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Forced Disclosures: The Reality Transgender People Face in Entering the Legal Field

Eden Yerby and Makayla Thomas*

INTRODUCTION

On July 4, 1776, the Continental Congress adopted the Declaration of Independence.¹ Thomas Jefferson stated in the preamble, “We hold these truths to be self-evident, that all men are created equal”² This sentiment of equality for “all men” was and continues to be ironic. Many forms of inequality persisted in America at that time, including slavery³ and the expected roles of women in their homes and society.⁴ Almost 250 years later, various forms of discrimination prevent true equality for “all.” Discrimination persists through race, gender identity, sexual orientation, and many other protected classes. While progress has been made for some oppressed groups, others are often left out of the discussions and

* Juris Doctors, Roger Williams University School of Law, 2023. We would like to thank the editors for the opportunity to share our work along with all the individuals we worked with in hopes of raising of awareness to transgender issues.

1. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

2. *Id.*

3. Jack D. Warren Jr., *Slavery, Rights and the Meaning of the American Revolution*, THE AM. REVOLUTION INST. (June 16, 2020), <https://www.americanrevolutioninstitute.org/slavery-rights-and-the-meaning-of-the-american-revolution/> [https://perma.cc/U39W-XX4Z].

4. Katherine M. Marino, *The International History of the US Suffrage Movement*, NAT'L PARK SERV. <https://www.nps.gov/articles/the-internationalist-history-of-the-us-suffrage-movement.htm> [https://perma.cc/9LF7-WGJP] (last visited Oct. 14, 2022).

movements. One such group that is consistently overlooked in terms of equality is transgender individuals.

While people are aware of other battles for equality in the United States, transgender people and their allies have been waging a war for equality in the shadows of society for years. The LGB⁵ community has had great success in gaining protection and equality with the recent legalization of same-sex marriage in 2015.⁶ However, the commonly associated transgender community has not shared the same levels of success. Protections and rights for transgender people are limited and openly debated. There have been some successes for transgender people, such as protection from discrimination in the workplace in 2020,⁷ but much more prevalent in the United States are actions being taken *against* transgender people. For example, North Carolina's former HB2 bill prevented transgender people from using the restroom that conformed to their gender identity.⁸ While this bill ultimately failed, North Carolina recently introduced new legislation to limit access to transgender-affirming medical care.⁹ Similar legislation against transgender people is gaining momentum across the United States as states and individuals continue to discriminate against this group.¹⁰ The war – while more visible – is still ongoing today.

Not every form of discrimination against transgender people occurs in the legislative arena. Instances of bias and discrimination based on transgender status continue to happen in the personal and professional lives of transgender people. This article focuses on how transgender people are subjected to additional stressors because of their gender identity. Specifically, this article analyzes barriers

5. Lesbian, Gay, and Bisexual communities.

6. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).

7. *See generally* Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).

8. H.B. 2, Gen. Assemb. 2d Extra Sess. (N.C. 2016).

9. *See* Associated Press, *N.C. bill would ban treatment for trans people under 21*, NBC NEWS, Apr. 6, 2021, <https://www.nbcnews.com/feature/nbc-out/n-c-bill-would-ban-treatment-trans-people-under-21-n1263146> [https://perma.cc/59VZ-D55]; *see also* S.B. 514, Gen. Assemb. Sess. (N.C. 2021).

10. *See* H.B. 454, 134th Gen. Assemb. Reg. Sess. (Ohio 2021–2022); H.B. 4608, 124th Gen. Assemb. (S.C. 2021–2022); H.B. 2210, Sess. (Kan. 2021); H.B. 2086, 101st Gen. Assemb. 2d Reg. Sess. (Mo. 2022); S.B. 44, 2022 Reg. Sess. (La. 2022); *see also* FREEDOM FOR ALL AMS., FINAL REPORT (2023), <https://freedomforallamericans.org/legislative-tracker/anti-transgender-legislation/> [https://perma.cc/243N-WHRT].

that transgender people face while seeking admission into the legal profession. It is important to note that this article is not intended to be a resource for understanding the complexities of the transgender experience; rather, this analysis will walk through a generalized experience that a transgender person faces on their journey to begin practicing law, with a focus primarily on the many forced disclosures along the way.

In order to discuss this lengthy journey, the article will be divided into various sections. Part I reviews relevant terminology, along with a brief discussion of disclosure. Part II, the hurdles applicants face before entering law school, focuses on the instances of disclosure that occur during the Law School Admissions Test and the law school application process. Part III provides insight into disclosures during law school, including the Multistate Professional Responsibility Exam (MPRE). Part IV will focus on post-law school barriers that primarily occur during the Character and Fitness examination, as well as a brief mention of disclosure during the Bar examination. Finally, Part V will discuss possible remedies to alleviate some of the hardships transgender applicants face during this journey.

I. TRANSGENDER TERMINOLOGY AND AN EXPLANATION OF FORCED DISCLOSURE

A. *Terminology*

Before exploring the barriers that are in place against transgender people, it is critical to understand relevant terminology and its intended use for the purpose of this article. One of the best places to start when understanding the complexities of gender expression and identities is the term “gender identity” itself. “Gender identity” and “gender expression” are an individual’s deep-rooted, internal sense of who they are as a gendered being—specifically, the gender with which they identify themselves.¹¹ The term “transgender,” also referred to as “trans,” describes a person whose gender identity does not match the biological sex they were

11. ELI R. GREEN & LUCA MAURER, *THE TEACHING TRANSGENDER TOOLKIT* 54 (2015); COMMONWEALTH OF PA., DEP’T OF CORR., *PRISON RAPE ELIMINATION ACT (PREA) PROCEDURES MANUAL: GLOSSARY OF TERMS* 4 (2023), <https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/dc-adm-008.pdf>.

assigned at birth.¹² It is an umbrella term that covers a range of gender identities, and includes “trans-men,” people who identify as male but were assigned female at birth, “trans-women,” people who identify as female but were assigned male at birth,¹³ and “non-binary,” individuals, whose gender identities are based on a spectrum that is not exactly wholly male or female.¹⁴ The ultimate goal for transgender individuals is to express their true gender identity as opposed to their gender at birth.

A shared experience that many transgender people face is gender dysphoria. “Gender dysphoria” occurs when an individual feels like their current anatomy does not match their true gender-identity.¹⁵ It is also used as the formal “diagnosis” in the medical field for an individual to “be” transgender.¹⁶ In order to combat this dysphoria, many transgender people “transition.” The act of transitioning often occurs in two main phases: “social transitioning,”¹⁷ which is when a transgender person begins the process of transitioning into their true gender-identity,¹⁸ and “medical transitioning,” which is when an individual uses medical interventions (hormonal and/or surgical) to change their body to be aligned with their gender-identity.¹⁹

These definitions and explanations are not intended to encompass the transgender experience and its complexities fully. However, the terminology above is meant to provide a general understanding of who transgender people are on the surface to better understand their hardships.

12. GREEN & MAURER, *supra* note 11, at 56.

13. COMMONWEALTH OF PA., *supra* note 11, at 10.

14. GREEN & MAURER, *supra* note 11, at 55.

15. *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/77M7-8GLG>] (last visited Apr. 21, 2023).

16. GREEN & MAURER, *supra* note 11, at 54.

17. Examples of social transitioning include using a preferred or chosen name, using pronouns that align with the individuals gender expression, and any other outward expression of gender including but not limited to outward expression of gender identity. *Id.* at 56.

18. *Id.*

19. *Id.* at 55.

B. *Disclosure*

When a transgender person begins to transition, they often decide to notify individuals close to them of their true gender identity by what is colloquially known as “coming out.”²⁰ Another way of phrasing “coming out” is to “disclose” their transgender status to the other person. Disclosure can take different forms and has many complex components for transgender individuals. Disclosure can be used for transgender people to “strategically validate one’s gender identity and to strengthen a bond in significant relationships.”²¹ At the same time, disclosure is often avoided by transgender people to prevent “dealing with the emotional and mental process related to revealing one’s identity or furthering stigmatization.”²² Disclosure is heavily reliant upon social processes;²³ the decision of an individual to disclose their transgender status is emotionally and mentally taxing due to fear of rejection in society. This fear of rejection and persecution is ever-present, and leaves individuals conflicted on whether they should disclose their transgender status.

Disclosure takes various forms depending on the specific contexts it arises in – that is to say, disclosure to a stranger vastly differs from disclosure to family, friends, or partners. Each form of disclosure poses unique fears and harms to a transgender person.²⁴ For the sake of this article, the primary form of disclosure considered is the disclosure to strangers. When meeting a stranger, a transgender person will likely not divulge personal information about their transgender status because they do not feel it is necessary for the encounter.²⁵ By generally choosing not to disclose their gender status to a stranger, the person can avoid “the emotional labor and uncertain reactions in noncontinuous interactions.”²⁶

20. “Coming out” is defined as openly declaring one’s previously hidden sexual orientation or gender identity. *Come Out*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/coming%20out> [<https://perma.cc/K2MV-H7Z4>] (last visited Feb. 11, 2023).

21. Tristen Kade, “*Hey, by the Way, I’m Transgender*”: *Transgender Disclosure as Coming Out Stories in Social Contexts among Trans Men*, *SOCIOUS*, 2021, at 1, 1.

22. *Id.* at 2.

23. *Id.* at 3.

24. *Id.* at 2.

25. *Id.* at 5.

26. *Id.* at 6.

However, there are some instances where a transgender person does not have the choice but to disclose their identity. In this situation, the ability to choose to avoid the “emotional labor and uncertain reactions”²⁷ accompanied by disclosure is stripped away, subjecting them to mental anguish. If an individual elects not to disclose their transgender status but is forced to disclose their status anyway, the individual is suddenly and unwillingly subjected to scrutiny, bias, and potential rejection that they purposefully tried to avoid. Taking away the decision to disclose a person’s status takes a deeply personal and already difficult decision and forces an individual into a possibly unwelcoming environment with bias, stigma, and harm. Removing an individual’s choice may also cause significant trauma, such as depression, severe anxiety, unhealthy coping behaviors, general safety issues, suicidal ideation, and more.²⁸

Beyond being voluntary or involuntary, disclosure can also be described as direct or indirect. Direct disclosure occurs when a person directly states their gender identity to another person.²⁹ In contrast, indirect disclosure is when a person hints at their gender status, but never directly confirms or denies their status.³⁰

Transgender people are constantly dealing with the balancing act of competing identities. These identities take shape in many forms, including names, clothing, pronouns, what bathroom to use, and many other aspects of day-to-day life. These struggles have created a long and complicated history of how transgender people have been understood and viewed in society. One of the earliest instances of a transgender person in the United States was an individual that went by the names of Thomas and Thomasine Hall,

27. *Id.*

28. See Nathaniel Frank, et al., *What Does the Scholarly Research Say about the Effects of Discrimination on the Health of LGBT People*, WHAT WE KNOW PROJECT (2019), <https://whatwewknow.inequality.cornell.edu/topics/lgbt-equality/what-does-scholarly-research-say-about-the-effects-of-discrimination-on-the-health-of-lgbt-people/> [https://perma.cc/38WA-BUDX].

29. Julia R. Fernandez & Jeremy Birnholtz, “I Don’t Want Them to Not Know”: Investigating Decisions to Disclose Transgender Identity on Dating Platforms, *PROC. ACM. ON HUMAN-COMPUT. INTERACTION*, Nov. 2019, at 226:1, 226:4.

30. *Id.* at 226:4.

who lived in Virginia in the 1620s.³¹ Local citizens persecuted Hall because they could not tell what Hall's true gender was.³² To resolve this issue, the citizens turned to the court, which ultimately decided Hall was to wear men's pants and a woman's apron and cap to disclose their bi-gender status to the community.³³ This involuntarily affirmed Hall's bi-gender status while also preventing Hall from choosing their gender identity.³⁴ Because of the court's ruling, Hall was forever marked as an oddity and outsider, subjected to ridicule within the early Virginian settlement.³⁵

Hall's story is the first of many legally documented forms of injustice that transgender people have and continue to face. The court forced disclosure and a gender expression decision onto Hall without considering the repercussions Hall would face.³⁶ While the injustices and barriers present today may not come in the form of a court order, the underlying injustice remains the same. Instances of forced or involuntary disclosures of an individual's transgender status continue to plague society today through countless avenues, including the legal field.

II. PRE-LAW SCHOOL DISCLOSURES

A. *The Law School Admissions Test*

Instances of involuntary disclosure start well before a prospective attorney enters law school. Before beginning their legal journey, an applicant must first complete an undergraduate degree of their choosing and sign up with the Law School Admission Council (LSAC) to complete the Law School Admission Test (LSAT).³⁷ The

31. GENNY BEEMYN, *TRANSGENDER HISTORY IN THE UNITED STATES: A SPECIAL UNABRIDGED VERSION OF A BOOK CHAPTER FROM TRANS BODIES, TRANS SELVES*, EDITED BY LAURA ERICKSON-SCHROTH, OXFORD 1–2, https://www.umass.edu/stonewall/sites/default/files/Infoforandabout/trans-people/genny_beemyn_transgender_history_in_the_united_states.pdf (last visited Oct. 25, 2021)).

32. *Id.* at 1.

33. *Id.* at 1–2.

34. *Id.*

35. *Id.* at 2.

36. *See id.* at 1–2.

37. M. Hope Echales, *A Step-By-Step Guide to Applying to Law School*, BLUEPRINT BLOG (Jan. 15, 2020), https://blog.blueprintprep.com/lSAT/a-step-by-step-guide-to-applying-to-law-school/?lead_srcid=4947&utm_source=google&utm_medium=cpc&utm_campaign=7966085409&utm_term=&hsa_acc=8133

LSAT is a three-and-a-half-hour multiple choice examination that tests an applicant's reading comprehension, reasoning, and writing,³⁸ with the purpose of testing the skills necessary for success in the first year of law school.³⁹

The LSAT forces transgender people to disclose their transgender status through administrative processes regarding an applicant's name and government identification. For applicants who have not legally changed their name, the issue appears in the LSAT terms and conditions paragraph 5, subsection (a).⁴⁰ Subsection (a) states it is required for test takers to provide government-issued identification to gain admittance to the testing facility or portal.⁴¹ Valid forms of government identification include "a recent and recognizable photo . . . , first name (which must match the first name on your test registration), last name (which must match the last name on your test registration), and your date of birth."⁴² This forces applicants to register with their legal name in order to have proper government identification.

The difference between legal and chosen names⁴³ is quite significant.⁴⁴ The definition of a "legal name" is "the term that is given

348918&hsa_cam=7966085409&hsa_grp=85287766794&hsa_ad=395025105065&hsa_src=g&hsa_tgt=dsa693004324732&hsa_kw=&hsa_mt=&hsa_net=ad-words&hsa_ver=3&gclid=CjwKCAjwov6hBhBsEiwAvrvN6Lp_zq3dRr55qhNiVHbFXURqkymWddT42QMlahb44Y3YbeYCIUyPJR0C7UAQAvD_BwE [https://perma.cc/KCD7-NE5B].

38. *Types of LSAT Questions*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/lsat/prepare/types-lsat-questions> [https://perma.cc/24GS-CZKZ] (last visited Feb. 5, 2023).

39. *Are You Ready to Start Your Law School Journey?*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/lsat> [https://perma.cc/26GD-K8NZ] (last visited Feb. 5, 2023).

40. *LSAC Candidate Agreement: Terms and Conditions for the LSAT and Spanish LSAT*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/about/lisac-policies/lisac-candidate-agreement> [https://perma.cc/PPJ4-Q43G] (last visited Oct. 12, 2022).

41. *Id.*

42. *Id.*

43. This is also sometimes referred to as a preferred name, but for the sake of this article we will be using chosen name.

44. It is possible that before signing up for the LSAC and subsequently sitting for the LSAT, a transgender applicant underwent the legal procedures to legally change their name; in that event, the following issues are likely not applicable.

to your first name and your last name.”⁴⁵ This is the name used on an individual’s birth certificate and on all other important government and identifying documents. While there is no current legal definition for chosen name, another definition may be applicable: “fictitious name” or “the term given to a false name and an alias.”⁴⁶ The only way a fictitious name can become a legal name is by completing the process of legally changing one’s name.⁴⁷ While the difference between a legal and chosen name may seem negligible, the ramifications of a properly classified name are immense for transgender people. A legal name is the most common and accepted version of a verified name, meaning it must be provided for identification purposes.⁴⁸ An applicant cannot take the LSAT with a chosen name.⁴⁹ By requiring an applicant to identify with their legal name, transgender applicants are forced to confront their dueling identities and brace themselves for impending misgendering and/or misnaming.

In addition to forcing the transgender applicant to hide their preferred name and identity for registration purposes, the applicant faces yet another hurdle when the actual test day arrives. Per paragraph 5, subsection (b), on the day of the exam LSAC and the test proctor “have exclusive discretion to deny [an applicant] admission to the Test due to [their] identification not satisfying LSAC’s criteria for identification.”⁵⁰ Later in the same subsection, it is stated that if the “proctor determine[s] that [the applicant] do[es] not have an acceptable form of identification, such determination shall be final, and [the applicant] will not be able to appeal or otherwise challenge such determination.”⁵¹ This poses a danger to transgender applicants who may have begun transitioning. It is possible that they do not look like their government-issued

45. *Legal Name*, BLACK’S LAW DICTIONARY (2d ed. 1995).

46. *Fictitious Name*, BLACK’S LAW DICTIONARY (2d ed. 1995).

47. NAT’L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 82 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

48. A “verified name” is a name that has “been authenticated by an officer of the court.” *Verified Name*, BLACK’S LAW DICTIONARY (2d ed. 1995).

49. *Frequently Asked Questions About the LSAT*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/lsat/frequently-asked-questions-about-lsat> [<https://perma.cc/8BSG-WBQY>].

50. *LSAC Candidate Agreement*, *supra* note 40.

51. *Id.*

identifications and are at risk of being turned away. By being denied admission to take the exam, transgender applicants face a direct roadblock in continuing their journey to becoming an attorney.

Even if the applicant is recognizable when compared to their ID picture, it ultimately comes down to LSAC and their proctors to ensure no gender expression discrimination occurs. A proctor may allow their biased opinions regarding transgender people to overshadow their responsibility to LSAC and deny the transgender applicant admission into the exam, without an opportunity to appeal their decision.⁵² The lack of a meaningful appeals process subjects the prospective applicant to both a monetary loss of testing fees⁵³ and public humiliation.

Transgender applicants face a difficult decision when taking the LSAT. One option is to forcibly disclose their status as a transgender person to the proctors and hope they will not be subjected to public humiliation or denied entry to the examination due to the administrators' personal biases. The other option is to suppress their true identity and take the examination while acting in the identity of their legal name and biological sex. Both options are less than ideal and force the applicant to suffer mental anguish regarding their safety and perception in society.

B. *Applying to Law School*

Unfortunately, forced disclosures do not stop at the LSAT – they continue to exist during the law school application process. Before applying, prospective law students research which schools they are interested in. LSAC houses a law school bank where applicants can input their GPA and LSAT score to advise the

52. Personal biases against transgender people are increasingly present in modern-day America, illustrated by the political climate (where over 100 anti-trans bills have been proposed) and the numerous murders that have occurred as a result of the victim's gender-identity. Ivan Natividad, *Why Is Anti-Trans Violence on the Rise in America?*, BERKLEY NEWS (June 25, 2021), <https://news.berkeley.edu/2021/06/25/why-is-anti-trans-violence-on-the-rise-in-america/> [https://perma.cc/52Q8-88KE].

53. *JD Refunds*, LAW SCH. ADMISSION COUNCIL, https://www.lzac.org/about/lzac-policies/jd-refunds?gad=1&gclid=CjwKCAjwge2iBhBBEiwAfXD BR8Yrj6Hl6gtHub9LCfa6uSQt1NG-EkaVLYK5dOg3XTQ3ZsQ7DDrh 8RoCIBQQAvD_BwE&gclid=aw.ds [https://perma.cc/7383-RL2A] (last visited Oct. 12, 2022).

likelihood of being admitted into each school.⁵⁴ The portal also allows applicants to search for schools by state or keywords and has resources for future students to quickly reference any diversity and inclusivity initiatives the law school may have.⁵⁵ The applicant chooses what schools to apply to and completes an application for each individual school. A completed application includes the physical application, a personal statement, letters of recommendation, and a diversity statement (should the applicant decide to include one).⁵⁶ Once everything is gathered and submitted through LSAC, LSAC creates a formal application for the school to review.⁵⁷ The applicant then waits for an admission decision.

The possibility for an applicant to disclose their status as transgender during the application process, either directly or indirectly, comes up in many ways. Applicants may elect to disclose their status as a transgender person directly to admissions staff to get information on the school and its resources.⁵⁸ Another avenue of direct disclosure is through the use of a diversity statement. Not every institution accepts diversity statements, and those that do traditionally make them optional. However, these statements are an excellent tool for students to disclose and explain their gender identity in their own words if they wish to do so.⁵⁹

One of the most common forms of direct disclosure includes self-identification on an application.⁶⁰ Historically, law schools have only offered the binary gender options of “male” or “female” on

54. *Official Guide to ABA-Approved JD Programs*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/choosing-law-school/find-law-school/jd-programs> [<https://perma.cc/K5UF-M5TJ>].

55. *LGBTQ+ Guide to Law Schools*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/discover-law/diversity-law-school/lgbtq-law-school/lgbtq-guide-law-schools> [<https://perma.cc/4BZ9-TDTC>] (last visited Oct. 15, 2022).

56. *JD Application Requirements*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/applying-law-school/jd-application-process/jd-application-requirements> [<https://perma.cc/5EDP-GKBX>] (last visited Oct. 15, 2022).

57. *Applying to Law School, Navigating the Application Process*, LAW SCH. ADMISSION COUNCIL, https://www.lsac.org/sites/default/files/media/lsac-application-checklist-u.s.-digital_2022.pdf (last visited Oct. 15, 2022).

58. *When You Apply*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/discover-law/diversity-law-school/lgbtq-law-school/when-you-apply> [<https://perma.cc/TUR2-QZNT>] (last visited Oct. 15, 2022).

59. Jarek Rutz, *Advice for LGBTQ Law School Applicants*, U.S. NEWS (Mar. 29, 2023), <https://www.usnews.com/education/articles/advice-for-lgbtq-law-school-applicants>.

60. *Id.*

their applications, erasing the existence of transgender and non-binary gender identities and incorrectly framing gender as a purely binary concept.⁶¹ This portion of the application leaves many transgender applicants in a place of conflict: should they identify with their birth-sex or preferred-sex? Some institutions have tried to ease these conflicted feelings by including various genders in their application process and admissions statistics.⁶² By providing information about various gender identities present at an institution, future applicants may realize they will not be alone in their hardships.

Counselors should pay close attention to conversations with prospective students, as prospective students could indirectly disclose their transgender status depending on the questions they ask. Questions about information regarding the school's chosen name policies, access to gender-neutral bathrooms on campus, access to transgender-specific healthcare in the surrounding areas, and the political and social climate of the law school and surrounding area towards the LGBTQIA+ community are all tip-offs to counselors that the applicant may be telegraphing their gender-identity.⁶³ Similarly, admissions counselors can pick up on subtle disclosures if an applicant has a transcript from a historically all-male or all-female undergraduate program.⁶⁴ Admissions staff aware of the single-gender status of the undergraduate university could be attuned to noticing a possible transgender student using a preferred name on their application.⁶⁵ In this instance, the applicant is essentially forced to disclose their gender identity if it does not align with the all-male or all-female undergraduate institution.

This portion of the journey to becoming a lawyer arguably provides transgender applicants the most discretion in disclosing their gender identity. While applicants are not required to disclose their transgender identity on law school applications,⁶⁶ it is clear that there are many avenues for transgender people to disclose or be forced to disclose their gender identity throughout the application

61. *Id.*

62. *Id.*

63. *See When You Apply, supra* note 58.

64. *See id.*

65. *See id.*

66. Zoom Interview with Maya Alperin, Assistant Dir. for Data & Enrollment Analytics, City Univ. of N.Y Sch. of L. (Sept. 21, 2022).

process. In light of these many avenues, it is essential to remember that disclosing their gender identity to strangers is not easy for transgender people and should never be forced upon them.

III. DISCLOSURES DURING LAW SCHOOL

A. *The Multistate Professional Responsibility Exam*

Following an applicant's success in beginning their legal studies, the now student must yet again face forced disclosures with the MPRE. As a prerequisite for admission to almost every state bar, the MPRE assesses whether an aspiring lawyer understands the confines of professional conduct.⁶⁷ Although the minimum score requirement varies from state to state, when a student scores below the threshold, they will not be able to practice law in that state.⁶⁸

The MPRE registration is a multi-step process that a student must complete to be eligible to sit for the test, and again presents instances of forced disclosures for transgender applicants.⁶⁹ The first part of the application goes over the applicant's identity.⁷⁰ Here, the student must submit their full name.⁷¹ The application states that the first and last name must match *exactly* as listed on their valid government-issued photo identification.⁷² A subsequent question reads, "[h]ave you ever been known by a different name, such as a birth name?," with a yes or no clickable response.⁷³ If the applicant clicks yes, it opens up another text box that requires input

67. *About the MPRE*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/mpre/> [<https://perma.cc/VY5D-6ABF>] (last visited Oct. 15, 2022) (noting that the MPRE is a two-hour, 60-question, multiple-choice examination administered three times a year at specific testing centers throughout the US. Also noting that while most states require that a lawyer pass the MPRE to be admitted to its bar, Connecticut, New Jersey, Wisconsin, and Puerto Rico do not).

68. *See MPRE Scores*, NAT'L CONF. OF BAR EXAM'R, <https://www.ncbex.org/exams/mpre/scores/> [<https://perma.cc/2TS6-2MJ>] (last visited Oct. 15, 2022) (listing the minimum MPRE scores required by each jurisdiction).

69. *MPRE Registration Information*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/mpre/registration/> [<https://perma.cc/3CJ3-GR9X>] (last visited Oct. 15, 2022).

70. *NCBE Account*, NAT'L CONF. OF BAR EXAM'RS, <https://accounts.ncbex.org/profile> (last visited Oct. 15, 2022).

71. *Id.*

72. *Id.*

73. *Id.*

of a first name and last name or surname.⁷⁴ This question forces a partial disclosure by making applicants disclose a name not matching their gender or legal name, and requiring a history of their name change.⁷⁵

For applicants who have not legally changed their name, a problem is presented within the terms and conditions that they must agree to in order to register. The National Conference Bar Examiners (NCBE) requires applicants to present two forms of original, unexpired identification: a primary and secondary ID.⁷⁶ The primary ID must be “government issued and include the test-takers first and last name, recent recognizable photo, and signature.”⁷⁷ Examples of such documents are “a passport, US driver’s license or state ID, US military ID, or US alien registration card.”⁷⁸ The secondary ID must include “at least a first and last name and signature or first and last name and recent recognizable photo,” such as a “school/university/college ID⁷⁹, credit card, and library card.”⁸⁰ These ID requirements present an issue for transgender test-takers who are transitioning or have transitioned but have not changed their name or ID to a recent recognizable photo. This raises the issue of how transgender test-takers must express their identities on test day: do they elect to present as their birth-sex and experience significant mental anguish, or do they present as their preferred gender and risk being turned away at the testing facility? The transgender test-taker suffers regardless of their decision.

NCBE goes on to state, “If you do not present both an acceptable primary ID and an acceptable secondary ID, you may be prohibited from testing.”⁸¹ In addition, “If you are allowed to test, your

74. *Id.*

75. The disclosure is partial because, notably, the NCBE does not require applicants to explain the reason for their name change, and therefore, it is not a complete disclosure of an applicant’s transgender status.

76. *MPRE Test Day Policies*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/mpre/test-day-policies/> [<https://perma.cc/32BJ-X6KT>] (last visited Oct. 15, 2022).

77. *Id.*

78. *Id.*

79. In addition to the primary ID issue, it is notable that many students have their student IDs match their preferred name and are ineligible to use that ID.

80. *MPRE Test Day Policies*, *supra* note 78.

81. *Id.*

score may be canceled.”⁸² This poses a punishment on transgender applicants who are in the middle of an already difficult transition. The applicant could have an unmatching ID for a multitude of reasons, such as an inability to afford the legal procedure to change their name, difficulty in changing their name in the state where they reside, fear of changing their documents, and feelings of hesitancy in disclosing their identity to government workers. Many, if not all, transgender students will face test day with additional anxiety because of this forced disclosure. Whether or not a transgender student’s ID is sufficient to take the exam is at the discretion of the testing center confirming their identity, leading to the same discrimination and bias situations a person faces when taking the LSAT.

Included within the demographic information of the application is an option to provide a gender identity.⁸³ The application asks, “[w]hich of the following questions best represents your gender identity?” and then gives the applicant the options to select “man,” “woman,” “non-binary,” “gender not listed here (please specify),” and “I prefer not to have my response used for research purposes.”⁸⁴ While a response is required to register for the exam, students may elect not to disclose their gender identity.

This is unique. As the only standardized test throughout an aspiring lawyer’s journey to the legal world to not require a gender identity disclosure to complete their application, the MPRE demonstrates that organizations are capable of proctoring examinations without collecting gender-specific data. In this sense, the MPRE avoids forcing disclosures by providing students with a choice of whether or not to reveal their gender identity. The option for students to provide, or not to provide, their gender identity allows them to mitigate any internal struggle with how they identify for the sake of registration.

Instances of forced disclosures persist well into law school for transgender students.⁸⁵ While the MPRE does not require an

82. *Id.*

83. *Id.*

84. *Id.*

85. It should be noted that this discussion and analysis does not cover many likely instances of disclosure a transgender law student may face in and out of the classroom during their legal education. Some of these instances may include a chosen-name policy, instances of transphobia on campus,

applicant to disclose their gender identity, transgender students still face the anxiety-inducing decision of how to present themselves on test day. Unlike their cisgender counterparts, transgender students carry the burden of not only knowing the tested material, but also having to worry about being forced to disclose any discrepancies between their ID and physical appearance.

IV. POST-LAW SCHOOL DISCLOSURES

A. *The Bar Exam*

No matter how many times a transgender student discloses their gender status prior to and during law school, the instances of required disclosures continue post-graduation. The last portion of the journey to becoming a lawyer is encapsulated in the Bar examination and the accompanying Character and Fitness application. Every jurisdiction has a Bar exam to test the candidate's knowledge and skills to "think like a lawyer," proving they are competent to practice in that state. Most jurisdictions use the Uniform Bar Exam (UBE), which is coordinated by NCBE and is composed of the Multistate Essay Examination (MEE), two Multistate Performance Test (MPT) tasks, and the Multistate Bar Examination (MBE).⁸⁶ It is uniformly administered, graded, and scored, resulting in a portable score that can be transferred to other UBE jurisdictions.⁸⁷ The test is administered over two days, with the MEE and the MPT given on the last Tuesday of February and July, and the MBE given the next day.⁸⁸ Some jurisdictions may require a jurisdiction-specific law component.⁸⁹ Ultimately, the state's board of bar examiners will decide who can sit for their bar and be eligible to practice law.⁹⁰ Like the LSAT and the MPRE, the Bar exam presents the same disclosure issues by requiring an applicant to provide valid

inaccessibility to restroom facilities, and so forth. The scope of this section is limited to the basic requirements that students must complete at this stage of their journey.

86. *About the UBE*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/ube/> [<https://perma.cc/W3LN-KL43>] (last visited Oct. 15, 2022).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

government identification to take the exam.⁹¹ The Bar exam is yet another instance of forced disclosure.

B. *The Character and Fitness Application*

The Character and Fitness application is an in-depth background check to confirm that the applicant is morally fit to practice law.⁹² Each state's respective board of bar examiners creates its own application processes and guidelines. Students will complete their Character and Fitness application and submit it to the NCBE or the admitting authority in the jurisdiction to which they are applying.⁹³ The NCBE will then contact schools, employers, and courts identified in the application to gather letters of recommendation and positive character testimony to submit to the jurisdiction.⁹⁴ The jurisdiction will then review the application materials and the NCBE's investigation report to make a final conclusion on fitness.⁹⁵ The jurisdiction may require additional information or the applicant's appearance for a personal interview if they have any concerns.⁹⁶ Ultimately, the NCBE only provides a service for Character and Fitness applications; each jurisdiction sets its own requirements, deadlines, processing timelines, and decisions.⁹⁷

The Character and Fitness application raises numerous disclosure issues for transgender applicants.⁹⁸ The first issue arises with

91. *MBE Test Day Policies*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/mbe/test-day-policies/> [<https://perma.cc/ZF4Z-NRUT>] (last visited Oct. 15, 2022).

92. See James Spence Jr, *From My Perspective: Advising Applicants on the Character and Fitness Process*, BAR EXAM'R, Spring 2022 (Vol. 91, No.1) at 54.

93. The NCBE handles twenty-eight of the fifty-six US Jurisdictions for character and fitness. *2021 Year in Review*, NAT'L CONF. OF BAR EXAM'RS, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2021-comp-guide.pdf (last visited Oct. 25, 2022). Other jurisdictions conduct their own character and fitness investigation, which the NCBE does not participate in. *Id.*

94. *Character and Fitness*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/character-and-fitness/> [<https://perma.cc/KQ3P-4G3V>] (last visited Oct. 15, 2022).

95. *Id.*

96. *Id.*

97. *Id.*

98. This analysis will look primarily at the sample Character and Fitness application provided on the NCBE. See *Sample Character and Fitness Application*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/dmsdocument/134> [<https://perma.cc/UB9W-HD5R>] (last visited Oct. 15, 2022).

the name portion, just as it has in many other areas of the legal journey. Applicants again must provide their government name, which is not always their chosen name.⁹⁹ A subsequent section asks applicants if they “have ever used or been known by a different name.”¹⁰⁰ This section attempts to reveal any previous names used in employment, official documentation, or governmental records. While this question is understandable, the problem arises when the application asks about *the reason* for the name change.¹⁰¹ By asking for a specific reason for the name change, applicants are forced to disclose their status as a transgender person even if they have been able to avoid disclosing their status for the entirety of their legal career up to this point.

The Character and Fitness application also requires applicants to disclose deeply personal information, including everywhere they have ever lived; everywhere they have held a driver’s license; any traffic violations; extensive financial history reports including bankruptcy, debts, and child-support payments; academic and disciplinary records; criminal history; and any civil proceedings they may have been a party to.¹⁰² In this extensive pry into an applicant’s life, multiple instances of involuntary gender-identity disclosures occur depending on the name(s) associated with each stage of the applicant’s life.

Another example of forced disclosure is the character witness requirement, which requires the Character and Fitness administrators to reach out to individuals in the applicant’s life to ask questions or confirm specific information about the applicant.¹⁰³ This raises the risk of additional disclosures depending upon which name is used when reaching out. In soliciting letters of recommendation or character testimonies, the applicant is faced with the choice of forcibly outing themselves to their references (if they have not already done so) or risk their reference being unable to identify

99. *Id.*

100. *Id.*

101. *See id.*

102. Mike Sims, *Welcome to Character and Fitness Application Season*, BARBRI (Feb. 19, 2022), <https://www.barbri.com/blog/usbar/character-and-fitness-not-just-virtues-requirements/> [https://perma.cc/J4XE-7MV8].

103. Alan Hamilton, *How to Prepare References for A State Bar Application*, A.B.A. (Sept. 16, 2020), <https://abaforlawstudents.com/2020/09/16/how-to-prepare-references-for-a-state-bar-application/> [https://perma.cc/RE4W-M28U].

them when the administrators reach out using their legal name.¹⁰⁴ This process of soliciting character testimonies and letters of recommendation provides copious amounts of anxiety and mental distress for applicants, as they must make a decision about their personal representation to each individual reference the administrator contacts.

Because of the immense variations between jurisdictions and ways of administering the Character and Fitness application, this analysis only discusses some instances of disclosure that an applicant is likely required to make during this stage. Many instances of disclosure come up on a case-by-case basis for applicants. At the very least, it is clear that numerous forms of disclosure occur during this naturally stressful period for prospective attorneys, and subject transgender applicants to heightened stress and mental anguish.

V. REMEDIES¹⁰⁵

There are many ways to prevent students from being forced to disclose their gender identity, or at least alleviate the stress and anxiety transgender students deal with because of forced disclosure. Across all stages of the legal journey, options for self-identification of gender identity must be expanded. During the law school admission process, some schools still request disclosure of an applicant's gender with only male or female identifications.¹⁰⁶ If schools provide a more expansive range of identifications for students, they could alleviate some of the stress gender-nonconforming individuals face. This is also true for the Bar exam and the Character and Fitness application. The NCBE has stopped requiring individuals to provide their gender identity altogether and has instead

104. Notably the NCBE attempts to work with candidates to prevent these possible harms from occurring by ensuring the proper name is sent to the recommenders. An applicant may place a time frame on certain names, which acts as a general guide to prevent confusion during the solicitation process. However, to prevent additional disclosures, the applicant must disclose their status to the administration.

105. This section is derived from multiple interviews with transgender and nonbinary individuals with the promise of anonymity; therefore, citations have been omitted.

106. Jarek Rutz, *Advice for LGBTQ Law School Applicants*, U.S. NEWS (Mar. 29, 2023), <https://www.usnews.com/education/articles/advice-for-lgbtq-law-school-applicants>.

requested it in a separate section for research purposes only,¹⁰⁷ which may be another alternative option. By providing such options, each entity will collect more accurate information for their admissions reports and statistics, allowing future students to see they will not be alone in this career.

Allowing students to be identified by their chosen names on all applications or testing registrations is also critical in the search for equality. Permitting transgender individuals to use their chosen names will give them a sense of affirmation and acceptance of their gender identity.¹⁰⁸ This small change would alleviate a lot of stress and anxiety transgender people face daily by not forcing them to disclose their gender status. Additionally, allowing a chosen name in place or in conjunction with a legal name on an application will enable the applicant to identify themselves correctly. Notations can be made on an applicant's information sheet, allowing the applicant to still be identified with their legal documentation and use their chosen name to interact with the exam administrators on test day.

CONCLUSION

There are many forms of discrimination and hardships in the legal field, but one group that is consistently overlooked is transgender individuals. Transgender people face issues before they even step foot in a law school. These issues follow them for the duration of the legal journey, primarily in the form of forced disclosures. Forced disclosures place transgender students in uncomfortable and damaging positions, unique from any other form of disclosure. Forced disclosures occur repeatedly and take a significant toll on the mental health and overall well-being of transgender students. While it is not an easy issue to tackle, some actions can be taken to alleviate the inequities and stressors faced by transgender students. By offering additional gender identification markers and allowing individuals to identify their chosen names on applications, a significant burden would be lifted from transgender people.

107. Mark A. Albanese, *The Testing Column February 2018: The MBE Storm Surge Continues*, BAR EXAM'R, Summer 2018 (Vol. 87, No.2) at 27, 27-28.

108. It should be noted that chosen name policies may be implemented beyond the exams and organizations discussed in this article. By implementing this type of policy within the law school itself, transgender students will continue to be affirmed in their gender-identity.

Affirmation by way of acknowledging a transgender person's gender identity also alleviates some of the stress from disclosures.

Transgender people are the only identity forced to disclose themselves, and it is hard to exist as a baseline. No matter what the remedy might be, it is critical that organizations and individuals alike begin addressing these issues to prevent further harm from being done. With each step towards addressing these issues, the legal community can be closer to achieving true "Justice for All."