1.0 INTRODUCTION

For a majority of Western society, the body can only assume two biological forms, the male body and the female body. This binary view of the body and its subsequent interpretations through birth sex and gender appears to be a settled known, and many of our American institutions, such as the military, base their regulations and personnel policies upon this view. For these institutions, any questioning of this view can be seen as a threat to the accepted, natural order of things. However, a growing minority of Western and many non-Western individuals are increasingly coming to view sex and gender as more fluid concepts. Whether one believes that gender and sex are binary and fixed, or that more fluid, confronting the issue of gender identity poses a challenge to the military. As I argue in this paper, the traditional idea that the body can have only one of two forms, and that those forms are determined by biology, has a powerful impact on military policies and procedures.

1.1 Overview

Military service involves the routine practices of physical training and strict attention to discipline. As with Olympic training, which was traditionally viewed as a “male practice,” the military’s ideal body is historically male, and this ideal represents the social history of our culture’s bodily norms. The focus of military training centers on the development of a traditionally masculine body as well as the integration of this body into the larger “body” of the military and its collection of rules and regulations in order to fulfill the need for combat-ready troops. This body is the standard against which virtually everything of value is measured in military contexts. Moon provides the following remarks of a female Korean officer as a window into a woman’s view of female military capability:

Soldiering involves a lot of physical activities like running, jumping up and down, and crawling. Some women can do these just as well as men do. On average, however, women cannot do as well as men do.

This brief statement illustrates the biological differences that are often associated with women and men’s bodies. Further, it reflects the military’s need to interpret these differences as being deficiencies or weaknesses on the part of female bodies and strengths on the part of male bodies. If the idea of rigidity is associated with male power or masculinity and the female body with acceptance, softness, and weakness, then discrimination between bodies is arguably essential to the military’s need to produce masculine, warrior-like bodies capable of preserving military effectiveness.

Distinguishing between male and female bodies also requires the military to deal with a wide range of individuals whose bodies may not fit neatly into either category, like transsexual and intersex individuals. When the lines between male and female are

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3 Wells-Petry, Exclusion.
blurred, problems emerge through the challenge such ambiguity poses to legal, behavioral, and medical codes relating to the military. Both the individual and the systemic response to ambiguity is often visceral in nature. Nowhere was this more clearly seen than in addressing the issue of gay and lesbian service in the military. Much has been written on this issue, and it is beyond the scope of this report to review that literature in detail. But the literature on gay, lesbian, and bisexual service is of central importance to the issue of gender identity in the military primarily in its limitations: that literature focuses largely on the issue of sexual orientation and practice alone; that is, it focuses on discriminating between what is sexually allowed and not allowed, based on a binary understanding of the male and female body. Yet what emerges from that dialogue is one of the principal legal precedents used to define how ambiguous gender identities are treated in the military.

This precedent is grounded in a traditional Western religious and medical belief that only two sexes, male and female, exist and that heterosexual reproductive sexuality is the most—indeed only—acceptable form of sexuality. This belief is reinforced by a Biblical mandate that homosexuality is a sin which is spiritually unacceptable. The typical Biblical citation (Leviticus 20:13) states, “If a man has intercourse with a man as with a woman, both commit an abomination. They must be put to death.” Embracing this traditional belief system, the U.S. armed forces, with the support of the U.S. Congress, reflect and enforce this binary system of gender and sexuality through the “don’t ask, don’t tell” policy, which bars any identification with or practice of the taboo sexuality condemned in the Bible.

For the armed forces, gender identity, which is also labeled by the military as transvestitism, cross-dressing and transsexualism, further complicates these issues. Deviation from strict male-female bodies contradicts much of Western sociology, particularly that of Western military institutions. As of this report, little has been written concerning the topic of non-traditional gender identities in the military. In the current context, such identities blur the carefully delineated distinctions of body, sex, sexuality and social role, thereby potentially creating perceived instability in the rigid order of the military structure. This disorder and the consequent inability to distinguish between clearly marked sexes has intensified the violent reaction to non-conforming gender identities, as in the notorious case of Barry Winchell’s murder, in which a soldier was

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6 The “don’t ask, don’t tell” rule only applies to homosexual, lesbian, or bisexual sexual orientations and practices; it does not apply to transgender, transsexual, or non-normative gender identities.

7 Army Medical Services Standards of Medical Fitness, 2002; Army recruiting regulation 601-210 (2004).


beaten to death by his peers because he was perceived to be gay; in fact he was dating a transsexual. Such reactions remain a problem throughout the world. As Ungar observes,

The high levels of legal, semi-legal, and extra-judicial violence against LGBT people in many of the world’s new democracies result from the explosive combination of authoritarian legacies, weak governments, powerfully unacceptable police forces and deep levels of societal homophobia. These three forms of violence blend into each other: written laws, governmental measures, official rhetoric, police violence, undemocratic police measures, and extra-judicial activity.10

Many of these issues are exacerbated when one considers the impact of intersex identities on gender roles, gender self-perception, and gender identity as they are perceived by individuals external to the intersex-identified person.11

Nevertheless, in modern Western societies, the rigidity of sexual difference, gender roles, and sexuality are becoming increasingly less absolute. For a growing number of armed forces, military training is no longer exclusively based upon a strict separation between male and female bodies. Such developments raise potentially complex questions with regard to transgender, transsexual, and intersex-identified individuals in the military: Where should the female-to-male transsexual train? If he opts for surgery, and identifies as male post-operatively, should he then train with the men, or should he train with the women because his chromosomes are female? How should the XY female be regarded in this context?12 Similar problems were faced by the International Olympic Committee.13 While the acceptability of trans- or intersex-identified individuals remains limited, it is possible that the presence of such non-conforming bodies in the military could serve as a gateway to re-examining the ideal of two strictly separable body types and thus fundamentally alter the military’s idealization of the traditional masculine body. Yet even such changes would likely be limited, for no matter how open-minded and willing to work with transgender, transsexual, or intersex-identified individuals members of the military may be, they are constrained by the military’s history of endorsing a strict separation between male and female and are required to follow its rules regarding the rejection of those individuals who deviate from sexual and gender norms.

1.2 Brief Study Conclusions
The study’s primary conclusion is that the U.S. military’s historical treatment of non-traditionally gendered, ambiguously gendered, and/or non-normatively gendered individuals has created a formidable, viscerally negative response in the armed forces and

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among many military personnel, particularly those who fall within traditionally accepted male heterosexual roles. Furthermore, the study finds that institutionalized constraints on how transgender, transsexual, or intersex-identified individuals must be medically and legally handled have limited the ability of American military personnel to work successfully with acknowledged transgender-identified personnel from either U.S. or foreign militaries. Such an inability occurs even when the trans-identified or intersex-identified person is a decorated war hero or when the gender change has occurred post-military service.

Furthermore, the study finds that military treatment of trans-identified or non-normatively gendered individuals is dual-edged. It is (1) preventative in that it bars trans-intersex- or non-normatively-identified persons from entering the military and it is (2) acute, in that it removes them from the military when they are so-identified. This treatment emerges from direct legal precedent and is independent of both individual or group desires to do otherwise. Moreover, when conflicts or an “outing” do arise, they are typically non-trivial and the military response is swift and surgical. It excises the “disease” from the body of the armed forces, returning the disrupted, idealized institutional body to the norm.14

There is no consensus on whether or not non-traditional gender identities rightly should be viewed as a medical condition or a psychopathology. While the traditional Western medical view is that there is a psychopathological basis for many groups which are included under the broad transgender umbrella, this characterization is not accepted in some cultures. Indeed, as discussed below, some foreign countries allow transsexuals to serve in their armed forces because they view the issue as being one of a non-disqualifying medical condition, not a psychopathological disorder.

On an institutional level, this study finds that the U.S. military has taken the traditional view that non-traditional gender identities fall under the aegis of disease, in particular psychopathology,15 and that individuals claiming such identities are therefore to be prevented from entering the service and removed from service wherever and whenever possible. Nowhere is this more clearly delineated than in the Army Medical Services Standards of Medical Fitness, which states in the section on Psychosexual Conditions that the “causes for rejection for appointment, enlistment, and induction are transsexualism, exhibitionism, transvestitism, voyeurism, and other paraphilias.”16 In this regulation, the military classifies transsexualism as a paraphilia, a psychiatric disorder involving deviant sexual practices, and it further lumps transsexualism together with paraphilias such as transvestic fetishism (fetishizing clothing of another gender).17 Such classifications stigmatize those individuals who do so identify, and perpetuates the military’s sense of binary sexual difference and idealization of the masculine body.18 Recent discussion about the validity of gender identity disorder (GID) as a pathology, or even as a diagnosis

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17 American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Ds 302.6/302.85.
18 Ibid.
at all, is included in Karasic and Drescher. Identified case law illustrates the military’s use of lesbian, gay, and bisexual-based case-law surrounding “cross-dressing” as the pathway to prosecute transsexuals, the principle cases being *U.S. v. Guerrero* and *U.S. v. Modesto.*

Lastly, this study finds a diverse international response to transgender and intersex persons in the military. Some countries such as Canada, Israel, Spain, Thailand and the Czech Republic allow such service, while most Western nations studied do not.

2.0 INTERSEX AND TRANSGENDER IDENTIFICATION IN THE MILITARY

Having laid out an overview to the norms and assumptions inherent in Western culture about the body, sex, gender, and sexuality, this paper will now examine in greater detail how the U.S. military addresses such issues in its recruitment and medical policies in relation to gender identity. It will argue that the U.S. military views intersex-, transgender- and transsexual-identified individuals as medically and psychologically deviant, and deems their presence to be inconsistent with the masculine ideal it has long used to socialize warriors.

2.1 Intersex Identification and the Military

The U.S. military does not allow intersex individuals to be members. These rules apply to both the National Guard and the Reserves. Both Navy and Air Force recruiters stated

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28 Army Recruiting Regulation 601-210 (2004); Marine Corps Military Personnel Procurement Manual (2004); Order P-1100.72c, p.3-83.
that they believed that “being a hermaphrodite was a medical disqualification” and that
the Navy and the Air Force would not accept them as candidates for their Armed Services
branch. Recruiters interviewed for this study were unable to provide a precedent or
citation to that effect. The ban on intersex-identified individuals illustrates the
overarching importance for the military of classifying the body in either male or female
terms. The Navy recruiter indicated that she believed that “this condition would require
much medical treatment and that the Navy would not wish to be taking such an individual
into its programs.” These recruiter responses conform to a history of using “medical
issues” as a pretext to cover the discomfort associated with having to deal with an
identity that blurs the boundaries between male and female and its potential consequences
in much the same way that intersex babies are “sexed” in order to cover the discomfort of
the parents.30

2.2 Transgender Identification and the Military
While the U.S military maintains that intersex-identified persons are medically
unqualified to serve, it deems transgender-identified persons as psychologically unfit. In
the only refereed study of transsexuals in the U.S. military, which was based on
investigations of 11 male “gender-dysphoric” patients meeting DSM III standards,31
Brown discusses the military as a choice for the hypermasculine phase of transsexual
development.32 Brown states that “Eight of the patients had extensive military
experience, 3 were on active duty, I was a Department of Defense employee, and 4 were
veterans.” Of relevance is the fact that the outcome of military service was premature
discharge in the majority of cases. Frye points out that the military is a place where one
would expect to see a large number of transgender-identified persons: “When you think
of it, what more masculine occupation would an emerging FTM want to try than the
military?” In fact, some female-to-male transgender soldiers fought in the American
Revolution and the Civil War. And for an MTF who is doing everything possible to deny
or trying to kill-off the feminine impulse, what better way to try. “That is why so many of
us MTFs are Eagle Scouts and veterans as well as police officers, fire fighters and
paramedics. Yes, lots of us.”33 Similar comments were made by Lisa Griffin, an Air
Force retiree and marksman for the Australian military. “Like many transsexuals and
homosexuals,” she recalls, “I became an over-achiever. I became a crack marksman. I
could hit something at 3000m and I did nursing, topping the class.”34

Individuals who are entering the military are subject to both a physical and a mental
examination. If such an individual states that he or she is transgender, transsexual or

31 The current version is DSM IV-TR. American Psychiatric Association, Diagnostic and Statistical Manual of Mental
Disorders, 4th ed.
32 G. R. Brown, “Transsexuals in the Military: Flight into Hypermasculinity,” Archives of Sexual Behavior 17, no. 6
33 P.R. Frye, transgendered vet (2005), http://www.camermeyer.com/board.htm?step=thread&threadid=244. See also
http://www.holtesq.com/military.htm; Gansler, L. The Mysterious Private Thompson: The Double Life of Sarah Emma
34 K. Olsson, “Kindest Cut of All,” Courier Mail, Nationwide News Pty Limited, Queensland, Australia, November 8,
2003.
trans-identified, then he or she will be rejected as unfit under the applicable medical standards of the branch of service the individual is attempting to join. An individual who has undergone any sort of gender modification, such as hormones or gender-confirming surgery, will be rejected both from the perspective of being psychologically unfit as well as having had surgery that is considered a “major genital abnormality or defect.” Should an individual attempt to conceal a history of gender modification, in the course of routine entry-level security background checks, an individual’s gender, as designated at birth, and if different from the self-identified current gender, will be substantiated and can be used to discharge a potential military candidate. Moreover, falsification of the entries on the form may be construed to be a fraudulent enlistment and subjects the service member “to UCMJ penalties and discharge.”

Individuals who decide to transition during their enlistment from female to male or male to female may be discharged under enlistment violations, as well as through rules relating to homosexuality or cross-dressing or through being classified as psychologically unfit or having a personality disorder. The military does not recognize the professional standards of care when it comes to hormone therapy, living in the appropriate gender identity, and gender confirming surgery. Consequently, the military will not provide the medical support necessary to assist a service member in transitioning from his or her original gender identity to the target identity. Making use of the military’s medical and psychological services to address trans-related issues can also be problematic for a service member as “conversations with military health-care providers are not confidential and any statement concerning being transgender can, and most likely will, be reported to their commands and separation proceedings begun.”

Unlike civilians, who are protected against violations of patient confidentiality and privacy by laws such as the Health Insurance Portability and Accountability Act, military members and their medical records lack “doctor-patient confidentiality.” Service members also face hardships not different from those in the general population when trans-identified individuals are dealing with healthcare providers. One participant in a recent study stated, “There are scads of FTM who suffer in isolation because they refuse

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36 Ibid., 51.
37 Author conversation with military recruiters.
38 American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 4th ed.
40 “Former N.C. Soldier Sues to Ease Transition from Man to Woman,” The Fayetteville Observer, Associated Press, June 4, 2004. It should be noted that even if federal documents such as social security and/or passport have been altered to present the correct gender identity, this will not alter the military view that such surgery is related to psychopathology and therefore makes the service member disqualifiable or dischargeable. Moreover, if a member of the reserves is called up for duty and is in the process of gender transformation as, “recall places them directly under the regulatory rules of the requirements [of the armed forces], these military members may need to consider ceasing, or interrupting their transition while they complete their active service requirement. Alternatively, transitioning or post-transitioning reservists may be medically disqualified for continued service once they are called back to active duty and medically examined.” http://www.ncequality.org/news.asp, August 20, 2005.
to subject themselves to medical scrutiny, possible mistreatment, and ridicule.” Another participant observed, “I spent about 10 years lying to doctors and getting inappropriate treatment ... I was convinced I would be institutionalized if I told the truth.” In fact, it is alleged that Tyra Hunter, a Washington, DC pre-op transsexual was allowed to bleed to death on the street because EMT workers would not treat her, as they appear to have believed that she was gay and had AIDS. Additionally, there is the inability to access Medicare or Medicaid coverage, and the legal system’s failure to respond to violence and abuse against transgender and intersex communities. Intersex-identified individuals have similar problems surrounding healthcare interactions. One survey respondent related the following story:

A college student visited the university clinic for back pain problems. When the doctor discovered that she had been treated for the intersex condition he wrote, in capital letters on her chart, ‘Ambiguous Genitalia.’ The student stopped attending the clinic because of the reasonable expectation that she would be treated as a freak.

Due to the stigma and the associated potential for violence and persecution, trans-identified individuals in the military may choose to use non-military services in order to address their needs. It is important to recognize that each branch of the armed forces has specific regulations around reporting external healthcare back to the military. Failure to abide by those regulations could place a service member seeking gender-related healthcare at risk for criminal action under the UCMJ, which could lead to court-martial.

While in the military, trans-identified individuals may choose to dress in their gender-confirming or target-identity clothing. However, as the military sees only the identity of origin and not the target identity as valid, service members who cross-dress could be prosecuted under the UCMJ. Furthermore, because of the conflation of birth sex, gender identity, and sexuality, individuals who do choose to cross-dress could face risks if they make any statements about sexual identity to any individual in the military. As the SLDN manual points out, “the military would view a pre-operative male-to-female transsexual, self-described as a heterosexual female, having sexual relations with males to be committing homosexual acts ... [and would be therefore] ... subject to administrative and disciplinary proceedings.”

42 Study participants, Transcience Longitudinal Aging Research Study (TLARS), directed by Dr. Tarynn M. Witten, TransScience Research Institute.
46 Witten, “Life Course Analysis.”
48 Cleghorn, Survival Guide; TG Crossroads Staff, Transgender Military Issues Added to SLDN’s “Survival Guide.”
A number of scenarios exist in which a former service member, who has been discharged from the military and has decided to transition, may be recalled during transition:

[Gwen] volunteered for military service as a male in the late ‘60’s, had served in Vietnam and in numerous other campaigns throughout the ensuing decades, and had taken a twenty-year retirement in or about 1989, going on six-year reserve status upon discharge. As soon as her formal discharge was completed, she began her transition from male to female, an event she had been planning virtually her whole life. Saddam Hussein had different plans for her, though, and when his troops began marching in the Persian Gulf, Gwen was called out of reserve status. Although she had by that time been living as a woman for over a year, she sheared her locks, put away the prescriptions, and trundled off to the Gulf for a year. When pressed as to why she hadn’t challenged her call-up, she replied that she didn’t wish to have her discharge status changed, endangering her benefits.49

As has been demonstrated by the previous example, transitions that take place after the completion of active-duty service can still cause complications. Similar scenarios can be envisioned for military reservists and National Guard members.

Post-military life issues can still be an important aspect of an individual’s history. Witten has discussed how various life stage issues intertwine with gender.50 Numerous unanswered questions arise: Should military benefits cover gender-related medical and psychological costs? Will the military supply the necessary medical support for individuals to transition after they complete active-duty service?51 How will medical costs be charged? How will medical problems arising in the course of gender transitions be handled? Will problems of stroke or other clotting problems be seen as a consequence of taking estrogens and therefore not be covered under military benefits?52 Will smoking cessation programs be offered for military members who wish to transition and who need to stop smoking before hormones can be initiated? How will dental care be handled once hormones have been started? How will military records be handled? Can names or sexes be changed? How will ex-military individuals be buried if they choose to be buried at a military cemetery?

Aging issues have also been a growing concern in the transgender community.53 When military members need nursing home treatment, what access will they have to military facilities? Witten has discussed the importance of the interplay of geriatric care management and gender identity issues.54 Legal rights of aging transgender-identified individuals have been little discussed.55 How these issues will be addressed by military

49 Holt, “Transgender Warriors.”
rules remains to be seen. Less obvious questions also arise concerning social support. How will former military connections be handled? What about friends and significant others still in the military? There is a large literature on the importance of social support networks to quality of life, longevity, and health.

The importance of religion/spirituality in successful aging is also well-established in the literature. How will issues of spirituality and religiosity be addressed? Will transgender-identified ex-military members be allowed to attend religious ceremonies at their former places of worship? As end-of-life issues appear, how will hospice care, palliative care, and future military burials be handled for persons who are transgender or transsexual and ex-military? Will trans-identified, former military be able to make use of VA facilities? Will they be respected in their new gender-identities? Will their medical records be altered to reflect those identities when those individuals are in need of end-of-life care and when it is central that an individual have the utmost respect? How will spouses of trans-identified military members be handled? How will new marriages, deemed legal in one state but not in another, be addressed when it comes to military benefits for the surviving spouse? Equally important is the question of whether or not the military will train its healthcare providers in the life course healthcare needs of transgender-identified personnel. None of these questions are addressed in the military literature.

2.3. Transgender Law and the Military
There is sparse case law dealing specifically with transgender or transsexual identities and the military. The first case appears to be *Doe v. Alexander* (1981), in which the Army defended its policy of denying enlistment to transsexuals, arguing that transsexual persons presented a medical problem in that their requirements for hormone supplementation might not be available at some location where they could be assigned. The court declined to address the merits of the case. In *Leyland v. Orr* (1987) the case revolved around an Air Force reservist, Leyland, who, while honorably discharged after completing a sex reassignment surgery, argued that the discharge was wrongly grounded

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60 *Leland v. Orr*, 828 F2d 584 (9th Circ.), 1981.
in psychological and physical unfitness. The court ruled that the discharge was well-founded in the case of physical unfitness and therefore found no reason to rule on the grounds of psychological unfitness. The court’s finding was that “some medical conditions always require discharge because the particular condition invariably impairs the evaluatee’s ability to perform.” It made its finding “without dispute [that] transsexualism in which sex reassignment surgery has occurred is such a condition, because all evaluatees in this category have potential health problems which may require medical care and maintenance not available at all potential places of assignment.” In rendering its judgment, the court likened the genital surgery to loss or amputation of a limb thereby rendering the enlisted person unable to perform the full demands of soldiering.

Case law addressing transgender or transsexual-identified individuals who had not yet undergone gender surgery starts with *U.S. v. Davis* (1988). Davis was charged under Article 134 of the UCMJ. Davis had received a diagnosis of gender identity disorder by several Navy psychiatrists and had been not only recommended for continuing treatment of the condition but had been attending transsexual support groups. This case and subsequent case law revolves around the issue of cross-dressing which is discussed in the next section.

### 2.4. Cross-dressing vs. Transvestitism

It is important to distinguish between cross-dressing and transvestitism or transvestic fetishism. While the general act of cross-dressing falls under the rubric of transgender identities, experts do not regard it as a paraphilia and it is not the same as transvestic fetishism. The military, however, does not make such a distinction. Transvestic fetishism is a condition meeting the following criteria: (a) Over a period of at least 6 months, in a heterosexual male, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving cross-dressing and (b) The fantasies, sexual urges, or behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Cross-dressers, on the other hand, do not have fetishistic dynamics associated with their cross-dressing. Most cross-dressing individuals state that they cross-dress in order to express another facet of themselves. Some individuals may choose to use small amounts of hormones to alter their physical characteristics slightly. Moreover, some individuals who cross-dress may, at some point, decide to move further along the transgender continuum. What is important to understand is that the military equates cross-dressing with transvestitism and considers it to be a psychopathology, thereby allowing an individual to be discharged for it. Additionally, should the cross-dressing be seen and reported, service members can be prosecuted under regulations associated with homosexual cross-dressing. While cross-dressing is not a per se violation of either UCMJ Article 133 (conduct unbecoming) or UCMJ Article 134 (general article

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62 For example, see the Army Medical Services Standards of Medical Fitness.

63 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed.
pertaining to good order and discipline), as a practical matter, any incidence of cross-dressing brought to a command’s attention will be found to be prejudicial to good order and discipline. This is noted by SLDN’s Survival Guide and is discussed in *Army Lawyer*. The 1988 opinion in *U.S. v. Davis* stated that because the cross-dressing took place on a military installation this would “virtually always be prejudicial to good order and discipline and discrediting to the armed forces.” The court also pointed out that “… [his] unusual conduct, when it occurred on a military installation, had an adverse effect on military order and discipline and created a negative perception of the armed services.”

The question of punishment for cross-dressing and whether or not cross-dressing in public should be disciplined was considered by the Navy-Marine Corps Court of Military Review in *U.S. v. Guerrero*. The court concluded that the conduct of the accused did violate the first two clauses of Article 134, notwithstanding its having taken place off base. The court did not construe *U.S. v. Davis* as requiring that the cross-dressing occur on base to violate Article 133 (conduct unbecoming). Rather, the *Davis* decision was interpreted to mean that, “cross-dressing can violate Article 134 – regardless of the situs of the conduct – provided that it has ‘an adverse effect on military order and discipline and created a negative perception of the armed services.’” The court argued that the maximum punishment for “novel” Article 134 offenses is “determined by referring to the maximum punishment permitted for the most closely related, enumerated Article 134 offense.” The court concluded that cross-dressing in public most closely resembles disorderly conduct under Article 134; therefore, the maximum punishment would apply as it does for disorderly conduct. The court defined disorderly conduct as

Conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of contentious or turbulent character.

Thus, considering that transgender-identified individuals could be construed to outrage public decency or endanger public morals when in the clothing of their target identity, they may be considered in violation of Article 134 of the UCMJ and thereby subject to punishment and possible discharge from the military. This decision was further elaborated in a string of cases in which military personnel were discharged for behavior related to cross-dressing and other offenses.

Exploring the interplay of gender, sexuality, and clothing, Taylor and Rupp present a discussion surrounding the question of “doing drag” and “negotiating gender and sexual

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66 United States v. Guerrero.
67 “Practice Notes,” 42-43.
68 United States v. Guerrero.
69 U.S. v. Modesto. In this decision, off-post, off-duty, cross-dressing at gay club was conduct unbecoming. *U.S. v. Gunkle*, J.D. Army 9701960, 1999; *U.S. v. Saunders*, J.D. Army 9900899, 2002. These cases involved behavior related to cross-dressing and other offenses.
dynamics” in a drag cabaret. According to this study, many male-to-female transsexuals will work in “drag” environments in order to find employment. From the perspective of the identity of origin, these individuals would be perceived as homosexual in that they are “natal males.” However, from the perspective of the target identity, they should be perceived as female. Hence, they should be seen as heterosexual. It is this ambiguous domain that the military uses to prosecute and discharge trans-identified individuals who come out while in military service.

Other aspects of gender-identity can emerge as problematic for the military. For example, suppose a male soldier wishes to marry a non-military male-to-female transsexual. It is possible, under case law established in Von Hoffburg v. Alexander, that the soldier could be discharged once he has married the transsexual. It becomes clear, then, that legal protection from discrimination based on sexual orientation can be confounded by conflating an individual’s gender identity of origin with his or her target identity, thereby leading to the potential for litigation.

It is also important to understand the multicultural aspects of transgender identification. For example, in Thailand, the word “transvestite” is not considered a descriptor of a psychopathology. Similarly, in Argentina, the word transvestite is used to describe what is called a transsexual in North America. In India, the Hijra define themselves as a third gender. Hijra individuals are physical males or intersexed persons identifying as the “third sex” of India, Bangladesh, and Pakistan. They describe themselves as neither man nor woman, though they “refer to themselves with female pronouns” and wish to be referred to as female. In Hindu contexts, they belong to a special caste devoted to “the mother goddess Bahuchara Mata.” The Indian government has recently protected the Hijra by announcing that they now have legal status as a third gender. In Pakistan, they are described as “eunuch-transvestites who scrape out a hard existence as beggars, dancers and prostitutes.” Hijra means “hermaphrodite in Urdu” but most of them are described as “homosexual transvestites.” Again, in such a description, we see the conflation of target and origin identities, sexuality, and psychopathology. In addition, we see the lack of clarity between the perceived psychopathology of transvestitism and the non-pathology of cross-dressing. Similar issues arise in the South East and East Asian

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71 Von Hoffburg v. Alexander (5th Cir.), 1980. 615 F.2d 633, 641 n.15 (5th Cir. 1980). In this case a female service member was discharged after marrying a transsexual.


countries such as Indonesia and Thailand where sexual and gender diversity are not only

For the U.S. armed forces, such cultural practices can raise important questions
concerning the management of military personnel. For example, indigenous men in the
Pacific “engage in gender practices that historically have had widely different
consequences for their positions of power.”\footnote{T. Tengan, “(En)gendering Colonialism: Masculinities in Hawai‘i and Aotearoa,” \textit{Cultural Values} 6, no. 3 (2002): 239-256.} This is particularly important for males in
Hawaii who might follow such practices and who might wish to enlist in the U.S.
military, which could require them to “cease and desist” these non-normative gender
positions or else face discharge.

\subsection*{2.5. Transsexuality and Military Functioning}
The question of how being trans-identified may or may not affect a service member’s
ability to function as a soldier has been addressed in one internal military document.
Clements and Wick look into the problem of whether or not a “transsexual pilot with
questionable judgment affecting flight safety” can be seen as a risk due to
Number ED93, Task Number 56, AD Number ADA229994 (Brooks AFB, TX: School of Aerospace Medicine, 2002).} The report argues that transsexuals must undergo many changes, some
of which require therapy, and that this “could be significant.” The implication of this
statement is that the gender changing protocol could significantly affect an individual’s
ability to function as a soldier. They further argue that “transsexuals tend to have more
episodes of anxiety and depression than the norm.” They provide no evidence, however,
to support this statement, nor is it made clear what, if any, comparison group they are
using to derive their conclusion. In addition, they begin with the given that the pilot
under question has “questionable judgment,” making it impossible to assess a causal
relationship between transsexuality and flight judgment. Ultimately, however, Clements
and Wick conclude that “through practitioner awareness and rapport with the patient, the
transsexual need not be considered unsafe to fly.”\footnote{\textit{Ibid.}}

The complex dynamics of the military’s binary view of the body, sex and gender raise
potential questions about how the U.S. armed forces should interact with the militaries of
other countries that do adapt to non-normative identities. Disparate policies with respect
to transsexual participation, for example Israel’s inclusiveness of transsexuals or the Hijra
of India, could be perceived as highly problematic when American forces operate in
tandem with foreign militaries.

\section*{3.0 SUMMARY AND CONCLUSIONS}
The U.S. military views individuals who identify as intersex, transgender, transsexual,
cross-dressing, or other non-normative gender or sexuality as medically problematic
and/or psychologically disturbed and consequently not suitable to serve in the armed
forces. Individuals who identify, during enlistment phase, as trans-persons are disqualified under psychiatric exclusion rules. Individuals who decide to so identify during their military careers are either discharged under the same rules or, if caught “cross-dressing,” are discharged under criminal or administrative sanctions. Similarly, intersex-identified individuals are excluded from the U.S. military as “hermaphrodites,” a term that has historically been seen as pathologizing. All U.S. military representatives contacted for this study indicated that intersex-identified individuals are presumed to require greater medical attention than the armed forces are willing or able to provide and would therefore be excluded from service, although they did not identify the regulatory, legal or policy basis for this particular claim.

This study concludes that, whether or not individual members of the armed forces have worked with or are willing to work with trans- or intersex-identified individuals, military personnel are currently constrained by military code and tradition, and therefore cannot effectively adopt a more inclusive perspective. Given these current constraints, the U.S. military may encounter problems when interacting with other militaries that are more inclusive when it comes to transgender or transsexual service.

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\(^{79}\) http://www.transgenderlaw.org/
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\(^{81}\) http://transgenderlegal.com/
\(^{82}\) http://www.transgenderlawcenter.org/
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