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We Hear You Knocking: An Essay on Welcoming "Trans" Lawyers

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**WE HEAR YOU KNOCKING: AN ESSAY ON WELCOMING
“TRANS” LAWYERS**

Ellen (Ellie) Krug[†]

I. INTRODUCTION..... 181
II. THE STORY OF JOHN-TURNED-JENNIFER 182
 A. *John* 182
 B. *Jennifer*..... 190
III. THE TOP FIVE PRACTICAL TIPS FOR WELCOMING “TRANS”
 LAWYERS..... 193
IV. CONCLUSION 212

I. INTRODUCTION

Given that the American legal community ranges from liberal to conservative, the following will surely be a newsflash for some: as of 2015, transgender persons are increasingly showing up in the legal profession.

Yup, applying soon to a legal employer near you—or, holy cow, even to your own shop—will be a law school grad born in one gender who is now living, or about to live, in the other gender. It is even possible that this grad will decide they are more comfortable somewhere in the middle, between the two genders.

Alternatively, perhaps it will be that goateed and balding, hard-charging middle-aged male partner and tennis mate who suddenly announces that he is actually a “she.”

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Then again, it might be a fifth-year female associate proclaiming that from here on out, he will report only as male—and it better not affect his chances for making partner.

One can easily imagine how any of this might be disquieting to traditionalists. Nonetheless, it is happening now, and it will be happening with increased frequency in the coming years. As the saying goes, “Get used to it!”

With the goal of helping others achieve much more than mere grudging tolerance, here are some practical tips on how legal employers can welcome their first transgender—in shorthand, “trans”—lawyer.¹

II. THE STORY OF JOHN-TURNED-JENNIFER

First, let us begin with a mock, yet quite realistic, scenario.

A. *John*

Meet “John,” a class of 2011 graduate who snagged a litigation associate position with a major Minneapolis law firm. This firm, which for simplicity’s sake I will call Big Law, employs 250 attorneys in offices in a dozen states and overseas.

John’s personal story is not at all unusual for the traditional Minneapolis legal community.² He grew up in rural North Dakota

1. Some of the suggestions herein apply to anyone found on the lesbian, gay, bisexual, transgender, or queer person (LGBTQ) alphabet; however, my focus is on the unique challenges that transgender people face in attaining or keeping employment in the legal community. Additionally, my use of the “transgender” is intended as an umbrella term for the spectrum of people whose emotional gender identity or physical way of appearing in public is different from those typically associated with the sex assigned to them at birth (e.g., the sex listed on their birth certificate. See *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited Oct. 20, 2014) [hereinafter *Definitions*].

2. While the Twin Cities as a whole has a disproportionate number of LGBTQ people compared to much of the rest of the country, its legal community lags woefully behind in diversity on a number of fronts. *Minnesota HIV/AIDS Epidemiologic Profile: Minnesota General Demographics*, MINN. DEP’T HEALTH 5–6, <http://www.health.state.mn.us/divs/idepc/diseases/hiv/epiprofile/epiprofileMNgenddemographics.pdf> (last visited Oct. 20, 2014). For example, although people of color constitute twenty-six percent of the Twin Cities’ population, less than four percent of the bar is of color. *Race*, MINN. COMPASS, <http://www.mncompass.org/demographics/race#7-5069-d> (last visited Oct. 20, 2014); see *Lawyer Demographics*, A.B.A. (2012), <http://www.americanbar>

in a politically conservative family. His stocky frame—5'11", 175 pounds—implies both a farming background and years of playing undergraduate intramural rugby. Up until his first year in law school, John regularly attended a Protestant denomination church that views gay and lesbian people as "lost souls" who require both patient understanding and personal salvation.

In his short tenure with Big Law, John has alternated between a well-manicured, closely cropped beard and no facial hair at all. Until recently, he wore his hair very short. However, for the past several months, he has been growing it out to where hair now covers his ears. John's parents have questioned the wisdom of this given John's aspiration to make partner at the firm.

Except for the longer hair, I have described any one of a thousand young male attorneys working for American legal employers.

Now for the twist.

Although John was born male, he has long known—for at least fifteen of his twenty-seven years—that psychologically and emotionally, there is actually a female spirit roaming within "his" body. Day by day, this female within has grown stronger and more assertive, to the point where John now fantasizes about trading penis for vagina and male chest for supple, feminine breasts. In the privacy of his twenty-fifth floor downtown Minneapolis apartment, John regularly dons fashionable blouses and skirts, products of online shopping.

Even more, every day John wears women's bikini panties under his Brooks Brothers pinstripe suit—those panties are an "anchor" to John's true female self. Yes, the lingerie poses a risk in the firm

.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf. To date, the Minnesota Supreme Court has declined to require personal demographics as part of the annual attorney registration process, and thus there are no reliable statistics as to the number of Twin Cities attorneys who identify as LGBTQ or, for that matter, who are persons with disabilities. See *MSBA Report Recommendation on Demographic Information*, MINN. ST. BAR ASS'N 3 (2014), <http://msba.mnbar.org/docs/default-source/diversity-msba/final-msba-report-and-recommendation-to-the-sup-ct.pdf> (noting Minnesota, by omission, is not a state that collects LGBTQ demographic information). However, all of the available data show that older white men hold the vast majority of control positions in Twin Cities law firms. At least as initial outward appearances go, the protagonist of our scenario, John, fits very nicely with this image.

locker room during John's noon runs, but so far he has been able to keep pink lace from prying eyes.

At this point in our hypothetical, the pronouns change.

Thus, imagine also that until now, John has gone to extraordinary lengths to hide *her* "gender secret" from everyone except a longtime therapist and a close high school friend, the latter being fully accepting of John's femininity, but also concerned about John's career and long-term emotional health should John's gender secret ever become public.

On the other hand, John's therapist acutely understands just the opposite: unless John comes out and lives as a woman, John's mental health could be irreversibly harmed. The therapist is well aware of the statistics reflecting that within the LGBTQ community, transgender people have the highest rates of depression, suicide (both attempts and successes), substance abuse, joblessness, and homelessness.³ For several years now, the therapist has seen many patients like John: persons who grew up in households where the need to conform to birth anatomy and traditional gender norms was a given, making it nearly impossible for a gender-variant person to accept themselves. The net result can be a life of immense frustration and self-hatred over the lack of personal courage to break free and live within one's "true" gender.

Adding to John's anguish is the near constant media showcasing of persons who have "come out" as transgender, in particular biological males who have transitioned to female: Janet Mock—beautiful, smart, and extremely articulate—is a regular talk show guest;⁴ Laverne Cox, the star of *Orange is the New Black*, was on the cover of *Time Magazine* with the tagline, "The Transgender Tipping Point";⁵ and Candis Cayne, svelte and sexy, who repeatedly tweets about her desire to become the first transgender Victoria's Secret model.⁶

3. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2-4 (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

4. JANET MOCK, <http://janetmock.com> (last visited Oct. 20, 2014).

5. Katy Steinmetz, *The Transgender Tipping Point*, TIME, June 9, 2014, at 38.

6. Candis Cayne, @candiscayne, TWITTER, <https://twitter.com/candiscayne> (last visited Oct. 20, 2014).

These success stories—and role models—have added a drumbeat to the voice inside John's head that shouts daily, "*You must live as your true self.*"

Finally, John decided to listen to that voice.

Together, John and her therapist worked out a plan many months ago that included John consulting with a local gynecologist to determine if she was fit enough to start on female hormones (estrogen) and testosterone blockers, which she was. More importantly, by the time John reached her next birthday, she would stop hiding as "John" and instead would come out as her "true" self—a woman named "Jennifer."

Yesterday was John's birthday.

In a single sweep, the moment has arrived for John's gender reckoning and Jennifer's birth.

Let us assume that as self-promised, John scrapes together the courage to meet with her Big Law mentor to announce that in four weeks—the first Monday in March 2015—John would no longer exist, replaced by Jennifer, who planned to report for work in a female power suit and heels. What is more, after living for several months as Jennifer (a process known as "transitioning socially"), she planned to travel out-of-state for breast implants and sex-change surgery (referred to as "transitioning surgically").

After weathering some moments of initial shock, John's Big Law mentor promises his personal support. However, the mentor also advises that they must check with firm management on the next steps.

Enter Shirley, the firm's human resources (HR) director, who astutely understands that Minnesota's employment laws prohibit discrimination against transgender persons.⁷ In fact, Shirley has anticipated this very situation and planned for it. With the blessing of the firm's management committee, Shirley had previously reached out to the Human Rights Campaign (HRC)⁸ and various consultants to better understand "gender identity" (how someone emotionally perceives themselves gender-wise),⁹ "gender

7. MINN. STAT. § 363A.08, subdiv. 2 (2012); *see also id.* § 363A.03, subdiv. 44 (incorporating legal protections for gender identity within the definition of "sexual orientation").

8. The HRC, based in Washington, D.C., with affiliates across the country, is the largest LGBT civil rights organization in the United States. *About Us*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/the-hrc-story/about-us> (last visited Oct. 20, 2014).

9. "Gender identity" refers to how a person subjectively perceives their

expression” (how a person presents their gender publicly),¹⁰ and the challenges associated with a gender transition.¹¹

As a result of this planning, the newly revised Big Law employee handbook includes a section entitled “Welcoming LGBTQ Employees,” which provides that the firm will guarantee a workplace free from discrimination or harassment based on an employee’s gender identity, expression, or “transitioning” of genders while on the job. The handbook even makes clear that bathroom usage—always a potential tripwire for workplace gender transitioning—is based on gender expression and not on birth anatomy.

This latter “right” is somewhat risky; as of early 2015, Minnesota law did not confer “bathroom access” to transgender persons who are “pre-operative” and still living with their birth genitalia.¹² Still, the chair of Big Law’s employment committee is aware of various administrative and national judicial decisions holding that transgender persons have a right to access the bathroom of their choice.¹³ In other words, the firm sees the handwriting on the proverbial legal wall.

gender along a spectrum that spans one hundred percent male to one hundred percent female. For example, a person may subjectively believe they are male, notwithstanding that anatomically they have a vulva, ovaries, and female breasts. *See Definitions, supra* note 1.

10. “Gender expression” is the manner in which a person appears publicly, relative to their subjective gender identity. *Definitions, supra* note 1. Hence, a male-born person, believing they are actually female, may present in public wearing a dress. In doing so, their gender expression is “female.” *Id.*

11. “Transitioning” genders occurs when a person born in one gender (e.g., female), regularly presents in public in the other gender (male). *Definitions, supra* note 1. Just like gender itself, transitioning occurs along a spectrum. *Id.* For some, transitioning is restricted to clothing and make-up; for others, transitioning involves living publicly in one’s “true” gender, including obtaining a legal name change and a new set of government-issued documents (driver’s license, social security card, etc.) that are consistent with that identity. *Id.* This latter point on the spectrum is sometimes referred to as “transitioning socially.” *Id.* Yet others transition both socially and “surgically”; to wit: in addition to a legal name change, document changes, and living publicly in their “true” gender, they undergo “sex reassignment surgery,” where birth genitalia and breasts are surgically altered to conform to the person’s gender identity. *Id.*

12. *Goins v. W. Grp.*, 635 N.W.2d 717, 724–25 (Minn. 2001).

13. *See Doe v. Reg’l Sch. Unit 26*, 86 A.3d 600, 607 (Me. 2014); *How Minnesota Protects Gender Identity*, THE RTS. STUFF: MINN. DEP’T HUM. RTS.’ ONLINE NEWS. (Mar. 25, 2009), <http://www.outfront.org/docs/20140327150947698.pdf>.

In addition to beefing up the firm's personnel policies, HR director Shirley engineered a crucial change in Big Law's employee health plan. Whereas formerly the idea of health coverage for hormones and sex change surgery—technically called “sex-reassignment surgery”¹⁴—was considered the embodiment of craziness, Shirley learned that many legal employers are now offering such coverage.

She convinced the firm's management committee to change its health plan to offer transgender-related coverage (and to mandate that Big Law's health insurer provide such coverage to employees) by arguing two points. First, she pointed out that the cost of reassignment surgery, thought by many to be hundreds of thousands of dollars, is actually more in the range of \$25,000 to \$90,000, depending on the surgeon and the locale of the procedure.¹⁵ Given that Big Law's insurance plan covers heart-

14. THE WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 97 (2012).

15. Surgeons who perform sex-reassignment surgery in the United States are still relatively rare: in 2006, about a dozen such surgeons existed. See Paul Vitello, *The Trouble When Jane Becomes Jack*, N.Y. TIMES, Aug. 20, 2006, at 9, available at 2006 WLNR 14407254. For the most part, they do not publish their rates; however, both through personal and anecdotal experience, the across-the-board cost of male to female reassignment surgery in this country (including breast implants) ranges from \$15,000 to \$30,000. See *Sex Reassignment Surgery Cost: How Much Does Sex Reassignment Surgery Cost?*, COSTHELPER HEALTH, <http://health.costhelper.com/sex-reassignment-surgery.html> (last visited Oct. 20, 2014). The cost of overseas surgery, particularly in Thailand, may be half this cost. Surgery for a female to male transition may involve “top surgery” (e.g., a mastectomy and chest “sculpting”), with an average cost of \$8,500; a hysterectomy, with an average cost of \$9600; and in rare cases, creation of a penis from forearm tissue, a “phalloplasty,” which can cost in excess of \$50,000. *Gender Reassignment Surgery Cost*, REALSELF, <http://www.realself.com/gender-reassignment-surgery/cost> (last visited Oct. 20, 2014) (mastectomy cost). Interestingly, in 2013, the city of San Francisco set aside \$300,000 dollars to cover the cost of sex-reassignment surgeries for city residents. Chris Roberts, *Transgender Surgeries Funded by San Francisco Considered Successful*, S.F. EXAMINER (Mar. 23, 2014), <http://www.sfexaminer.com/sanfrancisco/transgender-surgeries-funded-by-san-francisco-called-successful/Content?oid=2741523>. In the first nine months of the program, fifteen people underwent such a procedure. *Id.* San Francisco has a long history of understanding that gender reassignment medical expenses are a very real barrier for many transgender persons. In 2001, for example, the city began paying for city employee sex-reassignment surgeries, with the expectation that the average cost per employee would be approximately \$50,000. See Margie Mason, *San Fran. Poised to Pay for Sex Changes*, ABC NEWS, <http://abcnews.go.com/US/story?id=93510> (last

related conditions or any number of cancer treatments, all of which can easily cost in the several hundred thousand dollar range, the management committee readily concluded that covering sex-reassignment surgery would not have a dramatic effect on company-paid health insurance premiums.

Shirley's other point was that national businesses like Target Corporation, General Mills, and 3M now require the law firms they work with to have very progressive and "real" diversity and inclusion programs.¹⁶ In fact, many businesses want their law firms to score one hundred percent on HRC's Corporate Equality Index.¹⁷ One of the critical factors in that index—and something the HRC has stressed of late in promoting the index—is the provision of employer-offered health coverage for transgender-related health needs, including sex-reassignment surgery.

It also does not hurt that Shirley, the HR director, has a teenage "niece" who was born male. Because that niece grew up in a liberal Saint Paul, Minnesota, family that embraces diversity, "he" was able to come out as "she" just before her tenth birthday. As a result of this collective family experience, Shirley personally understands all too well how someone can struggle with gender identity and how one's gender is not a *choice*. Shirley also realizes that many non-transgender (technically called "cisgender")¹⁸ persons often believe the opposite.

visited Oct. 20, 2014).

16. For example, Rick Palmore, General Counsel for General Mills, has repeatedly advocated for law firm diversity as a measuring stick for law firm retention. See Stephanie Francis Ward, *Rick Palmore: Demanding Diversity*, LEGAL REBELS (Aug. 24, 2009, 9:19 PM), http://www.abajournal.com/legalrebels/article/demanding_diversity.

17. *Corporate Equality Index: 2013 Statements from Employers that Rated 100 Percent*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/corporate-equality-index-2013-statements-from-employers-that-rated-100-perc> (last visited Oct. 20, 2014); see also *Corporate Equality Index FAQ*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/corporate-equality-index-faq> (last visited Oct. 20, 2014). Given the HRC's current emphasis on allowing "trans" people access to health care, including sex-reassignment surgery, it is easy to see that many law firms—which adroitly understand that LGBTQ attorneys represent a gateway to continued and expanded legal business—do not want to fall below "perfect" on the HRC Equality Index.

18. E.g., Dean Spade, *Be Professional!*, 33 HARV. J.L. & GENDER 71, 76 n.6 (2010) ("Cisgender is a word commonly used in trans and allied communities and in trans scholarship for people who are not transgender.").

So far, the gender transition stars have aligned incredibly nicely for John soon-to-be-Jennifer.

At an afternoon meeting that will extend into the early evening, several Big Law employees gather to discuss the practical logistics of John transitioning genders on the job. The meeting includes Fred, the chair of Big Law's management committee, several management committee members, John's mentor, and Shirley. Together, they produce a "transition plan" with two components: one part deals with ethics and business issues associated with John's transition; the other concerns workplace matters.

The ethics and business issues of John's transition are straightforward. On the first day of Jennifer's appearance at the firm (her "coming out day"), a letter will be sent to clients, judges, and opposing counsel. Co-signed by Fred and (by then) Jennifer, the letter will advise of John's transition to Jennifer and how she will soon obtain a legal name change. The letter will also include a very brief explanation (authored by a transgender consultant with Jennifer's input) about gender identity and how it is that some persons come to understand their "true" gender years after their birth. The letter will invite recipients to contact either Jennifer or Fred with any questions. Otherwise, once Jennifer's name change becomes legal, the firm will ensure for name changes on all cases on which John has appeared. Since John is a fourth-year associate and not responsible for any upcoming trials on a solo basis, there is no need to remind clients of their option to secure alternate counsel.¹⁹

Understandably, Big Law's management committee is concerned that John's transition will adversely affect certain client relationships. In response, Shirley and the firm's employment law section chair reminded the firm that, as of 2015, on-the-job gender transitions are not restricted to legal employers; undoubtedly some Big Law institutional clients are having their own experiences with transgender employees. Moreover, Minnesota law gave Big Law no choice about the situation; if a particular client pulled its business

19. Of course, a client always has the right to change counsel. I submit, however, that there is no obligation to remind the client of this fact unless a conflict of interest or other potentially adverse condition to the attorney-client relationship arises. That a transgender attorney has publicly "come out" in no way constitutes such a condition.

because a young associate came out as transgender, that was how things had to be.²⁰

The second part of the transition plan focuses on Big Law's employees. The "transition committee," consisting of Fred, John's mentor, and Shirley, will meet with John for her input on how to break the news of Jennifer to other Big Law employees. Being very cognizant of HIPAA requirements,²¹ the committee hopes that John will be comfortable with a plan for two mass firm meetings (both to occur on one day), where John's coworkers would be informed about John's transition to Jennifer.

B. Jennifer

At this point in our scenario, the transition committee decides to use only one name—"Jennifer" (and attendant female pronouns)—in referring to the firm's gender transitioning associate. This makes sense because it is the transition committee that needs to take the lead in adapting the firm to Jennifer's new identity.

Once again, relative to the second part of the transition plan, Shirley had done her homework. With some still considering gender transition far out of the norm—even in the category of "crazy"—Shirley knows that education and training are essential for a smooth employee on-the-job gender transition. Just as important is the quality of the training to head off potential problems, such as pronoun usage, bathroom issues, and negative reactions as to why coworkers must adapt their behaviors or attitudes to accommodate the transgender employee.

One way of heading off potential problems is to hold institution-wide mass meetings on the same day. Thus, the transition committee hopes Jennifer will agree to back-to-back meetings—one with Big Law lawyers and a second with staff—where the transition team would announce that Jennifer was "joining the firm."

20. Good business sense would dictate that, on the cases that John handled, the key clients would be alerted to Jennifer's coming out in advance. At the same time, this cannot be seen as a suggestion that the firm is not supportive of Jennifer.

21. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (codified in part at 45 C.F.R. §§ 160, 162, 164); *see also* MINN. STAT. § 363A.08, subdvs. 2, 3 (2012).

Those meetings, led by the firm's managing partner Fred, but facilitated by Shirley, will include a transgender consultant (a male-to-female professional), who will share some key concepts about gender identity, gender expression, and transitioning. The meetings will include Shirley's refresher on Big Law's personnel policies relative to nondiscrimination or retaliation. A question and answer session will follow. The meetings will close with Fred reinforcing the firm's support for Jennifer and its commitment to diversity and inclusion. Shirley will also provide an internal mechanism for employees to raise any lingering concerns.

A key topic at those meetings will be bathroom usage. As both Fred and Shirley will point out, firm policy is geared around gender expression and not anatomy. Given that the firm occupies several floors in a downtown Minneapolis building, female employees will be reminded that they have options if, for some reason, Jennifer's presence in a particular restroom makes them uncomfortable. However, also to be made clear will be that Jennifer will not be "assigned" to a particular bathroom.

Crucially, one person will not be in attendance at the firm meetings: Jennifer. Her presence could be a deterrent to frankness, both by the transition committee and audience members. Instead of being present, Jennifer will be on paid company leave in the interim between the day of the firm meetings and the morning on which she will appear at the office for the first time.

This plan, of course, hinges on Jennifer's agreement. Should she not agree, the transition committee will need an alternative; it cannot simply do nothing for Jennifer relative to transitioning at Big Law.²²

Because Shirley has taken the time to get to know Jennifer, which included meeting for lunch where Shirley shared about her transgender niece, she has earned Jennifer's trust. This has given Jennifer confidence that the firm will act in her best interests. As a result, Jennifer agrees to the transition team's plan.

At 1:30 p.m. on the last Thursday in February 2015, the transition team convenes the first of two meetings. All available Big Law attorneys are mandated to attend—there were electronic feeds to the firm's satellite offices. After announcing that John will now

22. As with any employee issue, mutual trust is a necessary requirement. In the case of Jennifer, trust is crucial. She can only hope that Big Law will do the right thing, and the firm can only hope that Jennifer will not become too demanding.

be known as Jennifer, the transgender consultant briefly talks about what it means to be transgender and about challenges that “trans” people face (such as “lost” relationships due to family or friend abandonment). Fred then explains that a letter will go out to clients, and thereafter, it will be “business as usual,” with Jennifer picking up where John left off.

While most attorneys express support for Jennifer, there are questions about protocol if a client objects to staffing Jennifer on a case. Additionally, a junior partner questions how feminine Jennifer would appear and wonders if that would have a deleterious effect on jurors at any trial that Jennifer second-chaired. Fred responds that case staffing will go unchanged; he will talk with the client if need be.

On the subject of Jennifer “passing”²³ as female, Shirley reminds the group that there is a wide variety of body shapes and sizes among Big Law’s 250 male and female attorneys; she adds that concerns about satisfying a perceived gender appearance standard reflect hidden biases, something on which the firm’s diversity team has repeatedly trained and will again train.

As soon as the attorney meeting ends, the transition team meets with the firm’s support staff. Once more, many express support for Jennifer. However, a very small, but vocal, minority are displeased about needing to be the ones who have to “get used to” Jennifer in the women’s restroom. When asked about the consequence of objecting to Jennifer’s use of the women’s restroom, Fred replies that an objector will first be counseled. If the objector persists and is believed to be undermining firm morale or engaging in harassing or retaliatory conduct, HR will utilize the firm’s progressive discipline process. In an extreme situation, the objector’s employment could be terminated.

Shirley looks out at the audience as Fred’s explanation sinks in. Clearly, it is not up for debate whether Big Law intends for Jennifer’s transition to be successful.

At the end of the day, Shirley telephones Jennifer to report that both meetings went extremely well. She advises that everyone is supportive and that the transition team looks forward to meeting Jennifer the next Monday.

23. To “pass” means that a stranger would not appreciate that the transgender person was assigned a different gender at birth.

Over the weekend, Jennifer receives more than a dozen supportive emails and a couple phone messages from her colleagues, which boosts her self-confidence and confirms that Big Law's transition plan appears to be working.

At 8:30 a.m. on Monday morning, Jennifer nervously steps off an elevator into the Big Law offices dressed in a navy blue blazer with a matching skirt and white shell. Her hair and makeup are done as well as her limited female skill set will allow; with time and practice, both will get better.

She rounds a corner and navigates the corridor that leads to her office, where she encounters support staff and attorneys beginning their day. Fearing the worst, she instead sees smile after smile; some coworkers offer congratulatory hugs.

Jennifer's spirit soars.

Affixed to her office chair is a brightly colored sign that reads, "Welcome Jennifer!" On her desk are flowers and multiple cards from coworkers congratulating Jennifer on gaining the courage to live authentically.

As Jennifer settles into the office formerly occupied by John, she feels something that has eluded her for all of her life: a sense of peace; confirmation that now, she has finally started on the path to becoming complete as the human she truly is—a woman.

III. THE TOP FIVE PRACTICAL TIPS FOR WELCOMING "TRANS" LAWYERS

The foregoing scenario, although quite sappy and extremely optimistic, is not at all far-fetched or beyond the pale.

Indeed, as I write these words, thousands of gender diverse²⁴ individuals attend American law schools, or, as pre-law students, colleges and universities.²⁵ Some of these students are relatively self-

24. Gender is a spectrum, just like sexuality. "Gender diverse" connotes individuals who may not identify with their birth genders in a variety of ways. *Definition of Terms*, GENDER EQUITY RESOURCE CENTER, http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms (last visited Nov. 9, 2014).

25. Data on the number of transgender students in general is difficult to obtain, although the trend appears to be that more and more students are identifying as transgender. For example, a 2009 study by the Gay, Lesbian and Straight Education Network (GLSEN) found that six percent of students identified as transgender. EMILY A. GREYAK ET AL., *GAY, LESBIAN AND STRAIGHT EDUC. NETWORK, HARSH REALITIES: THE EXPERIENCE OF TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS* 7 (2009). Other sources have noted that the number of gender

aware and by their teens (if not sooner) were “out” in their “true” genders—male to female (“transwoman”), female to male (“transman”), or gender ambiguous (“gender nonconforming” or “gender queer”).

Others simply have only an inkling that something is not right about the gender assigned to them at birth; these persons, like John in the above scenario, face a host of challenges owing to familial, religious, and life circumstances, which makes it much more difficult to understand personal gender identity and related self-acceptance. Yet, as these people grow older, many will incrementally come to understand their “true” gender; thus, we can expect that lawyers will continue to come out and transition genders in the 2020s, 2030s, and beyond.

Regardless of the label or the timing of one’s personal gender awakening, these people will work for legal employers across the board—national or international law firms, corporate law departments, Legal Aid, nonprofits, and small- or medium-sized law firms. Moreover, many will become active members of their bar associations; some will even become leaders.

Still, in contemporary America, many questions surround “trans” lawyers. For example, how will some legal employers react to transgender applicants? What unique issues arise with applicants who have difficulty “passing” (e.g., the 6’2”, 225 pound broad-shouldered “trans” woman)? What about colleagues who present in one gender when hired by a legal employer and then, months or years later, transition to another gender status, just as John did above?

Even more important to trial law firms like the fictional Big Law, how will institutional clients, jurors, and judges react to a lawyer who has transitioned genders?

Complicating all of this is the vacuum that arises from the absence of uniform legal protections for transgender people in the United States. As it presently stands, only eighteen states and the District of Columbia have laws or ordinances that prohibit discrimination on the basis of gender identity.²⁶ Nearly one

diverse students is increasing. Brett Beemyn et al., *Transgender Issues on College Campuses*, in GENDER IDENTITY AND SEXUAL ORIENTATION: RESEARCH, POLICY, AND PERSONAL PERSPECTIVES 49, 55 (Ronni L. Sanlo ed., 2005).

26. See COLO. REV. STAT. ANN. §§ 24-34-401 to -402 (West, Westlaw through 2014 legislation); CONN. GEN. STAT. ANN. § 46a-60 (West, Westlaw through 2014 legislation); D.C. CODE § 2-1401.01 (West, Westlaw through 2014 legislation); HAW.

hundred and fifty cities, municipalities, and counties have ordinances that protect gender-variant people.²⁷ Because there are no federal protections in place for transgender persons,²⁸ it is difficult to offer a blanket statement on the legal obligations that law firms or other legal employers have towards transgender applicants or employees.²⁹

Although the legal sands on which transgender rights rest continue to shift, one thing is absolutely clear: there are and will be a greater number of transgender people in the legal profession. Since this is so new for so many, it is helpful to get a better understanding of what it means to be transgender and how the legal community, in particular, can be hospitable.

Embedded in the John-turned-Jennifer scenario are many tools—some institutional, some mechanical, and others common

REV. STAT. § 378-2 (West, Westlaw through 2014 Act 235); 775 ILL. COMP. STAT. ANN. 5/1-103 (West, Westlaw through 2014 Act 98-1125); IOWA CODE ANN. § 216.6 (West, Westlaw through 2014 legislation); ME. REV. STAT. ANN. tit. 5, §§ 4553, 4572 (West, Westlaw through 2014 portion of 2013-2014 Legis. Sess.); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West, Westlaw through 2014 ch. 396); MINN. STAT. §§ 363A.02-.03 (2012); NEV. REV. STAT. ANN. § 613.330 (West, Westlaw through 2013 Legis. Sess.); N.J. STAT. ANN. § 10:5-12 (West, Westlaw through 2014 ch. 60); N.M. STAT. ANN. § 28-1-7 (West, Westlaw through 2014 legislation); OR. REV. STAT. ANN. §§ 659A.006, 174.100 (West, Westlaw through 2014 legislation); R.I. GEN. LAWS ANN. § 28-5-7 (West, Westlaw through 2014 ch. 555); VT. STAT. ANN. tit. 21, § 495 (West, Westlaw through 2014 legislation); WASH. REV. CODE ANN. §§ 49.60.040, .180 (West, Westlaw through 2014 legislation); Act of Sept. 9, 2014, 2014 Cal. Legis. Serv. ch. 302 (West) (to be codified at CAL GOV'T CODE § 12940); Act of Sept. 9, 2014, tit. 19, § 711, 2014 Del. Legis. Serv. ch. 429 (West); Fairness for All Marylanders Act of 2014, 2014 Md. Legis. Serv. ch. 474 (West) (to be codified at MD. CODE ANN., STATE GOV'T § 20-101(e)).

27. *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> (last visited Sept. 30, 2014).

28. *A History of the Employment Non-Discrimination Act*, CENTER FOR AM. PROGRESS, <http://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/> (last visited Sept. 30, 2014) (explaining that Congress has tried to pass the Employment Non-Discrimination Act (ENDA) since 1994, which would confer legal protection to LGBTQ people in employment settings).

29. Some limited employment protection for transgender persons is arising by way of administrative case law in lieu of federal legislation. See *Macy v. Holder*, EEOC Decision No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) (holding that discrimination based on "gender identity, change of sex, and/or transgender status" is recognized under Title VII).

sense—that legal employers can utilize to welcome transgender lawyers and legal staff. Many of those tools are readily identifiable from the scenario itself (e.g., having a competent personnel manager and/or diversity director; conducting regular diversity and inclusion trainings and seminars; maintaining up-to-date personnel manuals; giving the transgender person ownership in a transition plan) and require no further discussion.

Other tools, or more aptly put, understandings and attitudes that underlie the tools, are far subtler. As a transgender person and lawyer who transitioned genders on the job, it is the more subtle issues that I want to address here.

Consequently, I offer some suggestions below on how to create a positive, welcoming environment for an attorney (or any other employee) who identifies as transgender or variant somewhere on the gender spectrum.

One: Dispel the “Crazy ‘Trans’ Person” Myth with Understanding and Compassion

First and foremost, let me tackle head-on a major underlying prejudice that some people hold relative to transgender persons: the belief that “trans” people are to one degree or another “odd,” not to mention “strange,” or even worse, “crazy,” and are to be avoided or shunned. All of this collectively falls into the broad category of “transphobia.”³⁰

Think about it. Until relatively recently, who were the public’s role models for transgender people?

We had Dr. Frank-N-Furter of *Rocky Horror Picture Show*. Or RuPaul. Or the cross-dressing murderer Buffalo Bill in *Silence of the Lambs*. These “characters” easily lent to the belief that being transgender really is nothing more than an excuse for exhibitionism, a form of comic relief, or an outlet for sociopathic behavior.

Feeding the “crazy” myth are popular media figures who openly castigate transgender people. For example, when Fallon Fox, who fights women in Ultimate Fighting Championship (UFC) competitions, came out as transgender, regular UFC announcer and commentator Joe Rogan continued to call Fox “a fucking

30. “Transphobia” encompasses “[f]ear or hatred of transgender people; transphobia is manifested in a number of ways, including violence, harassment and discrimination.” *Definition of Terms*, *supra* note 24.

man."³¹ He added, "You (Fox) can't fight women. That's fucking crazy."³²

On the political front, former Arkansas governor and one-time presidential candidate Mike Huckabee weighed in on a California law that gives transgender students equal bathroom access: "Is that not the craziest thing you've ever heard?"³³

Then there is Bill O'Reilly and his *Fox News* colleagues, who regularly portray "trans" people as freaks. Feeling the need to comment on transgender equality in California, O'Reilly said that it was "anarchy and madness."³⁴ On another occasion, O'Reilly used "dopey" to describe parents who support younger children who identify as transgender and even suggested that such parents might be engaging in child abuse.³⁵

It did not help that until recently, the American Psychiatric Association (APA) protocol for treating transgender persons mandated a diagnosis of "gender identity disorder."³⁶ This constituted an enormous barrier to self-acceptance: most transgender persons did not want to correlate "disorder" with "identity."

Luckily for "trans" people, in 2012, the APA discarded "gender identity disorder" in favor of "gender dysphoria," which it defines as emotional distress over "a marked incongruence between one's experienced/expressed gender and assigned [i.e., birth] gender."³⁷

31. *Joe Rogan's Rant Against Transgender Fighter Fallon Fox is Based on Prejudice, Not Science*, CAGE POTATO, <http://www.cagepotato.com/joe-rogans-rant-against-transgender-fighter-fallon-fox-is-based-on-prejudice-not-science/> (last visited Nov. 19, 2014).

32. *Id.*

33. *Gov. Mike Huckabee at Values Voter Summit 2013*, YOUTUBE, at 18:25 (Oct. 11, 2013), <https://www.youtube.com/watch?v=vcdiZEHpfRg>; see Sabrina Rubin Erdely, *About a Girl: Coy Mathis' Fight to Change Gender*, ROLLING STONE, Oct. 28, 2013, available at 2013 WLNR 30104762. For the full story, see the ROLLING STONE website: <http://www.rollingstone.com/culture/news/about-a-girl-coy-mathis-fight-to-change-change-gender-20131028>.

34. Erderly, *supra* note 33.

35. Luke Brinker, *Bill O'Reilly's Dangerous Parenting Advice for Transgender Kids*, MEDIA MATTERS FOR AM. (June 4, 2014, 3:39 PM), <http://mediamatters.org/blog/2014/06/04/bill-oreillys-dangerous-parenting-advice-for-tr/199598>.

36. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 581 (4th ed., text rev. 2000) (emphasis added).

37. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 452 (5th ed. 2013).

Thankfully, more recent role models like Chaz Bono³⁸ and Jenna Talackova³⁹ have taught society that transgender people are responsible, successful, and articulate humans. Many more successful role models are surfacing virtually every day via social media.

Moreover, relative to the legal community, as of this writing, there are two sitting transgender judges: the Honorable Victoria Kolakowski, venued in the California Superior Court in Oakland, California; and the Honorable Phyllis Frye, who sits on a municipal court bench in Houston, Texas. Inevitably, other transgender judges will be added to this list.

The bottom line: transgender people are not crazy or strange or even odd. In fact, we are quite sane and even enlightened. After all, most of us are products of years, if not decades, of intense therapy. Indeed, some have figured out one of life's most pressing questions: Who is it that I really am? How many cisgender persons can claim to have answered that question?⁴⁰

It is thus crucial that legal employers (and for that matter, all lawyers) understand what feeds the "crazy" myth and then take active steps to dispel it. Further, as the John-turned-Jennifer scenario suggests with Big Law's HR director Shirley (the aunt to a "trans" teenager), it is much easier to welcome "trans" lawyers when others have a basic understanding of what it means to actually be transgender. Such understanding spawns another crucial component to welcoming "trans" attorneys: human compassion. Consequently, what follows is a very abbreviated explanation of the transgender experience.

For some, underlying the "crazy" myth, and transphobia generally, is the belief that "trans" people *choose* to give up their birth gender when they transition socially or surgically. From this flows a bias directly related to surgery: that a person must be fairly insane to think that his or her "plumbing," or the appearance of his

38. Chaz Bono is a social activist, author, and the child of Sonny & Cher. *About Chaz*, CHAZ BONO, <http://www.chazbono.net/aboutchaz.php> (last visited Oct. 20, 2014).

39. Jenna Talackova, who was born male, successfully fought for the right to compete for the 2012 Miss Universe Canada crown. Emily Jackson, *Transgendered Beauty Queen Makes History: Jenna Talackova Makes Top 12 at Pageant*, TORONTO STAR, May 20, 2012, at News, *available at* 2012 WLNR 10639211.

40. See Spade, *supra* note 18.

or her chest, is not only wrong but that it must be surgically changed.⁴¹

Hence, anyone who feels a need to conform body to brain (rather than vice versa) must be somewhere on the far end of the insanity spectrum.

The "choice" argument will be familiar to gay and lesbian people and their allies, who for decades battled religious and political conservatives over whether or not sexual orientation is something that one can choose. While that battle is far from over, the fact that more and more states are granting same-sex marriage rights (via legislative or judicial action) confirms that many straight people now understand that sexual orientation is not a choice.

Yet, transgender people continue to hear that they can "choose" to stay in their birth genders. The fact remains that some cisgender people simply cannot wrap their arms (or heads) around how it is possible that a person's emotional self-image can trump his or her anatomy. As the thinking goes, we are born with a body that in most instances dictates gender; how can it then be that one's brain and emotional well-being do not match that birth body?

For "trans" persons, the disconnect between body and brain (i.e., gender dysphoria) can become all-encompassing and personally consuming. Putting aside the "trans toddlers"—who at an exceptionally young age know that their brain does not match their body (and who enjoy the immense benefit of well-informed parents with access to social media and greater societal acceptance of "trans" people)—for many transgender persons, the disconnect begins gradually as an uncomfortable feeling about one's body. Eventually, and this is something that can take a decade or more, the disconnect morphs into an intense realization that living in one's birth gender is not at all "right."

41. It should be noted that the vast majority of transgender people do not transition surgically. See JAMIE M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & THE NAT'L GAY AND LESBIAN TASK FORCE, NATIONAL TRANSGENDER DISCRIMINATION SURVEY REPORT ON HEALTH AND HEALTH CARE 11–12 (2010), available at http://transequality.org/PDFs/NTDSReportonHealth_final.pdf. Only approximately one third of "trans" persons undergo surgery. *Id.* This number has been influenced by the absence of health insurance that covers sex-reassignment surgery; it is expected this number will increase as more transgender people are able to access health insurance plans that provide for sex-reassignment surgery. *Cf. id.* at 10–12 (explaining that costs render surgeries "inaccessible to most transgender people").

Further, all too often, someone experiencing the brain-body disconnect will do just about anything to eliminate gender-variant thoughts. Many will compartmentalize their daily routine to minimize or eliminate gender-variant thinking (something I refer to as “stuffing”). In doing so, they will force themselves to focus on other things. Some will go to the other end of the masculinity spectrum, such as by enlisting in the military. Others will engage in “compensating” behavior and seek refuge in materialism (e.g., that brand new, shiny BMW 530i) by becoming workaholics who earn high incomes, allowing them the freedom to buy the toys or vacations of their choice. Still others will engage in any of the thousand other placating behaviors humans use to avoid dealing with pressing life problems.

On a personal note, I am very familiar with “stuffing” and “compensating.” As a teenage boy, I felt an intense attraction to all things feminine, particularly lingerie, which I would wear as a way of pretending that I was actually female. Rather than permitting myself to explore this attraction and emotional pull (after all, it was the early 1970s), I began a high school romance that led to marriage just after law school. This was enough to send my gender ideation into remission. When thoughts about my body not matching my brain resurfaced several years into my marriage, I opened my own law firm, hoping that it would leave me little time to think of anything else. Again, the thoughts went away, only to return. This on-again, off-again pattern persisted until age forty-four when I realized that unless I tackled my “gender demon” head-on, I would someday lay on my deathbed and look back at my life with deep regret for not having lived authentically and honestly.

Dealing with my gender demon meant acknowledging that, in fact, I was actually female.

As my example reflects, despite the “choice” perception held by many cisgender people, gender dysphoria does not go away; instead, it simply gets worse and worse. It is, in essence, a “gender hunger” that gnaws at one daily, growing more and more intense until the person acknowledges that their birth gender is not right (even if the “trans” person so wants it to be right) and that something must be done to conform to their true gender. Otherwise, as the attempted suicide rate for “trans” people attests,⁴²

42. See GRANT ET AL., *supra* note 41, at 14 (reporting that in a survey of over 7000 transgender individuals, 40% of participants had attempted suicide,

many "trans" people ultimately get to the point of being unable to live with bodies that do not match their brains.

It is also important to remember a key word: *incrementalism*.

For many "trans" people, there are hundreds of incremental steps, from the first inkling of brain-body disconnect to actual social or surgical transition. In fact, often a "trans" person will at first refuse to believe they would ever transition, and yet years later they end up doing so. Why is this?

It is because humans can emotionally process only so much at a particular time. For a "trans" person, this may translate to resisting the idea of making dramatic changes to his or her life because of the people that it might hurt, or because of fears about job loss, homelessness, and so forth. Many erroneously think that their gender hunger will be satisfied by half steps (such as a male-born person wearing lingerie under his business suit, like John in the earlier scenario). Eventually, those half steps no longer satiate; at that point, taking full steps (e.g., hormones or social transitioning) becomes both more "real" and viable.

In this sense, transgender people are not really different from anyone else. All humans make key life changes incrementally, such as deciding to change careers or end a marriage. The only difference is that for transgender people, those decisions are much more public (e.g., one usually does not have to change their appearance in order to accomplish a career change).

"Trans" people get to the point of publicly transitioning usually only after great emotional forethought and professional guidance. Often, that transitioning comes with huge personal sacrifice, since in many instances, family and friends do not fully understand or refuse to "go along," usually because they believe that transitioning is a choice.

Consequently, a key element to welcoming "trans" lawyers is educating cisgender individuals about the challenges that transgender people face in arriving at the decision to transition genders. It takes time and effort to train on this. For many cisgender people, it is at first difficult to appreciate what it means to be transgender. Indeed, when a "trans" person transitions, everyone connected with that person—family, friends, and co-workers—transition too. Suddenly, everyone is being called upon to use a new name, new pronouns, and a new way of thinking.

compared with 1.6% of the general population).

Some find these changes difficult to accept, but with patience, positive reinforcement, and good intentions, transitioning on the job can work!

Training and education about transgender people, something I call “Trans 101,” will pay off by increasing positive familiarity that will, in turn, foster acceptance. The result will be a workplace of compassion and respect for “trans” people, which greatly increases a transgender lawyer’s chances for success.

Two: Do Not Let “Passing” be a Litmus Test

The process of transitioning genders usually involves taking hormones: estrogen for male-to-female transitions and testosterone for female-to-male transitions. The hormones can have profound effects on the body (after all, that is the entire idea), but with quite different results relative to “passing” in one’s “true” gender.

For a transman, injecting testosterone into a biological female body often produces dramatic changes—beard growth, a deeper voice, pattern balding, and body fat accumulation (i.e., the stereotypical male “gut”). For some transmen, just two years of testosterone therapy will spur physical change to such a degree that it is impossible for another “trans” person, let alone someone cisgender, to ascertain that the transman had been born female.

Estrogen is not nearly as effective in making transwomen appear “female.” Certainly, estrogen will help grow female hips and sprout breast “buds” that turn into actual breasts. Estrogen also helps sustain hair growth and has an important calming emotional effect. However, to the chagrin of most transwomen, estrogen, which is usually taken via injection or through a wearable patch, will not change the pitch of one’s voice, nor will it change male-born facial features or body type.⁴³ The net result is that hormones do not make transwomen nearly as passable as they do transmen.

As a side note, this truism may, in the end, make it more likely that legal employers (often controlled by men) will favor hiring a

43. For transwomen who can afford it, a number of surgeons specialize in “facial feminization surgery,” which literally involves reconstructing male-born facial features (nose, brow line, eyes, and jaw) into female features with the use of implants (cheek and chin), sculpting, and skin removal (facelift). See FACIAL FEMINIZATION SURGERY, <http://www.facialfeminizationsurgery.info> (last visited Sept. 30, 2014). However, this surgery will not change a male-born body frame, which usually is the biggest factor in a person’s ability to “pass.”

transman over a transwoman. Consider the irony here, one that is associated with cisgender male prejudice toward cisgender women: a genetically born woman, who historically may have been stopped by a "glass ceiling" relative to legal employment success, can suddenly bypass that ceiling as a transman. On the other hand, a genetically born male, who otherwise would enjoy male privilege—and have no need to even consider the "glass ceiling"—suddenly bounces against the ceiling as a transwoman. I can attest from personal experience that men, including many male lawyers, treat me far differently as a woman compared to when I lived as a man. Some of that treatment has been positive (for example, a far greater willingness to offer hugs and compliments about my appearance). On the other hand, men now question my leadership abilities far more often than when I was male. Indeed, several years after I transitioned to female, a male colleague called me "ignorant" in a crowded room of peers; that would never have happened when I presented as a man.

Returning to the subject of "passing," it is, for the most part, a problem relative to transwomen, like stocky John in our scenario. To most people, including clients, jurors, and judges, it will be fairly obvious that "she" was born "he."

Complicating this further is that today's transwomen role models are, for the most part, extremely passable. No one would ever guess that the gorgeous Janet Mocks or Candis Caynes of the world were born with male genitalia. The net result is that many cisgender people expect any transwoman who transitions to be similarly beautiful.

Of course, cisgender women have had to contend with the artificial beauty standard for decades. In that sense, maybe this is proof that the transwoman of 2015 has formally become a member of the club.

Still, "passing" as a litmus test is a problem. As a profession, how should we deal with this? How do we avoid "passing" as a job requirement?

Again, we are back to addressing the tendency for human bias head on. The truth is that we organize emotionally and find comfort in absolutes: good/bad, gay/straight, winner/loser. One of those absolutes is male/female. Thus, when a person physically presents somewhere in between male and female, it makes other humans *uncomfortable*.

The discomfort, in part, stems from an immediate uncertainty of how to interact with this person: should I use male or female pronouns? Will I say something to embarrass them or myself? Which restroom will this person be using, and will I see them in there? What then?

Underlying all of this is where I started—the “crazy” person myth: “Is not this female-dressed, but rather male-appearing, person a bit detached from reality?”

There are three things a legal employer can do relative to the “passing problem.”

First, a legal employer can train on what I call “Gray Area Thinking” (GAT®), which fosters compassion by helping people recognize that much in life really is not black or white but instead gray. GAT® involves sharing stories of humans reaching out to other humans, such as that of a Buffalo, New York, bus driver named Darnell Barton, who saved a perfect stranger from committing suicide.⁴⁴ The stories are examples of people who disregard daily judgments and categorization (e.g., race, gender, social class) to put aside black-white, or absolute, thinking and see a person for who they are—simply another human.

Transgender people do not live in a black and white world; instead, their world is completely gray. Reminding cisgender persons that it is possible to look at another human without judging them by appearance makes it easier to accept a “trans” person who does not entirely pass.

Second, a legal employer can tackle the “passing problem” by reminding decision-makers and colleagues that the human condition, by nature, is never one hundred percent. We are all imperfect in one way or another.

Thus, if “passing” was the keen litmus test for the human experience, there would be quite a few singers or actors who would never have been allowed to set foot on a stage. A million Velvet Elvis paintings would have gone unsold. *Fifty Shades of Grey* would be gathering dust in the corner of some literary agent’s office.

Also, a good percentage of trial lawyers in this country would be out of work.

44. Philip Caulfield, *Buffalo Bus Driver Coaxes Suicidal Woman Off Bridge*, N.Y. DAILY NEWS (Oct. 30, 2013, 8:37 AM), <http://www.nydailynews.com/news/national/buffalo-bus-driver-coaxes-suicidal-woman-bridge-article-1.1501092>.

The reality is that, as with most things in life, we do not expect or demand one hundred percent; in fact, many of us will gladly put up with fifty percent and call that "good."

In light of this, why is it permissible to hold "trans" persons to a one hundred percent standard? Doing so is not fair, and in 18 states⁴⁵ and 143 cities and counties,⁴⁶ doing so is also illegal.

The net effect: legal employers have an obligation to rebut the idea that transgender people who do not pass entirely should receive "less equal" treatment. Just the opposite is true: some "trans" people need to be protected because they "stick out" in the workplace.

Finally, the "passing problem" can be resolved through one more human trait: adaption. Over time, people adapt. We become used to the unusual. As more and more transgender people transition in everyday life, the fact that someone does not pass one hundred percent will become less of an issue.

The adaption truism impacts everyone, including clients, who are also encountering transgender employees in greater numbers. Private and public sector employers, who often promote and encourage "employee resource groups," or other affinity identities in the workplace, are often far more adroit than legal employers at creating positive work environments for transgender employees. Indeed, a one hundred percent rating on the HRC's Corporate Equality Index hinges on positive and equal treatment of transgender employees.⁴⁷ There is no exception on that Index for "trans" people who do not pass.

In summary, legal employers have an affirmative obligation to be aware of the "passing" issue and to take steps to prevent it from becoming a barrier to employment or success. If need be, they should utilize a transgender consultant to help educate decision makers and staff.

45. *Employment Non-Discrimination Act*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/employment-non-discrimination-act> (last visited Oct. 20, 2014).

46. *Non-Discrimination Laws that Include Gender Identity and Expression*, TRANSGENDER L. & POL'Y INST., <http://www.transgenderlaw.org/ndlaws/> (last visited Oct. 20, 2014).

47. See HUMAN RIGHTS CAMPAIGN FOUND., CORPORATE EQUALITY INDEX 2014: RATING AMERICAN WORKPLACES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUALITY 13-14 (2013) [hereinafter CORPORATE EQUALITY INDEX 2014].

Three: Share that “Trans” People Make Really Good Lawyers (and Employees)

The process of coming out as a transgender person usually involves great personal struggle. For many, there are intense familial and societal pressures to conform to one’s birth gender. Bucking those pressures in order to live authentically takes tremendous courage. It also requires intelligence, enormous drive, persistence, and an uncompromising belief in one’s self.

Smarts. Fearlessness. Staying on task. Problem solving. Self-confidence. Are these not the very traits that make for a good lawyer? Do legal employers not look for these qualities in particular?

In comparison to law school graduates who may be relatively untried, most out “trans” lawyers have already demonstrated that they have the “right stuff” to be effective attorneys. Why go with someone who is an unknown when you already have a proven track record of grit to the “nth” degree with a “trans” person?

Even more so, “trans” people have *perspective*: by having lived in two different genders, they have the unique experience of actually knowing what it is like to be accepted as a man or rejected as a woman. A transgender person cogently understands the challenges or rewards that come with gender. This too—the ability to identify with the plight or power of others and to understand the implicit *secrets* or *cues* inherent with living in a particular gender—cannot but greatly enhance one’s ability to practice law.

It is true: a transgender lawyer could represent added value to a legal employer.

Once again, I will share my personal experience. Throughout my existence as a male, I had no idea of the extent to which testosterone controlled my daily thoughts and actions. I did not realize that, in many cases, I behaved in a certain way only because testosterone actively influenced my behavior. My aggressiveness at a deposition or in the courtroom was a direct product of testosterone coursing through my body. Yes, my clients loved that. On the other hand, I occasionally went overboard, which did not make for the smartest lawyering.

When I transitioned to female, estrogen provided a much greater sense of emotional peace and control. As a “trans” person who doesn’t pass entirely (due to my voice), I am now far more vulnerable; in turn, I have found that many people—particularly women—identify with me and my vulnerability. Indeed, I believe

this has helped me win cases since jurors and judges find me more credible.

Moreover, in transitioning to female, I lost the near constant internal drumbeat to be "top dog" at whatever cost, and I became much more practical and willing to consider alternative points of view. Thus, I now more fully understand various dynamics of human behavior. This makes me both a better human and a better lawyer.

In short, the process of self-acceptance and gender transitioning fundamentally rounds out a "trans" person. The "tool kit" of traits and skills that we bring to the workplace is greatly expanded as a result. Legal employers should both recognize and appreciate this.

Four: Remain Sensitive to Ongoing Challenges

Let us assume that you hire a transgender attorney. While your progressiveness is to be commended (and in some places in the United States, replace "progressiveness" with "scary pioneering"), it is not enough to simply *employ* a lawyer who is transgender. Rather, a legal employer must remain vigilant about particular challenges that a "trans" lawyer or employee might face going forward.

First off, the absence of uniform (read federal) legal protection can have great ramifications for any transgender attorney.⁴⁸ Simply put, without the backing of the federal government and its implicit threat of prosecution for illegal discrimination, in many parts of the United States, transgender people face a great deal of randomness in their day-to-day lives.

To make this point, we will briefly return to our scenario with Jennifer post-transition. Imagine that Big Law, based in LGBTQ-friendly Minnesota, has a satellite office in Bismarck, the capital of North Dakota. Owing to the explosion of business from oil and gas production taking place in the Peace State, Big Law needs a senior associate to help manage its Bismarck office. Given Jennifer's continuing ties to her birth state, she is a natural for the position.

Consequently, the firm creates a plan that gives Jennifer a twenty percent raise to relocate to Bismarck, along with a package that includes moving costs, temporary housing, and a no-interest loan for the down payment on a house or town home.

48. Of course, the absence of legal protection uniformity also impacts those represented by the other "letters" of the LGBTQ alphabet.

Great idea, right? Could this even be seen as proof that Jennifer's transition has not had a negative effect on her career?

Good intentions aside, not so fast.

As it turns out, Bismarck completely lacks any legal protections for transgender people.⁴⁹ In fact, Bismarck earned a paltry rating of seventeen on the HRC's 2013 Municipal Quality Index, which rates places to live on a scale of one to one hundred relative to a wide array of LGBTQ legal protections.⁵⁰ Moreover—and no real surprise—as of early 2015, there were no statewide legal protections for LGBTQ people in North Dakota.⁵¹

How could this potentially play out to Jennifer's detriment?

Recall that Jennifer, at 5'11" and 175 pounds, does not entirely pass as female. This exposes her to a host of risks, some nominal, others not. For example, to get started in Bismarck, Jennifer might need to rent an apartment. Given the absence of any ordinance that offers transgender protection in housing, a landlord could legally decide to not rent to Jennifer's "kind."

Suddenly, it becomes difficult for Jennifer to find a place to live.

Taking it a step further, without a city ordinance to protect transgender people, Jennifer could be legally barred from obtaining car insurance, life insurance, utility access, health club memberships, and medical care. Even more, and as crazy as it may sound, the Burleigh County Bar Association (Bismarck proper) could conceivably refuse her membership.

In 2015, this is what I refer to as the "transgender crap shoot." One never knows when or where the challenges to self-identity and authenticity will present themselves. A landlord may not be accepting because of fear that a "trans" person would attract the "wrong element." An insurance agent could be a religious conservative who cannot fathom the idea of someone tinkering with "God's gift"—the human body. A physician could conclude that she lacks the expertise to treat a male-born person who is

49. See Nick Smith, *Senate Rejects Anti-Discrimination Bill*, BISMARCK TRIBUNE, Feb. 14, 2013, at News, available at 2013 WLNR 4023182.

50. HUMAN RIGHTS CAMPAIGN FOUND., MUNICIPAL EQUALITY INDEX: A NATIONWIDE EVALUATION OF MUNICIPAL LAW 48 (2013).

51. See Julie Deisher, *North Dakota Moves to Dismiss Challenge to Same-Sex Marriage Ban*, JURIST (July 3, 2014, 4:13 PM), <http://jurist.org/paperchase/2014/07/north-dakota-moves-to-dismiss-challenge-to-same-sex-marriage-ban.php>; Smith, *supra* note 49.

taking female hormones. This kind of uncertainty can be unnerving—and for some “trans” persons—debilitating.

Another factor in the crap shoot: lower public *tolerance* for transgender people in states without LGBTQ protections. How could this impact Jennifer?

One potential impact relates to personal safety. Practically speaking, Jennifer could be at greater risk for personal assault in Bismarck, compared to locales with LGBTQ protections. After all, we are talking about human nature: we humans work off of cues. If the government tells us that certain people have rights and are to be accorded breathing room, many will permit such grace.

Alternately, if the government is silent as to one’s legal place in society, a vacuum arises, which makes it far easier to marginalize (and harm) those who are “different.” Thus, Jennifer might want to reconsider dinner in downtown Bismarck if it will have her out alone after 10:00 p.m.

For “trans” people, it is the random uncertainty of discrimination—or actual hatred—that accounts for why many “trans” people never come out as their true selves or why those who do come out fear being assaulted or even murdered.⁵²

Nonetheless, other underlying factors will slowly promote positive change for transgender people, lawyers included. This change is very likely—in fact, almost certain—even in the absence of a current national gender identity and expression civil rights law.

A key factor is the *business community*. As more and more corporate entities successfully navigate on-the-job transitions of their own transgender employees and earn one hundred percent Corporate Equality Index ratings,⁵³ they will keenly understand how legalized discrimination of transgender persons and others on the LGBTQ alphabet impacts their ability to transfer or relocate highly qualified and valued employees (e.g., a plan to promote a very dynamic and self-aware transwoman regional manager from Minnesota to say, Alabama or Texas). Eventually, those companies

52. See generally GRANT ET AL., *supra* note 3; TDOR 2013, TRANSGENDER EUR. (Apr. 21, 2014), http://www.transrespect-transphobia.org/en_US/tvt-project/tmm-results/tdor-2013.htm.

53. See CORPORATE EQUALITY INDEX 2014, *supra* note 47, at 6 (“In this 12th edition of the . . . Corporate Equality Index, a record 304 businesses achieved a top rating of 100 percent. In the first CEI in 2002, just 13 businesses achieved a top score of 100 percent.”).

will utilize their business and political clout to push for a national uniform LGBTQ protection law.

In this sense, the rule of the marketplace may make up for a Congress (and/or President) that lacks the political resolve to do what is necessary—not to mention what is right.

Thus, we get back to a legal employer's need to be aware of and vigilant against the challenges that transgender lawyers may face.

As for Big Law's offer that Jennifer relocate to Bismarck? It may not be as great of an idea as first envisioned. This truly is where someone in the know (e.g., a personnel manager or diversity director) must speak up and advocate on behalf of the transgender lawyer. At a minimum, speaking up must include education about challenges that the "trans" lawyer could face in a new environment.

It may also mean that an employer like Big Law uses its influence. Hence, a relocation plan might include someone serving as Jennifer's point person in Bismarck for housing, insurance, and the myriad of other things needed for a safe and happy life.

Would doing this give Jennifer "special" rights at the firm? Of course it would not.

"Trans" lawyers have certain challenges that cannot be met with traditional notions of the employer-employee relationship. If a legal employer values "trans" people, it will go the extra distance to understand and protect them.

Five: Remember the Ethical Considerations

Lastly, I submit that as licensed professionals, attorneys are ethically required to treat transgender lawyers fairly.

For example, section 5 of the preamble to the American Bar Association's (ABA) Model Rules of Professional Responsibility provides, "A lawyer's conduct . . . should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including . . . other lawyers . . ."⁵⁴

Each state, of course, has its own version of ethical rules and considerations—some patterned after the ABA and others that are more expansive. In Minnesota (my home state), it is considered professional misconduct for attorneys to "harass a person on

54. MODEL RULES OF PROF'L CONDUCT pmb. (2013).

the basis of sex . . . [and] sexual orientation.”⁵⁵ Additionally, Minnesota attorneys who “commit a discriminatory act prohibited by federal, state, or local statute or ordinance,” will be deemed to have engaged in professional misconduct.⁵⁶

Rule 2.3(c) of the ABA Model Rules of Judicial Conduct, under the heading of “Bias, Prejudice, and Harassment,” states in part, “A judge shall require lawyers . . . to refrain from manifesting bias or prejudice, or engaging in harassment, based upon . . . gender . . . [or] sexual orientation . . . against parties, witnesses, lawyers, or others.”⁵⁷

The takeaway from these and similar professional responsibility rules is that, as legal professionals, we owe ethical duties to each other. We simply cannot allow discomfort about transgender lawyers (particularly as to those who do not pass) to turn into a basis for discrimination. We are, as a profession, held to a higher standard than the general public.

Moreover, there is an ancillary duty to call out lawyers (be it opposing or co-counsel, a firm member, or merely someone we happen to encounter in a courtroom) who seek to marginalize or harass transgender attorneys on the basis of their gender identity or presentation.⁵⁸ Unfortunately, as more transgender attorneys enter the profession, some degree of harassment likely will occur, with locale, age, and a host of other factors coming into play. The profession must be vigilant against such conduct and not allow it to flourish.

Vice President Biden has proclaimed that transgender discrimination “is the civil rights issue of our time.”⁵⁹ As lawyers, we must be mindful of our obligation to move forward the rule of law so that all persons, regardless of distinguishing characteristics, have the right to fulfill their potential as humans.

55. MINN. RULES OF PROF'L CONDUCT R. 8.4(g) (2005).

56. *Id.* R. 8.4(h).

57. MODEL RULES JUDICIAL CONDUCT R. 2.3(c) (2011).

58. *See id.* This duty extends to attorney harassment of transgender witnesses or parties. *Id.* The harassment can range from “mis-gendering” a person (e.g., intentionally using a pronoun that is inconsistent with the gender expression of the witness or party) to using demeaning words or outright threats (e.g., “If your client doesn't give in on this point relative to parenting time, I will ask the court to preclude visitation entirely because of your client's transgender lifestyle.”).

59. Maureen McCarty, *Joe Biden: Transgender Discrimination is “Civil Rights Issue of Our Time,”* HUM. RTS. CAMPAIGN (Oct. 31, 2012), <http://www.hrc.org/blog/entry/joe-biden-transgender-discrimination-is-civil-rights-issue-of-our-time>.

IV. CONCLUSION

This has clearly been an essay and not a scholarly work. As such, I have utilized imagination and some old-fashioned soapbox advocacy to raise awareness and understanding about transgender people. Hopefully, I have succeeded.

The good news for transgender attorneys (your author included) is that there is momentum and the force of history behind us. Without question, like Jennifer from our scenario, we will show up in the legal profession in greater and greater numbers. I am confident that legal employers across the spectrum will ultimately welcome us.

There will be bumps, of course, as there are with any form of social change, yet let me go back to a key point made above: transgender people are, if nothing else, persistent—even resilient. As a group, we absolutely know what it means to hang in. Doing so is inherent in living as a “trans” person.

Thus, to the American legal community, I offer one last bold thought: grab us while you can. Someday in the not too distant future, a “trans” lawyer will be viewed as a tremendous asset rather than as a liability.