law would not necessarily remedy individual actors' behavior.

Specific laws are also called out. Several authors critique the Patient Protection and Affordable Care Act (ACA), noting for example that it institutionalized bias in health insurance coverage based on how coverage and premiums are initially described and calculated under the Act. Other authors note that the concept of "medically necessary" may preclude coverage unfairly. Authors describe Medicaid laws as applied to both wards of the state and adults. Tax treatment allowing as a tax deduction medical expenses related to hormone treatment and sex-assignment surgery, but not breast augmentation, is considered.

Several authors addressed the difficulties unique to transgender minors or youth who seek treatment prior to the age of 18. The process required to gain approval if the youth is a ward of the state is one example. The selection of standards of care including the World Professional Association for Transgender Health standards of care (WPATH) (formerly the Harry Benjamin International Gender Dysphoria Association's standards of care), may be outcome determinative, and thus they are considered or discussed in the articles contained in this chapter. Further, complications

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arise when determining whether a minor is eligible to consent to care, for example under the mature minor doctrine.

Scholarship in this area will likely grow in coming years, as awareness of health issues related to gender identity becomes more common. Advocates may take opposing views about important issues, and they will likely continue to dispute what issues are the most important: access to quality care, availability of insurance, protection from discrimination, and the relationship between a person's ability or right to determine their own gender and the medical standards of care chosen and followed by parents of minors, physicians, and courts. Another area for focus is intersectionality, particularly as low-income transgender people and people of color experience greater rates of discrimination in access and quality care than their white and higher income counterparts.¹ Interdisciplinary scholarship in the areas of law and public health will also continue to grow.

To search for scholarship in this area, in free databases such as Google Scholar, a search for *transgender health care issues* is a basic starting point. Other searches that yield helpful results may be *transgender health care* followed by a second point of consideration—such as *discrimination* or *treatment* or *guidelines*, etc. Other key search terms that may be used include: *trans* or *transgender* or *cisgender*, “*gender non-conforming*”, *health OR medical, patient OR physician OR doctor*. Additional search concepts may be added to refine results, such as *insurance OR insure OR insurer, discrimination OR discriminate, “standard of care” OR “standards of care”*, etc.

When using a specialized database such as PubMed.gov, a database that contains an index of medical literature with some full text access, it is useful to search for the MeSH major subject topic *Transgender Persons* and narrow from there. Using the additional search term *law or legal*, for example, narrows the focus of the articles retrieved to those that directly address legal issues. However, there are many issues discussed in medical scholarship that are relevant in this area, including bioethics, training of practitioners, the management of electronic medical records, and public health concerns. The medical literature also contains a number of advocacy pieces, editorials, and the like, proclaiming the need for equality for transgender patients.

¹ Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey on Discrimination Against LGBT People and People Living with HIV* 11–12 (2010), https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.

Note that during the period covered in this annotated bibliography, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) shifted in its categorization of gender nonconformity. As a result, the former diagnosis of “gender identity disorder” (GID) was replaced by the diagnosis “gender dysphoria” in December 2012.² Using those search terms in the alternative is recommended. An example search would be: “*gender identity disorder*” OR GID OR “*gender dysphoria*”.

Blosnich, John R., Mary C. Marsiglio, Shasha Gao, Adam J. Jordon, Jillian C. Shipherd, Michael Kauth, George R. Brown & Michael J. Fine, *Mental Health of Transgender Veterans in U.S. States With and Without Discrimination and Hate Crime Legal Protection*, 106 AM. J. PUB. HEALTH RES. 534–40 (2016).

Relying upon data from Veterans Administration patients who had been diagnosed with gender identity disorder, the authors identified correlations between both hate crime and employment discrimination statutes and improved mood and lesser rates of self-violence. The authors conclude that social stressors should be considered in developing treatment plans and coordinating care for transgender populations.

Burrill, Nikki & Valita Fredland, *The Forgotten Patient: A Health Provider's Guide to Providing Comprehensive Care for Transgender Patients*, 9 IND. HEALTH L. REV. 69–116 (2012).

Authors Burrill and Fredland provide a primer on the variety of legal issues and difficulties that transgender people encounter in their daily lives. The two note the false promise offered by the Patient's Bill of Rights published by the American Hospital Association and make recommendations for both future legal change, such as improved anti-discrimination laws and policies, as well as for health care providers, such as using proper pronouns and approaching patients nonjudgmentally.

² Daphna Stroumsa, *The State of Transgender Health Care: Policy, Law, and Medical Frameworks*, 104 AM. J. PUB. HEALTH e31–38 (2014).

Carroll, Maureen, *Transgender Youth, Adolescent Decisionmaking, and Roper v. Simmons*, 56 UCLA L. REV. 725–53 (2009).

Following the *Roper v. Simmons*, 543 U.S. 551 (2005), decision invalidating the juvenile death penalty, Carroll applies the Court's reasoning in *Roper* to the question whether minors should be allowed to seek hormone treatment without obtaining parental consent.

Chance, Travis Franklin, "Going to Pieces" over LGBT Health Disparities: How an Amended Affordable Care Act Could Cure the Discrimination That Ails the LGBT Community, 16 J. HEALTH CARE L. & POL'Y 375–402 (2013).

Chance describes the ways in which discrimination adversely affects LGBT access to healthcare, noting that adverse health outcomes arise from provider bias as well as insurance-access issues. Recognizing both intentional and unintentional provider discrimination against LGBT patients, Chance advocates that LGBT-specific cultural competency education will help close the care gap for LGBT people. The comment includes a thoughtful critique of the Patient Protection and Affordable Care Act (ACA), suggesting that the Act as passed will not resolve the discrimination experienced by LGBT patients.

DeCleene, Anne C., *The Reality of Gender Ambiguity: A Road Toward Transgender Health Care Inclusion*, 16 LAW & SEXUALITY 123–44 (2007). (National Lesbian and Gay Law Association Michael Greenberg Writing Competition).

DeCleene presents historical perspectives of gender ambiguity in both the medical and legal fields, noting that scholars have challenged the binary view of gender and suggesting that a recognition of the historic presence of gender ambiguity will lead to a diminishment in health disparities by transgender people. The author notes that courts define gender using the lens of the dictionary, religion, or the (modification of the) physical body. After describing discrimination, prejudice, and violence experienced by patients, the author calls for insurance reform and transinclusive definitions in nondiscrimination and hate crime laws.

Deutsch, Madeline B. & David Buchholz, *Electronic Health Records and Transgender Patients—Practical Recommendations for the Collection of Gender Identity Data* 30 J. GEN. INTERNAL MED. 843–49 (2015).

Doctors Deutsch and Buchholz note that respectful recognition of a patient's gender helps create a welcoming experience for the patient. The United States General Accountability Office's Health Information Technology Policy Committee recommended that electronic health records gather gender identity data, and the authors note the complications associated with the gathering and storage of this data. They offer suggestions about how to frame questions and suggest ways the data can be used to improve patient experience and care.

Diskin, J. Denise, *Taking It to the Bank: Actualizing Health Care Equality for San Francisco's Transgender City and County Employees*, 5 HASTINGS RACE & POVERTY L.J. 131–70 (2008).

The city of San Francisco is the first in the country to implement its prohibition against gender identity discrimination in the context of its employee health insurance benefits, and Diskin reviews evidence, including a Trans Realities survey, demonstrating the importance of access to quality health care for trans people. The city demonstrated that the cost of coverage was relatively low, and Diskin includes accounts of individuals who were active in seeking the change, as well as of employees who benefited from the change. Analysis includes explanation about why organizing for change may have been more effective than legal action.

ETHICS COMMITTEE OF THE AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, *Access to Fertility Services by Transgender Persons: An Ethics Committee Opinion*, 104 FERTILITY AND STERILITY 1111–37 (2015).

The Ethics Committee Opinion clearly sets forth the expectation that transgender patients should be treated for assisted reproduction without regard to gender identity and that transgender patients have an equal interest as all others in having children. The Committee notes that transgender patients should be offered the opportunity to preserve fertility prior to transition. The Committee further notes that gender-based discrimination may violate the law in some jurisdictions.

Gage, Sarah E., *The Transgender Eligibility Gap: How the ACA Fails to Cover Medically Necessary Treatment for Transgender Individuals and How HHS Can Fix It*, 49 NEW ENG. L. REV. 499–540 (2015).

In this note, Gage takes the position that the Patient Protection and Affordable Care Act (ACA) should be implemented in a way that improves access by transgender people to quality, gender-affirming health care. Specifically, Gage suggests that gender-affirming care should be considered preventative under the law. Gage notes ways in which the ACA perpetuates discrimination through its benchmark selection scheme, for example. Finally, she argues for the adoption of the WPATH Standards of Care.

Hanssmann, Christoph, *Counting Us in: Problems and Opportunities in Health Research on Transgender and Gender-Nonconforming Communities*, 8 SEATTLE J. FOR SOC. JUST. 541–69 (2010).

Hanssmann, a sociology graduate student, contributes thoughtfully to the increased prevalence of epidemiological studies of transgender people. Issues addressed relate to trans health advocacy, as distinct from LGBTQ advocacy; the research priorities of trans health research, and how the priorities affect the view of trans people; and access to quality healthcare. Hanssmann raises several cautions about the call for trans inclusion in research, noting possible pitfalls as well as the dangers of “looping effects” on trans and gender nonconforming people.

Herman, Lauren, *A Non-Medicalized Medical Deduction?: O’Donnabhain v. Commissioner & the I.R.S.’s Understanding of Transgender Medical Care*, 35 HARV. J.L. & GENDER 487–514 (2012).

The Internal Revenue Service decision to allow a transgender person to claim a tax deduction for medical expenses associated with transition-related procedures including hormone therapy and surgical sex reassignment, though not breast augmentation, is the focus of this note. The author of the case study explains that the IRS based its determination after accepting that the treatment constituted medical care, as distinguished from any argument that the treatment was medical care that affected her body’s structure or function.

Hovey, Jaime E., *Nursing Wounds: Why LGBT Elders Need Protection from Discrimination and Abuse Based on Sexual Orientation and Gender Identity*, 17 ELDER L.J. 95–124 (2009).

Recognizing the homophobia and transphobia that persists in American society, Hovey notes that LGBT elders lack explicit protection from harassment and abuse based on sexual orientation or gender identity

when it comes to long-term elder care including nursing homes. Hovey advocates for changes to federal housing and civil rights laws, suggesting that Rhode Island and Oregon models offer broad protection.

Ikuta, Emily, *Overcoming the Parental Veto: How Transgender Adolescents Can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent under the Mature Minor Doctrine*, 25 S. CAL. INTERDISC. L.J. 179–228 (2016).

In this note, Ikuta begins by defining terms and describing challenges faced by transgender youth. After describing general exceptions to the general rule requiring parental consent, Ikuta argues that the mature minor doctrine supports allowing transgender youth to access treatment by comparing puberty-suppressing treatment to abortion. Ikuta concludes by describing obstacles to treatment, including financial difficulties.

Kennedy, Amanda, *Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transition*, 19 HASTINGS WOMEN'S L.J. 281 (2008).

Kennedy's note begins with the premise that the law is a tool that transgender youth should be able to use to access healthcare. After describing difficulties that youth may face, including cost, practical problems such as finding a supportive endocrinologist, and social factors, Kennedy notes legal issues such as acceptance in school. The question of determining whether a transgender youth may transition and the consequences of transition are evaluated both when parents agree with the youth and when parents disagree with each other. Finally, Kennedy enumerates the legal options of a transgender youth who faces opposition.

Kurzweil, Rachel C., *"Justice Is What Love Looks Like in Public": How the Affordable Care Act Falls Short on Transgender Health Care Access*, 21 WASH. & LEE J. C.R. & SOC. JUST. 199–272 (2014).

In an extended student note, Kurzweil discusses barriers to health care, such as workplace discrimination and discrimination by both private insurance companies and public health programs. She explores the ramifications of both the Patient Protection and Affordable Care Act (ACA) and *United States v. Windsor*, 570 U.S. 744 (2013), for transgender health care. The author calls for an end to employment discrimi-

nation, as well as for Health and Human Services to take regulatory action to limit discrimination and clarify medical necessity for transition-related medical care.

LAMBDA LEGAL, HUMAN RIGHTS CAMPAIGN, HOGAN LOVELLS & NEW YORK CITY BAR, TRANSGENDER-AFFIRMING HOSPITAL POLICIES, https://www.lambdalegal.org/sites/default/files/publications/downloads/fs_20160525_transgender-affirming-hospital-policies.pdf (May 2016).

After survey results indicated that transgender people have experienced difficulties accessing medical care and/or discrimination when seeking medical care, the authors offer model hospital policies to improve the treatment of transgender patients. The model policies address room assignment, access to restrooms, access to hormone therapy, and access to personal items that assist gender presentation, as well as nondiscrimination policies and patients' bill of rights.

MIYASHITA, AYAKO, AMIRA HASENBUSH & BRAD SEARS, THE LEGAL NEEDS OF TRANSGENDER WOMEN LIVING WITH HIV: EVALUATING ACCESS TO JUSTICE IN LOS ANGELES (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Legal-Needs-of-Transgender-Women-Living-with-HIV-November-2015.pdf>.

The Williams Institute, a think tank associated with the University of California Los Angeles School of Law and dedicated to research on sexual orientation and gender identity law and policy, conducted this survey. The survey identified areas of legal assistance needed by the trans women surveyed, including immigration, health care access, victimization and/or the criminal justice system, and HIV status discrimination, and also barriers to need.

Moore, Matthew T., *Long-Term Plans for LGBT Floridians: Special Concerns and Suggestions to Avoid Legal and Family Interference*, 34 NOVA L. REV. 255–80 (2009).

This law review article notes specifically the need for LGBT individuals and those in same-sex relationships to undergo specific legal strategies, including wills, cohabitation agreements, medical powers of attorney or medical directives, to work around the discriminatory laws of Florida. The article pre-dates the *Obergefell v. Hodges* case, 135 S. Ct. 2584 (2015).

Parr, Henry, *Fixing Medicaid to “Fix Society”: Extending Medicaid Coverage of Gender-Affirming Healthcare to Transgender Youth*, 43 *FORDHAM URB. L.J.* 71–138 (2016).

Parr addresses the experience of youth who experience gender dysphoria and their access to gender-affirming healthcare under the New York Medicaid program. Parr also suggests that age-based exclusions for coverage of medically-necessary treatment may conflict with informed consent doctrine and give rise to litigation under the Patient Protection and Affordable Care Act (ACA). The solution, according to Parr, is to amend Medicaid programs to cover gender-affirming healthcare for minors on a case-by-case basis. The article is heavily footnoted.

Radix, Anita & Manel Silva, *Beyond the Guidelines: Challenges, Controversies, and Unanswered Questions*, 43 *PEDIATRIC ANNALS* 145–48 (2014).

The physician authors provide an overview of the issues arising when primary care pediatric physicians are unaware of current guidelines regarding medical treatment for minor patients who wish to have their physical representation reflect their gender identity. The authors describe barriers to treatment, including refusal of care and harassment, denial of insurance coverage, and cost. Also, they note that parental support of a transition plan is critical for transgender youth under age 18.

Redman, Laura F., Esq., *Outing the Invisible Poor: Why Economic Justice and Access to Health Care Is an LGBT Issue*, 17 *GEO. J. ON POVERTY L. & POL’Y* 451–60 (2010).

In this brief piece related to a presentation at a Queers for Economic Justice forum, Redman sets forth a number of barriers for LGBT people to access healthcare. Redman includes exclusion of transition-related care and infertility-related treatment as well as the experience of discrimination and substandard care by LGBT patients as barriers.

Scout, NFN, *Transgender Health and Well-Being: Gains and Opportunities in Policy and Law*, 86 *AM. J. ORTHOPSYCHIATRY* 378–86 (2016).

Scout summarizes recent developments in policies and laws related to gender identity, including the bathroom controversies, North Carolina’s

anti-trans legislation, the failure of Houston, Texas, to pass anti-discrimination legislation, and the Equal Employment Opportunity Commission's decision to interpret gender discrimination as prohibiting discrimination against gender nonconforming and lesbian, gay, and bisexual people. In the context of these developments, Scout provides a list of opportunities for health care providers to lead a cultural shift toward acceptance of transgender people. These include: seeking training to become trans welcoming, educating trans clients and their family members about the role of acceptance in mental health, demanding professional associations develop policy statements in support of trans people, and more.

Shield, Sonja, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361–433 (2007).

Shield describes the damage caused by requiring transgender youth to reach 18 years of age before beginning sex reassignment treatment. After critiquing medical and psychiatric responses to transgender people, Shield suggests that minor patients are capable and well-positioned to provide informed consent for treatment and that surrogate consent models, such as by parents or the state, are harmful and creates opportunities for discrimination by parents and the foster care system. Shield promotes the Health Law Standards of Care for Transsexualism (also known as the as an alternative to the Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders), and suggests that transgender teens should be treated as capable of informed consent for their own trans-related health care. Finally, Shield offers legislative solutions that would improve teens' access to trans-related health care.

Silver, Anne E., *An Offer You Can't Refuse: Coercing Consent to Surgery through Medicalization of Gender Identity*, 26 COLUM. J. GENDER & L. 488–526 (2014).

Silver presents a thoughtful argument that the right to bodily integrity is compromised by legal standards requiring specific surgical treatment for the reclassification of sex, regardless whether a person is medically eligible or desires such treatment. The surgical requirement, or medical model, for sex reclassification, she argues, should be rejected in favor of a system reliant upon self-identification and lived gender. This would avoid raising the bioethical concerns of the medical model. The note

includes a lengthy discussion of informed consent and related bioethical principles.

Silverman, Michael, *Issues in Access to Healthcare by Transgender Individuals*, 30 WOMEN'S RTS. L. REP. 347–51 (2009).

In this symposium presentation, Silverman addressed the significant barriers transgender people face when attempting to access primary health care for common issues such as a sore throat. Speaking as a founder and executive director of Transgender Legal Defense, Silverman describes the organization's work with healthcare providers and others to reduce discrimination and improve the experience of transgender people as they interact with medical providers.

Spade, Dean, Gabriel Arkles, Phil Duran, Pooja Gehi & Huy Nguyen, *Medicaid Policy & Gender-Confirming Healthcare for Trans People: An Interview with Advocates*, 8 SEATTLE J. FOR SOC. JUST. 497–507 (2010).

Dean Spade interviewed advocates from Washington, Minnesota, and New York states regarding their states' respective Medicaid coverage for trans people, noting the negative health consequences of the denial of gender-confirming medical treatment as well as the associated difficulty in obtaining identification reflecting a transgender person's gender.

Stern, Judith & Claire Merkin, *Brian L. v. Administration for Children's Services: Ambivalence Toward Gender Identity Disorder as a Medical Condition*, 30 WOMEN'S RIGHTS L. REP. 566–91 (2009).

Casting the appellate court's handling of the *Brian L.* matter, seeking sex reassignment for a transgender youth in foster care, as ambivalence toward gender identity disorder, the authors call for traditional judicial deference for expert medical opinion to be extended to the disorder. The authors describe the standards of care for treatment of the disorder and the resistance that Mariah L. (born Brian) experienced from both the Administration for Children's Services and the appellate court reviewing the Family Court's grant of her motion directing ACS to arrange for sex reassignment surgery. Author Stern represented Mariah at the appellate proceedings.

Stroumsa, Daphna, *The State of Transgender Health Care: Policy, Law, and Medical Frameworks*, 104 AM. J. PUB. HEALTH 31–39 (2014).

Dr. Stroumsa notes the limitations of federal policies regarding the provision for, and access to, health care by transgender people. Dr. Stroumsa offers suggestions regarding allocation of research funding, nondiscrimination policy implementation, and training of medical care providers. Ultimately the author argues for the amendment of existing policies that contradict medical standards of care, such as policies denying medical coverage for sex reassignment surgery. These issues are presented in the context of both prison and Veterans Health Administration care.

Telfer, Michelle, Michelle Tollit & Debi Feldman, *Transformation of Health-Care and Legal Systems for the Transgender Population: The Need for Change in Australia*, 51 J. PAEDIATRICS & CHILD HEALTH 1051–54 (2015).

In this advocacy piece, the doctors note the increase in referrals to the Melbourne Royal Children's Hospital Gender Service and argue that the legal procedures requiring a court to make a competency determination for a minor who seeks testosterone or estrogen treatment constitute institutional discrimination. The authors call for increased funding, training, and study to improve evidence-based practice.

Wong, Jennifer, *Recasting Transgender-Inclusive Healthcare Coverage: A Comparative Institutional Approach to Transgender Healthcare Rights*, 31 LAW & INEQ. 471–85 (2013).

In light of legal developments which have increasingly allowed transgender discrimination claims to proceed under Title VII's sex-discrimination protections, Wong evaluates from a strategic perspective whether the market, political process, or judicial system approach are likely to lead to transgender-inclusive employer-sponsored insurance plans. The evaluative framework Wong presents may be used in other contexts as well as healthcare.

Primary Sources

Brian L. v. Administration for Children's Services, 11 N.Y.3d 703 (2008)

Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

O'Donnabhain v. Comm'r, 134 T.C.M. (CCH) 4515 (2010)

Roper v. Simmons, 543 U.S. 551 (2005)

United States v. Windsor, 570 U.S. 744, 133 S. Ct. 2675 (2013)

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119-1025 (2010) (amending Title XVIII of the Social Security Act, 42 U.S.C. § 1395 et seq., by adding new § 1899), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010)