

**NOT GUILTY BY REASON OF GENDER
TRANSGRESSION: THE ETHICS OF GENDER
IDENTITY DISORDER AS CRIMINAL
DEFENSE AND THE CASE OF
PFC. CHELSEA MANNING**

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A young person sits in a dark room, face lit by the glow of a computer screen. The person types for long stretches, then pauses while waiting for an instant message response from a new “friend.” The message thread is bursting with the types of confessions familiar in a world of cyber anonymity: job frustration, anxiety, interspersed with flirtatious chatter and inquiries. The scene could describe the activities of hundreds of thousands of young people in America on any given night. When we learn the young person is gay and cannot tell anyone about it, or that the online pseudonym used differed from the gender assigned to the person at birth, we can still picture the scene. We know plenty of young people this could be, maybe even ourselves.

Except this young person, Chelsea Manning,¹ formerly and fa-

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¹ A day after being sentenced for various military offenses, Manning announced in a written statement that he would like to be known as Chelsea Manning, requested the use of feminine pronouns, and expressed a desire to undergo hormone therapy “as soon as possible.” See *TODAY: Bradley Manning: I Want to Live as a Woman* (NBC television broadcast Aug. 22, 2013), available at <http://www.today.com/news/bradley-manning-i-want-live-woman-6C10974915>. Various media outlets quickly honored Manning’s request and began using the correct pronoun. See Andrew Beaujon, *AP, New York Times, NPR Update Style on Chelsea Manning*, POYNTER (Aug. 29, 2013), <http://www.poynter.org/latest-news/mediawire/222260/ap-new-york-times-update-style-on-chelsea-manning/>. Except for direct quotations or attributions where a different pronoun would make reading cumbersome, this Note will also use the correct pronouns throughout, even when referencing events and circumstances occurring before Manning’s announcement. See cf. Adam Klasfeld, *Transgenderism More Likely in the Military, Study Finds*, COURTHOUSE NEWS SERVICE (July 24, 2012, 5:11 AM), <http://www.courthousenews.com/2012/07/24/48664.htm> (“Manning reportedly told his lawyers and the public to refer to him as a male.”); Evan Hansen, *Manning-Lamo Chat Logs*

mously known as Pfc. Bradley Manning, was instant-messaging from a tiny office in Iraq where she was deployed as an Army private. And the anxieties expressed had to do not only with being gay in a “Don’t Ask Don’t Tell”² (DADT) environment of forced secrecy, but also (and more importantly) about being a whistleblower against the U.S. government. The job complaints were about the hours spent as an intelligence analyst viewing computer files which exposed atrocities the government was hiding from the media (and the public), including the indiscriminate murder of Iraqi civilians and journalists by U.S. troops shooting from an Apache helicopter. Manning did not want to keep these secrets. And she didn’t. Manning was distraught about her complicity in covering up evidence of war crimes, and also about what would happen to her if she refused to continue to hide that evidence. And if caught, the fear loomed that her image would go out to the world: “[I] wouldn’t mind going to prison for the rest of my life, or being executed so much, if it wasn’t for the possibility of having pictures of me . . . plastered all over the world press . . . as [a] boy”³

Revealed, WIRED (July 13, 2011, 3:40 PM), <http://www.wired.com/threatlevel/2011/07/manning-lamo-logs/> (noting that Manning chose to use the name “Breanna Manning” when setting up Twitter and YouTube accounts). For commentary on pronoun usage specific to Manning, see Rainey Reitman, *Feminist, Transgender Advocates Should Support Bradley Manning*, WASHINGTON BLADE (Feb. 23, 2012), <http://www.washingtonblade.com/2012/02/23/feminist-trans-advocates-should-support-bradley-manning/>; Emily Manuel, *Why Does the Media Still Refer to “Bradley” Manning? The Curious Silence Around a Transgender Hero*, GLOBAL COMMENT (Dec. 22, 2011, 2:57 AM), <http://globalcomment.com/2011/why-does-the-media-still-refer-to-%E2%80%9CBradley%E2%80%9D-manning-the-curious-silence-around-a-transgender-hero/>; Julie Swoope, *Private Manning and Being Outed as Transgender*, THE TRANS LIFE (Dec. 27, 2011), <http://thetranslife.com/?p=498>; *Archive of Tumblr Posts Tagged with “Breanna Manning.”* TUMBLR, <http://www.tumblr.com/tagged/breanna%20manning> (last visited Sept. 25, 2013); Jos, *Why Do the Media and Her Supposed Supporters Continue to Misgender Breanna Manning?*, FEMINISTING (Dec. 22, 2011), <http://feministing.com/2011/12/22/why-does-the-media-and-her-supposed-supporters-continue-to-misgender-breanna-manning/>. For commentary on the problems of English-language pronouns for transgender communities, see *The Need for a Gender-Neutral Pronoun*, GENDER NEUTRAL PRONOUN BLOG (Jan. 24, 2010), <http://genderneutralpronoun.wordpress.com/>.

² “Don’t Ask, Don’t Tell,” codified at 10 U.S.C. § 654, prevented lesbian, gay, and bisexual people from disclosing their sexual orientation in the military. President Barack Obama implemented the repeal of the law on September 20, 2011. See FREEDOM TO SERVE: THE DEFINITIVE GUIDE TO LGBT MILITARY SERVICE, SERVICEMEMBERS LEGAL DEFENSE NETWORK 2 (2011), http://sldn.3cdn.net/5d4dd958a62981cff8_v5m6bw1gx.pdf.

³ Hansen, *supra* note 1 (quoting Manning in the chat logs with Adrian Lamo as saying, “i just. . . dont wish to be a part of it. . . at least not now. . . im not ready. . . i’ve totally lost my mind. . . i make no sense. . . the CPU is not made for this motherboard. . .”).

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INTRODUCTION

Manning was arrested soon after her chat “friend” Adrian Lamo⁴ told the federal government about the chats—namely, that

⁴ Lamo is a computer hacker who was arrested in 2003 for breaking into the computer networks of the New York Times, Yahoo!, Microsoft, and MCI WorldCom. He took a plea from federal prosecutors and received six months of house arrest and two years of probation. See Kevin Poulsen, *Feds Say Lamo Inspired Other Hackers*, SECURITY FOCUS (Sept. 15, 2004), <http://www.securityfocus.com/news/9520>.

Manning was in contact with Julian Assange and was considering turning over the evidence of war crimes and other select files to WikiLeaks.⁵ Manning's subsequent detention and court-martial⁶ have been watched and criticized for many reasons. This Note will concentrate on one specific aspect of the case: the earliest defense strategy of eliciting Manning's gender identity, including the use of the diagnosis of Gender Identity Disorder (GID) and negative stereotypes associated with it, as a factor mitigating Manning's culpability.⁷ It will examine disparities between what is good for social justice movements versus what is good for individual people accused of crimes, applying criminal defense ethical theories and comparing Manning's case to criminal cases in which negative stereotypes about marginalized groups have been used to benefit individual persons accused of crimes. While the issues raised by Manning's defense are applicable in the context of the criminal system, Manning is not being tried within that system, nor is her case indicative of trends within it.⁸

⁵ See GREG MITCHELL & KEVIN GOSZTOLA, TRUTH AND CONSEQUENCES: THE U.S. vs. BRADLEY MANNING 130–31 (2012) (noting that Manning contacted Lamo for the first time on May 20, 2010; that they began instant-messaging each other on AOL that day; and that on May 21, Lamo informed his friend and former Army counterintelligence agent about the chats but he continued chatting with Manning until May 26). See also Hansen, *supra* note 1.

⁶ Courts-martial are trials for military offenses, governed by the Uniform Code of Military Justice (UCMJ). The rules governing courts-martial are contained in the Manual for Courts-Martial. See JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL (2012), available at <http://armypubs.army.mil/epubs/pdf/mcm.pdf>. Military courts are administrative bodies governed by Article I of the U.S. Constitution and are thus not subject to the same procedural requirements as Article III courts. See ESTELA I. VELEZ POLLACK ET AL., CONG. RESEARCH SERV., RS21850, MILITARY COURTS-MARTIAL: AN OVERVIEW 1–3 (2004), available at <http://www.fas.org/man/crs/RS21850.pdf>.

⁷ The tactic is controversial and objectionable on many levels that I will discuss in this Note, which in turn is my attempt—as a white, queer, cisgender (person who is not transgender and whose gender identity conforms generically to the biological sex assigned at birth) activist, trans ally, and aspiring criminal defense attorney—to grapple with the tensions between criminal defense lawyering and social justice movements.

⁸ As a low-income, white, apparently gender-conforming gay person in the Army, Manning is not entirely representative of those whom the criminal system systematically seeks out and punishes. It is important to note that there is a crisis of mass incarceration in the U.S., and this crisis drives many criminal defense attorneys in the work they do, including the author. One in every 137 Americans was in prison or jail in 2010. Two-thirds of those incarcerated are people of color. See generally THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (2012), http://sentencing-project.org/doc/publications/inc_factsAboutPrisons_Jan2013.pdf; MARC MAUER, THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION: AN EXAMINATION OF CAUSES AND TRENDS (2003), http://www.sentencing-project.org/doc/publications/inc_comparative_intl.pdf. Although no data is

Gender Identity Disorder (GID), discussed in greater detail in Section II, was an extremely controversial diagnosis in the Diagnostic and Statistical Manual of Mental Disorders (DSM);⁹ community action and criticism led the American Psychiatric Association (APA) to announce in December 2012 that it would remove GID from the most recent revised edition, DSM-5, which was published in May 2013.¹⁰ GID's very existence is considered by some to be an affront to transgender,¹¹ genderqueer, and gender non-conforming people because it normalizes the gender binary by pathologizing people who don't fit the narrow idea of the DSM authors (and others) about what a "man" or "woman" is. However, the GID diagnosis in the U.S. has been necessary for trans people to receive certain essential gender-affirming medical care, or have it paid for by insurance. This creates something of a "necessary evil" relationship between the GID diagnosis and trans people who need medical services.

This Note is written from a perspective that does not accept either that trans identity/gender-nonconformity is a pathology or that the criminal system is a place of justice. Through this lens, it will analyze Manning's defense attorney's early choice to exploit the GID diagnosis, in the face of a movement that challenges its

available on transgender rates of incarceration, one San Francisco study found that 67% of transgender women and 30% of transgender men surveyed had a history of incarceration. See Emily Alpert, *Gender Outlaws: Transgender Prisoners Face Discrimination, Harassment, and Abuse Above and Beyond That of the Traditional Male and Female Prison Population*, IN THE FRAY (Nov. 20, 2005), <http://inthefray.org/content/view/1381/39/>.

⁹ DSM, Am. Psychiatric Ass'n, <http://www.psychiatry.org/practice/dsm> (explaining that the DSM was created by the American Psychiatric Association, which considers it to be the "standard classification of mental disorders") (last visited Nov. 5, 2013); *DSM: History of the Manual*, AM. PSYCHIATRIC ASS'N, <http://www.psychiatry.org/practice/dsm/dsm-history-of-the-manual> (last visited Nov. 5, 2013) (explaining that the first edition was published in 1952 and it has been revised several times since then).

¹⁰ Zack Ford, *APA Revises Manual: Being Transgender Is No Longer a Mental Disorder*, THINK PROGRESS (Dec. 3, 2012), <http://thinkprogress.org/lgbt/2012/12/03/1271431/apa-revises-manual-being-transgender-is-no-longer-a-mental-disorder/>.

¹¹ The terms "transgender," "trans," "genderqueer," and "gender-nonconforming" are used throughout this Note as umbrella terms to refer to people who "transcend gendered social roles assigned at birth based on their anatomical sex." See *Transgender 101: A Quick Guide on Being an Ally to People Who Are Transgender and Gender Non-Conforming*, TRANSGENDER LAW PROJECT OF ILL., <http://tjlp.org/TRANSGENDER101QuickGuide.pdf> (last visited Mar. 11, 2013). These terms are meant to be used analogously to the term "trans*" and to be inclusive of non-cisgender identities, rather than referring to an exclusive form of gender identity or presentation. See *Outward, What Does Trans* Mean, and Where Did It Come From?*, SLATE (Jan. 10, 2014, 12:37 PM), http://www.state.com/blogs/outward/2014/01/10/trans_What_does_it_mean_and_where_did_it_come_from.html.

validity and existence and where another defense theory, particularly a whistleblower defense, was viable. It also recognizes that a defense attorney has an obligation to act as a zealous advocate and use any and all arguments at her disposal to fight for a favorable outcome for her client; it arguably should not affect her strategy if the negative stereotypes involve an already-marginalized community, so long as they help her client avoid jail time. The question remains whether the defense attorney's opinions or political or personal motivations matter when defending someone who faces incarceration, or whether it is paternalistic to impose her beliefs, no matter how morally fundamental they are to her worldview, on the people she represents. This Note will focus on this issue in the context of both queer¹² and criminal justice theories and practice—at the center of which sits Chelsea Manning.

Part I of this Note is an overview of Manning's case and Part II is a brief introduction to concepts of gender identity and trans activism. Part III reviews the theories of punishment, concepts of culpability, the complex role of the criminal defense attorney, and the use of narrative storytelling in defense practice. Part IV analyzes other defenses used to either mitigate culpability or reduce sentences based on characteristics of the accused, from mental health to race to gender to cultural background. Part V focuses on past use of gender and sexuality in criminal courts. The Note concludes with the author's opinion that the wisdom of the defense strategy in Manning's case was questionable, although its use was arguably ethical if Manning agreed to it.

I. THE UNITED STATES V. PFC. MANNING¹³

Chelsea Manning was accused of leaking over 500,000 military

¹² The term *queer* has been reclaimed as a positive word that embraces nonconformance with gender and sexuality norms and celebrates a culture outside the mainstream. It will be used in this way to describe individuals and communities throughout the paper.

¹³ The military judge in Manning's court-martial, Colonel Denise Lind, refused to turn over transcripts, court orders, or prosecution documents filed during pre-trial hearings for nearly three years. The Center for Constitutional Rights (CCR), of counsel in the U.S. to Julian Assange, filed briefs with the military trial court and the U.S. Court of Appeals for the Armed Forces on behalf of itself and several independent journalists and media organizations, demanding public access to all pretrial filings, conferences, rulings, and orders. See *Summary of Center for Constitutional Rights et al. v. United States & Lind, Chief Judge*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/ourcases/current-cases/ccr-et-al-v-usa-and-lind-chief-judge> (last visited June 2, 2013). On February 27, 2013, the trial court released 86 redacted orders and rulings. See *Freedom of Information Act Electronic Reading Room*, RECORDS MGMT. AND DECLASSIFICATION AGENCY, https://www.rmda.army.mil/foia/FOIA_ReadingRoom/

cables and documents—including the infamous “Collateral Murder” video¹⁴—to WikiLeaks, a whistleblower website notorious for publishing sensitive and classified information from governments and other large organizations. She was arrested on May 26, 2010, and locked up in a detention facility in Kuwait before being transferred to the military prison in Quantico, Virginia, known as the Brig.¹⁵ Manning chose to hire a civilian defense attorney, David Coombs,¹⁶ in addition to the Army Judge Advocate General (JAG) attorney assigned to her by the military.¹⁷ The conditions of her incarceration at the Brig prompted an investigation by the UN Special Rapporteur on Torture and accusations of cruel and unusual treatment.¹⁸

index.aspx (last visited Nov. 6, 2013). Twenty-one of the orders are “court orders for records from mental health professionals.” Kevin Gosztola, *US Army Makes Bradley Manning Court Martial Bit Less Secretive to Avert First Amendment Ruling*, THE DISSENTER (Feb. 27, 2013, 6:42 PM), <http://dissenter.firedoglake.com/2013/02/27/us-army-makes-bradley-manning-court-martial-bit-less-secretive-to-avert-first-amendment-ruling/>. See also Press Release, Ctr. for Constitutional Rights, DOD Release of Docs in Manning Case Falls Short of Legal Requirement (Feb. 27, 2013), <http://ccrjustice.org/newsroom/press-releases/dod-release-of-docs-manning-case-falls-short-of-legal-requirement>. Importantly, media were not allowed to enter the court pressroom on several occasions (including hearings attended by the author in July 2012), and the public therefore has had to rely on reports by journalists who were forced to sit in the audience and take notes by hand, without computers.

¹⁴ *Collateral Murder Video*, PVT. MANNING SUPPORT NETWORK, <http://www.bradleymanning.org/learn-more/collateral-murder-video> (last visited Nov. 5, 2013); MITCHELL & GOSZTOLA, *supra* note 5, at 18–19.

¹⁵ Kevin Poulsen & Kim Zetter, *U.S. Intelligence Analyst Arrested in Wikileaks Video Probe*, WIRED (June 6, 2010, 9:31 PM), <http://www.wired.com/threatlevel/2010/06/leak/>.

¹⁶ Coombs is a lieutenant colonel in the Army Reserve but is representing Manning in a civilian capacity. His attorney fees were paid by the nonprofit Pvt. Manning Support Network and its parent organization Courage to Resist. See generally THE LAW OFFICES OF DAVID E. COOMBS, <http://www.armycourt martialdefense.info> (last visited Mar. 11, 2013); PVT. MANNING SUPPORT NETWORK, <http://www.bradleymanning.org/> (last visited Nov. 5, 2013).

¹⁷ A person accused of a crime in military court has a right to JAG counsel, but may also hire civilian defense counsel. 10 U.S.C.A. § 838 (West, current through P.L. 113-57 (excluding P.L. 113-54 and 113-56)). See also JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL31262, SELECTED PROCEDURAL SAFEGUARDS IN FEDERAL, MILITARY, AND INTERNATIONAL COURTS (2006), available at <http://www.fas.org/sgp/crs/natsec/RL31262.pdf>.

¹⁸ David E. Coombs, *PFC Manning’s Unlawful Pretrial Punishment at Quantico*, THE LAW OFFICES OF DAVID E. COOMBS (Aug. 10, 2012), http://www.armycourt martialdefense.info/2012/08/unlawful-pretrial-punishment-motion_10.html; David E. Coombs, *The Truth Behind Quantico Brig’s Decision to Strip PFC Manning*, THE LAW OFFICES OF DAVID E. COOMBS (Mar. 5, 2011), <http://www.armycourt martialdefense.info/2011/03/truth-behind-quantico-brigs-decision-to.html>. See also Editors, *Inhumane Treatment of WikiLeaks Soldier Bradley Manning*, HUMAN RIGHTS NOW AMNESTY INTERNATIONAL BLOG (Jan. 24, 2011, 9:24 AM), <http://blog.amnestyusa.org/waronterror/inhumane-treatment-of-wikileaks-soldier-bradley-manning/>; Glenn Greenwald, *The In-*

Manning originally faced twenty-two charges,¹⁹ the most serious being “Aiding the Enemy,”²⁰ a charge which reeks of treason and carries a sentence of death, although the government prosecutors have said they will “only” seek life imprisonment, not death.²¹ On February 28, 2013, Manning offered a guilty plea to ten lesser included offenses that carried a maximum total sentence of twenty years behind bars.²² The government continued to prosecute Man-

humane Conditions of Bradley Manning’s Detention, SALON (Dec. 15, 2010, 2:15 AM), http://www.salon.com/news/opinion/glenn_greenwald/2010/12/14/manning/index.html. Despite the fact that Brig forensic psychiatrists maintained she was not a suicide threat, Manning was forced to sleep in only her underwear for approximately eight months under Prevention of Injury watch. David E. Coombs, *PFC Bradley Manning Is Not Being Treated Like Every Other Detainee*, THE LAW OFFICES OF DAVID E. COOMBS (Jan. 26, 2011), <http://www.armycourt martialdefense.info/2011/01/pfc-bradley-manning-is-not-being.html>. After making a sarcastic comment that she could injure herself with the band of her underwear, she was forced to be nude each night for seven hours, from March 2 to April 20, 2011. Between March 3 and March 7, Manning was forced to stand at attention (“parade rest”), still naked, for about three minutes in the mornings in front of the guards, until the Duty Brig Supervisor completed his inspection rounds. See Brief for Defendant at 36, Motion to Dismiss for Unlawful Pretrial Punishment, United States v. Manning (filed July 27, 2012) (No docket number available), available at https://docs.google.com/file/d/0B_zC44SBaZPoQ2hLa21jNlM0WmM/edit?pli=1. In a letter to Coombs, Manning described the experience of this abuse: “The guard told me to stand at parade rest, with my hands behind my back and my legs spaced shoulder-width apart. I stood at parade rest for about three minutes . . . The [brig supervisor] and the other guards walked past my cell. He looked at me, paused for a moment, then continued to the next cell. I was incredibly embarrassed at having all these people stare at me naked.” Ed Pilkington, *Stripped Naked Every Night, Bradley Manning Tells of Prison Ordeal*, GUARDIAN (Mar. 10, 2011), <http://www.guardian.co.uk/world/2011/mar/11/stripped-naked-bradley-manning-prison>. On January 8, 2013, Military Judge Denise Lind ordered that Manning be given 112 days of sentencing credit for her time in the Brig; Coombs had requested that the charges be dismissed on that ground. Kevin Gosztola, *Judge: Bradley Manning Punished Unlawfully But Not Enough to Warrant More Than Weak Relief*, THE DISSENTER (Jan. 8, 2013, 5:18 PM), <http://dissenter.firedoglake.com/2013/01/08/judge-bradley-manning-punished-unlawfully-but-not-enough-to-warrant-more-than-weak-relief/>.

¹⁹ MITCHELL & GOSZTOLA, *supra* note 5, at 171–79. See also *Manning Charge Sheet*, N.Y. TIMES, <http://graphics8.nytimes.com/packages/pdf/politics/20110302-manning.pdf> (last visited Mar. 4, 2013).

²⁰ 10 U.S.C.A. § 904 (West, current through P.L. 113-57 (excluding P.L. 113-54 and 113-56)) (“Any person who . . . aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or . . . without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly . . . shall suffer death or such other punishment as a court-martial or military commission may direct.” *Id.* (emphasis added)).

²¹ See *About Pvt. Manning*, PVT. MANNING SUPPORT NETWORK, <http://www.bradley-manning.org/learn-more/bradley-manning> (last visited Nov. 5, 2013).

²² David E. Coombs, *PFC Manning’s Written Statement in Support of His Guilty Plea*, THE LAW OFFICES OF DAVID E. COOMBS (Mar. 4, 2013), <http://www.armycourt martialdefense.info/2013/03/pfc-mannings-written-statement-in.html> (“Through his plea

ning on the remaining charges, including the Aiding the Enemy charge; Manning chose to be tried by a military judge alone, not a jury.²³ On June 3, 2013, after more than three years in military detention, Manning's court-martial began, and on July 30, 2013, she was cleared of the Aiding the Enemy charge but found guilty of five espionage charges, for which she was sentenced to thirty-five years in prison.²⁴

A. *Article 32 Hearing—Manning's First Appearance in Court*

This Note is primarily concerned with the earliest defense strategies presented by Coombs during the Article 32 hearing between December 16 and December 22, 2011. A pretrial investigatory hearing, called an Article 32 hearing, is required to ensure there are sufficient facts to support a prosecution for the offense(s) charged.²⁵ The hearing differs most significantly from a state or federal criminal court grand jury indictment in that the person accused has access to the proceeding and may see the evidence against her, cross-examine witnesses, and present arguments, and is thus an opportunity for the defense to both glean discovery and to present testimony and evidence.²⁶ In this case, the hearing provided the first glimpse of Manning's defense strategy.

Coombs focused heavily on Manning's sexual orientation and gender identity, coupled with narratives about her mental and emotional health, as factors mitigating her culpability.²⁷ The goal

of guilty, PFC Manning has accepted responsibility for his actions of releasing information to Wikileaks. PFC Manning did not plead guilty pursuant to a 'plea bargain' or 'plea deal' with the Government.”).

²³ David E. Coombs, *Pfc. Manning's Offered Plea and Forum Selection*, THE LAW OFFICES OF DAVID E. COOMBS (Nov. 7, 2012), <http://www.armycourt martialdefense.info/2012/11/pfc-mannings-offered-plea-and-forum.html>.

²⁴ See Bill Chappell, *Bradley Manning Court-Martial Begins in WikiLeaks Case*, NPR (June 3, 2013, 5:24 PM), <http://www.npr.org/blogs/thetwo-way/2013/06/03/188404967/bradley-manning-court-martial-begins-in-wikileaks-case>; Ed Pilkington, *Bradley Manning Verdict: Cleared of 'Aiding the Enemy' but Guilty of Other Charges*, GUARDIAN (July 30, 2013), <http://www.theguardian.com/world/2013/jul/30/bradley-manning-wikileaks-judge-verdict>; Paul Courson & Matt Smith, *WikiLeaks Source Manning Gets 35 Years, Will Seek Pardon*, CNN (Aug. 22, 2013, 6:38 AM), <http://www.cnn.com/2013/08/21/us/bradley-manning-sentencing/>.

²⁵ See 10 U.S.C.A § 832 (West, current through P.L. 113-57 (excluding P.L. 113-54 and 113-56)); MANUAL FOR COURTS-MARTIAL, *supra* note 6, at R.C.M. § 405. See also R. CHUCK MASON, CONG. RESEARCH SERV., R41739, MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW 2 (2012), available at <http://www.fas.org/sgp/crs/natsec/R41739.pdf>.

²⁶ MANUAL FOR COURTS-MARTIAL, *supra* note 6, at R.C.M. § 405.

²⁷ Coombs spent the first day of the hearing making an oral motion for the recusal of the investigating officer, Lt. Col. Paul Almanza, on the ground that his position as a senior prosecutor with the Department of Justice—which was engaged in an ongoing investigation of Manning and WikiLeaks—caused a conflict of interest. See Phil

was both to shift the responsibility to Manning's supervisors for not revoking her security clearance or discharging her because of her emotional distress (which was attributed to her gender identity),²⁸ and also to support a diminished capacity defense by showing Manning did not have the intent to aid the "enemy," which the 10 U.S.C. § 904 statute requires.

At the hearing, Coombs questioned Army investigators about whether they were aware of Manning's cyber "alter ego" (Breanna Manning), or that Manning had sent an email to her supervisor SFC Paul Adkins in April 2010 stating that she suffered from GID, including a photograph of herself in traditionally feminine clothing.²⁹ One investigator who searched Manning's home after the arrest testified, upon questioning by Coombs, that she discovered a pamphlet about facial feminization and gender reassignment surgeries and a study entitled "Transsexuals in the Military: Flight into Hypermasculinity."³⁰ When the prosecutor challenged the relevance of this line of questioning, Coombs replied that the questions "were relevant to whether Pfc. Manning had diminished capacity at the time of the alleged offenses," and therefore lacked the intent necessary to establish the charges.³¹

Coombs also questioned witnesses about Manning's emotional health while in the service.³² Manning's team supervisor, Specialist Jihrleah Showman, testified about an incident in March 2009, where Manning became upset after being told she needed to receive counseling before being deployed in October 2009.³³ After that incident, Showman and Adkins met with Manning to check in;

Fornaci & Jane Zara, *Inside a Military Court Hearing: How the Government Is Railroading Bradley Manning*, TRUTHOUT (Apr. 3, 2012, 1:11 PM), <http://truth-out.org/news/item/8297-inside-a-military-court-hearing-how-the-government-is-railroading-bradley-manning>.

²⁸ Josh Gerstein, *Defense Cites Bradley Manning's Emotional, Gender Issues at Wikileaks Hearing*, POLITICO (Dec. 17, 2011, 9:13 PM), <http://www.politico.com/news/stories/1211/70597.html>.

²⁹ Adkins never reported this email. *Id.* See also Kevin Gosztola, *More Evidence at Manning Hearing on Sgt. Adkins' Dereliction of Duty*, THE DISSENTER (Dec. 20, 2011, 1:32 PM), <http://dissenter.firedoglake.com/2011/12/20/more-evidence-at-manning-hearing-on-sgt-adkins%E2%80%99-dereliction-of-duty/>.

³⁰ MITCHELL & GOSZTOLA, *supra* note 5, at 99–100.

³¹ Gerstein, *supra* note 28 (internal quotes omitted). See also Serena Marshall, *Bradley Manning: Judge Denies Dismissal, Sets Trial Date*, ABC NEWS' THE NOTE (Apr. 25, 2012, 11:56 AM), <http://abcnews.go.com/blogs/politics/2012/04/bradley-manning-judge-denies-dismissal-sets-trial-date/>.

³² See MITCHELL & GOSZTOLA, *supra* note 5, at 105.

³³ Gosztola, *supra* note 29. Showman informed Adkins of this incident, recommending nonjudicial action, but Adkins did not follow the recommendation; Showman also recommended that Manning not be deployed. See *cf.* Kim Zetter, *Army Was*

Showman testified that Manning said she “really felt paranoid because [she] felt people were listening and watching [her] every move.”³⁴ In December 2009, after being deployed, Manning flipped over a table and broke a computer; she was restrained by a fellow soldier based on a fear that she would use a weapon that was in the room.³⁵ After this event, Showman informed Adkins that she felt Manning’s security clearance should be revoked, and Adkins did not take action.³⁶ In May 2010, Showman saw Manning in the fetal position after a therapy session; a few hours later, Manning allegedly hit her after Showman confronted her, and Showman then pinned Manning to the ground.³⁷ While on the ground, Manning told her “[she] was tired of everyone trying to fix [her] and tired of everyone watching [her]. And, if [she] told behavioral health the truth, that would mean [she] would be removed from the army.”³⁸ This statement was assumed to relate either to Manning’s sexuality or gender identity.³⁹

During closing arguments, Coombs declared that GID “is an unfortunate term. It is not a disorder. When a person looks in the mirror and they do not feel that the person they are looking at is the gender they are, that’s not a disorder. That’s reality.”⁴⁰ He then read Manning’s letter to her supervisor, Adkins (who refused to testify, invoking the right against self-incrimination), which described Manning’s struggles with gender identity, her initial wish that the military would help her, and the subsequent realization that she could not get help from family or supervisors while in the military.⁴¹ Coombs emphasized that Manning was not adequately supported by her supervisors, who did next to nothing to help Manning after learning of her emotional distress.⁴² Coombs then recounted other incidents which he claimed indicated that Manning was not emotionally stable, including carving “I want” into a chair with a knife.⁴³ The prosecution, by contrast, did not mention

Warned Not to Deploy Bradley Manning to Iraq, WIRED (Jan. 27, 2011, 6:48 PM), <http://www.wired.com/threatlevel/2011/01/army-warned-about-manning/>.

³⁴ Gosztola, *supra* note 29.

³⁵ *Id.* See also MITCHELL & GOSZTOLA, *supra* note 5, at 106.

³⁶ Gosztola, *supra* note 29.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ MITCHELL & GOSZTOLA, *supra* note 5, at 142.

⁴¹ *Id.*

⁴² *Id.* at 142–43.

⁴³ *Id.* at 143–44. Coombs concluded by offering a completely different argument, which was that the leaks had not caused any actual harm. *Id.*

Manning's emotional or behavioral concerns at all in its closing; it focused solely on the classified information that was leaked and how it intended to prove that Manning was the one who leaked it.⁴⁴ One month after the Article 32 hearing, on February 3, 2012, the convening officer referred all twenty-two charges to a general court-martial.⁴⁵

B. *Subsequent Hearings and Strategies*

After the Article 32 hearing, Coombs did not rely heavily on Manning's gender identity and emotional health, and instead shifted tactics entirely. After steadily chipping away at the prosecutors' case for months,⁴⁶ Coombs and Manning unveiled a proper whistleblower defense on February 27, 2013, when Manning read a statement admitting she leaked the cables and voluntarily pleading guilty to lesser included offenses related to her actions.⁴⁷ By taking "full responsibility" for providing the materials to WikiLeaks, Manning confirmed that she knew what she was doing when she leaked

⁴⁴ *Id.* at 144–47.

⁴⁵ *Bradley Manning: US General Orders Court Martial for WikiLeaks Suspect*, GUARDIAN (Feb. 3, 2012), <http://www.guardian.co.uk/world/2012/feb/04/bradley-manning-court-martial-wikileaks>. The general court-martial is reserved for the most serious offenses and is the only type at which charges carrying death may be heard. See Pollack, *supra* note 6, at 5.

⁴⁶ For more information about other defense strategies employed since the Article 32 hearing, many of which do not rely on speculations or assumptions about Manning's gender identity, see generally THE LAW OFFICES OF DAVID E. COOMBS (Mar. 1, 2013), <http://www.armycourt martialdefense.info>. Other major and independent media outlets have been closely following the case. See, e.g., *Chelsea Manning (Formerly Bradley Manning) Article Archive*, GUARDIAN, <http://www.guardian.co.uk/world/chelsea-manning> (last visited Nov. 29, 2013); *Pfc. Manning Archive*, ALEXAOBRIEN.COM, http://www.alexaobrien.com/secondsight/wikileaks/bradley_manning/ (last visited Nov. 29, 2013) (compiling links to documents, articles, and other files connected to the case); Kevin Gosztola, *Pvt. Manning Coverage*, THE DISSENTER, <http://dissenter.firedoglake.com/tag/bradley-manning/> (last visited Nov. 29, 2013); *Pvt. Manning Coverage*, NATION, http://www.thenation.com/search/apachesolr_search/bradley%20manning and http://www.thenation.com/search/apachesolr_search/chelsea%20manning (last visited Nov. 29, 2013); *Bradley Manning Archive*, DEMOCRACY NOW!, http://www.democracynow.org/topics/bradley_manning (last visited Nov. 29, 2013); *Bradley Manning Archive*, WIRED, <http://www.wired.com/threatlevel/category/bradley-manning/> (last visited Nov. 29, 2013). Mainstream media coverage has been much more sporadic, with *The New York Times* being marginally more consistent than others. See, e.g., *Articles About Bradley Manning*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/m/bradley_e_manning/index.html (last visited Apr. 8, 2013).

⁴⁷ Alexa O'Brien, *Pfc. Bradley E. Manning's Statement for the Providence Inquiry*, ALEXAOBRIEN.COM (Feb. 28, 2013, 11:59 AM), http://www.alexaobrien.com/secondsight/wikileaks/bradley_manning/pfc_bradley_e_manning_providence_hearing_statement.html (audio and transcript of Manning statement).

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the materials and that she did so for moral and political purposes, as a whistleblower.⁴⁸

Although the whistleblower defense became the official strategy, the early use of Manning's gender identity as a defense strategy to mitigate Manning's culpability raised eyebrows and prompted much criticism and this criticism remains relevant in an ethical analysis of the strategy. What was said and done cannot be unsaid or undone, and the public (and potentially judicial) response to the early strategy serves as a lesson to those of us committed to both social justice and individual defense.

Upon examination, the strategy appears to have been employed in the context of a hearing in which nearly all the defense requests for discovery were denied, including those for exculpatory evidence.⁴⁹ Additionally, the defense had requested forty-seven witnesses⁵⁰ but was allowed only two, while the prosecution was allowed to call twenty-one witnesses.⁵¹ Through this lens, the tactic may have been born more of desperation than intentional strategy. Coombs made an early choice between two defense theories, neither of which was ideal. First, there was a story about an isolated, emotionally unstable, young trans person who attempted to go through the chain of command and get help from supervisors but was ignored. In this story, the prosecutor could not establish the "intent" required by the Aiding the Enemy statute because Manning suffered from a psychiatric disorder and thus had diminished capacity and was not responsible for her actions. The second story is that of a freedom-fighting whistleblower who saw war crimes being committed by the military in the midst of an unjust war and was compelled to expose them. Here, Manning was cognizant of her actions, but was justified in so acting because of the immorality of the war in Iraq and the military industrial complex. As it turns out, Manning's experience was an amalgamation of the

⁴⁸ See Kevin Gosztola, *Bradley Manning Pleads Guilty to Some Offenses (Updates)*, THE DISSENTER (Feb. 28, 2013, 11:00 PM); Spencer Ackerman, *Bradley Manning Takes "Full Responsibility" for Giving WikiLeaks Huge Government Data Trove*, WIRED (Feb. 28, 2013, 4:08 PM), <http://www.wired.com/threatlevel/2013/02/bradley-manning/>; Scott Shane, *Soldier to Face More Serious Charges in Leak*, N.Y. TIMES (Mar. 1, 2013), <http://www.nytimes.com/2013/03/02/us/manning-to-face-more-serious-charges-in-leak.html>; Floyd Abrams & Yochai Benkler, *Death to Whistle-Blowers?*, N.Y. TIMES (Mar. 13, 2013), <http://www.nytimes.com/2013/03/14/opinion/the-impact-of-the-bradley-manning-case.html>.

⁴⁹ MITCHELL & GOSZTOLA, *supra* note 5, at 104.

⁵⁰ David E. Coombs, *Defense Witness List*, THE LAW OFFICES OF DAVID E. COOMBS, <http://www.armycourt martialdefense.info/2011/12/defense-witness-list.html> (follow "witness list" hyperlink) (last visited Mar. 1, 2013).

⁵¹ MITCHELL & GOSZTOLA, *supra* note 5, at 148.

two stories. To determine if Coombs was justified in his decision to rely on GID, it is crucial to analyze the diagnosis and its stigma, implications, and impacts on trans people.

II. CAN GENDER IDENTITY “MAKE” A PERSON AID THE ENEMY?

Before Manning’s gender and sexuality were raised by Coombs, they were raised in the court of public opinion—the media. *The New York Times* ran an article soon after Manning’s arrest which traced her childhood from rural Oklahoma, to rural Wales, where classmates made fun of her “for being gay,” to the Army, where she was forced to conceal her sexuality.⁵² The article boldly postulated that “some of [Manning’s] friends say they wonder whether [her] desperation for acceptance—or delusions of grandeur—may have led [her] to disclose the largest trove of government secrets since the Pentagon Papers.”⁵³

The media’s focus on Manning’s gender identity led some to question—what exactly did her gender identity, even if coupled with severe emotional distress about it, have to do with a capital charge of aiding enemy terrorists?⁵⁴ The fact that Coombs did not immediately use a whistleblower defense, in light of Manning’s clear statements in the chat logs that her actions were motivated by political conscience,⁵⁵ was publicly criticized:

The emotional problems of loneliness and alienation Manning confronted are hardly atypical for a perceptive 20-year-old, particularly one with a long-estranged father dealing with issues of sexual orientation and gender identity who, after being raised in a tiny evangelical community in Oklahoma, finds himself deployed to Baghdad as part of the U.S. Army’s brutal war in Iraq The notion that these reactions to wholly unjustified, massive blood-spilling is psychologically warped is itself warped. The reactions described there are psychologically healthy; it’s

⁵² Ginger Thompson, *Early Struggles of Soldier Charged in Leak Case*, N.Y. TIMES (Aug. 8, 2010), <http://www.nytimes.com/2010/08/09/us/09manning.html>. See also Steve Fishman, *Bradley Manning’s Army of One*, N.Y. MAGAZINE, July 3, 2011, available at <http://nymag.com/news/features/bradley-manning-2011-7/>.

⁵³ Thompson, *supra* note 52.

⁵⁴ Mike Bruner, *Manning Defense’s Focus on Gender Identity Disorder Alarms Some*, NBCNEWS.COM (Dec. 21, 2011, 6:28 AM), http://openchannel.msnbc.msn.com/_news/2011/12/21/9590399-manning-defenses-focus-on-gender-identity-disorder-alarms-some. See also MITCHELL & GOSZTOLA, *supra* note 5, at 138; Manuel, *supra* note 7.

⁵⁵ Hansen, *supra* note 7 (“[I]nformation should be free / it belongs in the public domain / because another state would just take advantage of the information . . . try and get some edge / if its [sic] out in the open . . . it should be a public good” . . .).

far more psychologically disturbed NOT to have the reactions Manning had.⁵⁶

A. *The Whistleblower Defense*

Several commentators called attention to the logical links between a whistleblower and being queer and/or trans. Lieutenant Daniel Choi, an opponent of DADT, said about Manning, “I’m proud of him, as a gay soldier, because he stood for integrity . . . the gay community is [the] only one that bases its membership . . . on integrity and telling the truth.”⁵⁷ Choi also said: “That Bradley voiced his concerns proves he was the least unstable and most moral of all the members of his team. That he happens to be gay or transgender gives our community a new hero who brings great credit to the moral force of our people in this world.”⁵⁸ Other commentators noted that “queer activists have long known, there is power and transcendence in choosing truth, even when that truth makes others uncomfortable”;⁵⁹ that queer people should support Manning because “many of us have firsthand experience with being abused by the state”; and that her actions were in line with the “anti-war, anti-establishment values the gay movement used to champion before becoming more narrowly focused on marriage equality and the repeal of Don’t Ask Don’t Tell.”⁶⁰

However, some within the LGBT community did not consider Manning’s actions heroic. For military assimilationists, “Manning doesn’t fit into the affluent, we-are-just-like-you vision of gay normalcy He’s not the poster boy for the campaign they’ve been running for gays in the military.”⁶¹ A spokesperson for the Trans-

⁵⁶ Glenn Greenwald, *The Motives of Bradley Manning*, SALON (July 4, 2011, 8:05 AM), http://www.salon.com/2011/07/04/manning_11/.

⁵⁷ Eliza Gray, *How Bradley Manning Became a Gay Martyr*, NEW REPUBLIC (Aug. 21 2012), <http://www.tnr.com/blog/plank/106382/how-bradley-manning-became-gay-martyr>.

⁵⁸ Dan Choi, *We Must Stand with Bradley Manning*, MYFDL (July 14, 2011, 2:49 PM), <http://my.firedoglake.com/danchoi/2011/07/14/dan-choi-we-must-stand-with-bradley-manning/>.

⁵⁹ Reitman, *supra* note 1.

⁶⁰ Gray, *supra* note 57.

⁶¹ *Id.* See also Larry Goldsmith, *Bradley Manning: Rich Man’s War, Poor (Gay) Man’s Fight*, COMMON DREAMS (June 7, 2011), <https://www.commondreams.org/view/2011/06/07-6> (“Bradley Manning is not that butch patriotic homosexual, so central to the gays-in-the-military campaign, who Defends Democracy and Fights Terrorism with a virility indistinguishable from that of his straight buddies Having grown up in a dysfunctional family in a small town in the South, he is that lonely, maladjusted outsider many gay people have been, or are, or recognize, whether we wish to admit it or not. He broke the law, the President says. And he did so . . . because he wasn’t man enough to deal with the pressure. . . . This is, of course, the classic argument about

gender American Veteran's Association (TAVA) stated that "[d]espite all of our discrimination, I don't think that it occurred to any of us once to sell out our country because of that. . . . We're not supporting him . . . or her."⁶² The Executive Director of the Log Cabin Republicans (LCR) said:

This shameful defense is an offense to the tens of thousands of gay servicemembers who served honorably under [DADT]. We all served under the same law, with the same challenges and struggles. We did not commit treason because of it. . . .

. . . For [Coombs] to suggest that [Manning's] orientation and/or gender identity be part of a defense or excuse for misbehavior is as unacceptable as the use of a "gay panic" defense by a murderer.⁶³

While TAVA and LCR clearly felt Manning's actions were morally wrong and that Coombs's strategic use of Manning's gender and sexuality tarnished the image of LGBT people seeking acceptance in the military, others opposed the defense because it relied on GID as a psychiatric disorder, linking it to the seemingly insulting concept of "diminished capacity."

B. *Gender Identity—Disorder?*

Before analyzing the DSM diagnosis of GID, it is important to define key terminology and distinguish concepts.⁶⁴ "Gender identity" refers to each person's subjective understanding of themselves as being men, women, a combination of those, or neither, and can change and evolve over time. Gender identity is distinct from a person's *biological sex*, which also exists on a continuum from male to female.⁶⁵ "Transgender" is an umbrella term that can be used to describe a person "whose gender identity and/or expression . . . does not or is perceived to not match stereotypical gender norms

gays and national security—they'll get beat up or blackmailed and reveal our secrets.").

⁶² Adam Klasfeld, *Gender Politics in Manning-Wikileaks Case*, Courthouse News Service (Mar. 13, 2012, 12:09 PM), <http://www.courthousenews.com/2012/03/13/44632.htm>.

⁶³ R. Clarke Cooper, *Manning's Defense Dishonors Gay GI's*, STARS AND STRIPES (Dec. 21, 2011), <http://www.stripes.com/manning-s-defense-dishonors-gay-gis-1.164136>.

⁶⁴ See *Transgender 101*, *supra* note 11; *Trans 101*, SYLVIA RIVERA LAW PROJECT, available at <http://srp.org/resources/trans-101/> (last visited Mar. 11, 2013).

⁶⁵ The terms "intersex" and "disorders of sex development" are both used to describe several circumstances under which people's bodies do not fall squarely within the male/female binary rubric. See *Glossary of Terms*, ACCORD ALLIANCE, <http://www.accordalliance.org/learn-about-dsd/glossary.html> (last visited Mar. 11, 2013). See also INTERSEX SOCIETY OF NORTH AMERICA, www.isna.org (last visited Mar. 11, 2013).

associated with [their] assigned gender at birth.”⁶⁶ “Sexual orientation” is entirely distinct, referring to whom a person is attracted. A deviation from the “norm” within each of these categories may result in a person being diagnosed with a mental disorder listed in the DSM.⁶⁷ “Homosexuality” as a psychiatric diagnosis was not removed from the DSM until 1973.⁶⁸ However, the first edition that did not include homosexuality (DSM-III) introduced GID in children as a diagnosis, making it clear that gender conformity was of more concern than a person’s sexual activity.⁶⁹

The GID diagnosis has been contested by medical professionals⁷⁰ and rejected by some trans and queer advocates because it enforces an artificial norm of gender appropriateness and heteronormativity.⁷¹ Scholar and activist Dean Spade has criticized the “gatekeeping role that medical providers occupy in the lives of trans people . . . [where] medical evidence is required for various

⁶⁶ SYLVIA RIVERA LAW PROJECT, *supra* note 64 (“Transgender people have an enormous and beautiful gender diversity. Among transgender as among non-transgender people, there are feminine women, masculine women, androgynous women, feminine men, androgynous men, masculine men, to name just a few. There are infinitely different ways to be male and infinitely different ways to be female. And there are infinite ways to be neither.”).

⁶⁷ Arlene Istar Lev, *Disordering Gender Identity: Gender identity disorder in the DSM-IV-TR*, 17 J. OF PSYCHOL. & HUM. SEXUALITY 35, 38 (2005), available at http://choicesconsulting.com/assets/Disordering_Gender_Identity_JOURNAL.pdf.

⁶⁸ *Facts About Homosexuality and Mental Health*, U.C. DAVIS, http://psychology.ucdavis.edu/rainbow/html/facts_mental_health.html (last visited Nov. 5, 2013).

⁶⁹ Ellen K. Feder, *Power/Knowledge*, in MICHEL FOUCAULT: KEY CONCEPTS 55, 64 (Diana Taylor ed., 2011). In the previous iteration of the DSM, GID was diagnosed if a person met four criteria: 1) “A strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex); 2) “[p]ersistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex”; 3) “[t]he disturbance is not concurrent with a physical intersex condition”; and 4) “[t]he disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.” DIAGNOSTIC AND STATISTICAL MANUAL IV-TR, available at http://www.aclu.org/files/images/asset_upload_file155_30369.pdf. Section 302.6 Gender Identity Disorder in Children. Section 302.85 Gender Identity Disorder in Adolescents or Adults. GID was removed from the DSM-5 in 2013.

⁷⁰ Lev, *supra* note 67, at 36–37.

⁷¹ Dean Spade, *Law as Tactics*, 21 COLUM. J. GENDER & L. 40, 48 (2012) (“The diagnostic criteria of Gender Identity Disorder produces a fiction of a naturalized, untroubled binary gender identity for non-trans people, including a gender-appropriate childhood filled with gender-appropriate toys, role plays and friends. The existence of the criteria, we have also asserted, establishes a mechanism of surveillance by creating a category of deviance that gender non-normative behavior can trigger, which has often particularly led to involuntary psychiatric treatment in young people.”). See also Judith Butler, *Undiagnosing Gender*, in TRANSGENDER RIGHTS 275 (Paisley Currah et al., eds. 2006) (noting that GID serves to “pathologize as a mental disorder what ought to be understood instead as one among many human possibilities of determining one’s gender for oneself”).

forms of recognition of a trans person's gender identity or eligibility for treatment . . . determining which of us are true"⁷² Michel Foucault also recognized the role that medical normalization plays in controlling the lives of those deemed "other" by the medical establishment.⁷³ Others criticize the diagnosis because of how it may be perceived: "[f]or conservatives, [the GID diagnosis] provided rhetorical carte blanche to describe the entire trans [community] as disordered, delusional, and mentally ill."⁷⁴ Some claim the existence of the disorder itself inflicts emotional and psychological harm on children and adults who are gender nonconforming, where they otherwise may not experience such internal distress about their gender.⁷⁵

Such critiques⁷⁶ and direct advocacy eventually led to the APA publishing two position statements, one titled "Access to Care for Transgender and Gender Variant Individuals" and the other "Discrimination Against Transgender and Gender Variant Individuals."⁷⁷ Then, in December 2012, the APA Board of Trustees approved major changes to the DSM, which included the removal of the diagnosis "Gender Identity Disorder" from DSM-5, which was published in May 2013.⁷⁸ A new diagnosis has been put in its

⁷² Spade, *supra* note 71, at 48. Spade makes clear that the fallacy that medical providers are greater experts on people's gender than those people themselves results "in the enforcement of rigid gender norms on trans bodies with doctors often requiring performances of hyper masculinity and femininity read through straight, white, upper class norms. Those who fail to meet the arbitrary, subjective criteria of their medical providers are frequently denied access to care. . . . [T]hese criteria and relationships of authority [are] technologies of the production of gender normativity in which trans bodies experience intensified surveillance and correction."

Id. at 49.

⁷³ See Feder, *supra* note 69, at 62 ("Normalization, the institutionalization of the norm, of what counts as normal, indicates the pervasive standards that structure and define social meaning." There has been a shift from "a focus on health understood as qualities specific to an individual, to normality, a standard imposed from without.").

⁷⁴ Ford, *supra* note 10.

⁷⁵ Butler, *supra* note 71, at 280 ("[W]e have to ask whether submitting to the diagnosis does not involve, more or less consciously, a certain subjection to the diagnosis such that one does end up internalizing some aspect of the diagnosis, conceiving of oneself as mentally ill or 'failing' in normality, or both.").

⁷⁶ There are others. See, e.g., *Gender Identity Disorder and the DSM*, NATIONAL ASSOCIATION OF SOCIAL WORKERS, <http://www.socialworkers.org/diversity/new/lgbtq/51810.asp> (last visited Nov. 5, 2013); GENDER IDENTITY REFORM ADVOCATES, <http://gidreform.org/> (last visited Nov. 5, 2013).

⁷⁷ See Kelley Winters, *The American Psychiatric Association Issues Historic Position Statements on Trans Issues*, GID REFORM BLOG (Aug. 20, 2012), <http://gidreform.wordpress.com/2012/08/20/the-american-psychiatric-association-issues-historic-position-statements-on-trans-issues/>.

⁷⁸ See J. Bryan Lowder, *Being Transgender Is No Longer a Disorder: The American Psychi-*

place, however: “Gender Dysphoria” refers to a temporary state of acute emotional distress people may experience about their gender identity, resulting in “a marked incongruence between one’s experienced/expressed gender and assigned gender,”⁷⁹ as opposed to GID’s overarching pathological disordering.⁸⁰

While many called this a step forward for the trans community, others call attention to the crucial other side of the debate, which is that a diagnosis of GID provides needed medical legitimacy for trans individuals who seek necessary gender-affirming medical treatment such as hormone therapy and surgery, as well as individuals who find themselves caught up in institutional settings which categorize people based on sex and gender, such as prisons, treatment facilities, and shelters.⁸¹ A diagnosis of GID is necessary to receive any hormone therapy or surgical procedures under the Harry Benjamin Standards of Care,⁸² and is the strongest line of defense for trans people who are incarcerated—most often transgender women of color—to demand access to necessary medical treatment in the face of a prison system that so often denies necessary care to those who are locked up.⁸³ Queer theorist Judith Butler argues that, unless an alternative means of accessing necessary health care for low-income trans people is put in place, GID must be used strategically to pursue such treatment.⁸⁴

atric Association Salutes the T in LGBT, SLATE (Dec. 3, 2012, 6:21 PM), http://www.slate.com/articles/health_and_science/medical_examiner/2012/12/dsm_revision_and_sexual_identity_gender_identity_disorder_replaced_by_gender.html.

⁷⁹ See Camille Beredjick, *DSM-V to Rename Gender Identity Disorder ‘Gender Dysphoria,’* ADVOCATE (July 23, 2012, 8:00 PM), <http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria>.

⁸⁰ *Id.*

⁸¹ See Chase Strangio, *Debating ‘Gender Identity Disorder’ and Justice for Trans People*, HUFFINGTON POST (Dec. 5, 2012, 5:59 PM), http://www.huffingtonpost.com/chase-strangio/gender-identity-disorder-dsm_b_2247081.html; see also Lev, *supra* note 67, at 37; Butler, *supra* note 71, at 281; JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN) JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 107–10* (Michael Bronski ed. 2011).

⁸² See HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION, *THE STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS* (5th ed. 1998), available at <http://www.tc.umn.edu/~colem001/hbigda/hstndrd>.

⁸³ Strangio, *supra* note 81 (“[M]edical control over trans bodies and lives will always be most dangerous and violent for our community members in prison, jail, detention, homeless shelters and psychiatric hospitals and institutions. The removal of GID or its changing construction might help to further distance some (most likely white, wealthy, male-identified) trans people from external control over their access to affirming care, while simultaneously subjecting other trans people (low-income, incarcerated, people of color, female-identified) to enhanced control.”).

⁸⁴ See Butler, *supra* note 71, at 288. See also Strangio, *supra* note 81 (“[I]t is helpful to think about what we want from the law and discrete benefits systems and advocate

C. Trans in the Military

Coombs' decision to rely on Manning's transgender identity, in a military setting infamous for being one of the most trans- and homophobic institutions in the U.S.,⁸⁵ was troubling. The repeal of DADT had no effect on trans people in the military, who must remain officially in the closet to either enlist or avoid discharge,⁸⁶ and who suffer abuse and harassment from others enlisted regardless of whether they have expressly come out or not. Discrimination has been described as disparate, with "masculinity in women [being] more acceptable than expressed femininity in men."⁸⁷ Discharge for "sexual gender and identity disorders" is considered administrative, not medical, and therefore people who are discharged on these grounds may not access gender-affirming medical treatment through the Department of Veterans Affairs (VA).⁸⁸ The military, even more than the psychiatric establishment, strictly enforces gender norms through dress and grooming policies.⁸⁹ A deviation from what the military considers "gender appropriate" clothing can result in a person being charged with "cross-dressing" and being subjected to discipline or criminal prosecution.⁹⁰

from that standpoint centering the most vulnerable in our communities rather than looking to those systems to reflect our identities back to us in ways that is most affirming."); Spade, *supra* note 71, at 51 n.32 (suggesting treatment of "gender confirming health care for trans people" more like pregnancy, "something that happens to some bodies and requires care but is not an illness or pathology. . . . [T]rans identity need not be considered 'disordered' in order for health services to be considered necessary.").

⁸⁵ The military has openly discriminated based on sex, gender, and sexual orientation through limits on who can join the military and the Don't Ask Don't Tell policy. See Klasfeld, *supra* note 62; Klasfeld, *supra* note 1.

⁸⁶ See FREEDOM TO SERVE, *supra* note 2, at 29. Enlisting in the military requires undergoing a physical examination, and a person can be disqualified for any surgeries deemed to create "major abnormalities and defects of the genitalia." DEP'T OF DEFENSE, INSTRUCTION 6130.03, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE MILITARY SERVICES ¶¶ E4.14(e) & E4.15(l) (2010), available at <http://www.dtic.mil/whs/directives/corres/pdf/613003p.pdf>. Further, "transsexualism" and "transvestism" are considered "psychosexual conditions" which disqualify a person seeking to enlist. *Id.* ¶ E4.28(r).

⁸⁷ Katie Miller, *The New DADT: The Military's Ban on Transgender Service*, OUTSERVE (Jan. 31, 2012) <http://outservemag.com/2012/01/the-new-dadt-the-militarys-ban-on-transgender-service/>.

⁸⁸ FREEDOM TO SERVE, *supra* note 2, at 30. *But see* DEP'T OF VET. AFF., VHA DIRECTIVE 2013-2003, PROVIDING HEALTH CARE FOR TRANSGENDER AND INTERSEX VETERANS (2013), available at http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2863 (establishing policy guidelines for the "respectful delivery of healthcare" to transgender and intersex veterans enrolled in or eligible to receive VA care).

⁸⁹ See FREEDOM TO SERVE, *supra* note 2, at 29.

⁹⁰ *Id.* at 29-30.

Viewing Manning's case through the lens of trans advocacy and the critiques of GID, it is important to consider next the system of punishment Manning faces and the role Coombs plays as defense counsel. While Manning is not being tried in the Article III criminal system, the military criminal system is analogous in important ways.⁹¹ The next section will explore the complex role of defense counsel, the rights of people accused of crimes vis-à-vis their attorneys, and how the two coalesce in the development of defense strategies.

III. THE CRIMINAL SYSTEM AND THE COMPLICATED ROLE OF THE DEFENSE ATTORNEY

The conundrum of how to serve both the individual client and the larger community is one that has troubled social justice lawyers and led to movements in radical and community lawyering in the civil context.⁹² The challenge comes to an ethical head in the realm of criminal defense work. Different schools of thought have emerged to grapple with the question of what a criminal defense attorney should do when the interests of her client conflict with or cause harm to the interests of others, particularly marginalized and oppressed communities. As one leading theorist has phrased the issue, must a defense attorney "refrain from zealous advocacy, or even subvert their clients' cases, whenever the social good of doing so outweighs the moral costs"?⁹³

This section will first examine justifications for punishment, which are helpful to frame an analysis about effective defense tactics. Next, it will review the role of the defense attorney and the rights of people accused of crimes vis-à-vis their attorneys, highlighting conflicts that can emerge when developing a defense strategy, and the rules that govern—to an extent—when counsel and client disagree. Finally, this section will examine two schools of thought that grapple with such conflicts: those who believe in zeal-

⁹¹ Procedural safeguards shared by Article III courts and general courts-martial include, among others, the presumption of innocence, the right to remain silent, and—most relevantly for this note—the right to effective assistance of counsel (discussed in more detail below in Section III.B). MASON, *supra* note 25, at 9–10. *See also* ELSEA, *supra* note 17.

⁹² *See, e.g.*, Gabriel Arkles, Pooja Gehi & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building A Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579 (2010); Rose Cuison Villazor, *Community Lawyering: An Approach to Addressing Inequalities in Access to Health Care for Poor, of Color and Immigrant Communities*, 8 N.Y.U.J. LEGIS. & PUB. POL'Y. 35, 48–51 (2004).

⁹³ David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1758 (1993).

ous advocacy at all costs on behalf of individual clients, and those who believe that dignity-based, anti-humiliation, anti-subordination principles should guide individual representation in a way that is ultimately and primarily accountable to the larger community. Each perspective will be discussed in turn.

A. *Why Do We Punish?*

Two recognized theoretical justifications for punishment in American criminal law are utilitarianism and retributivism. Utilitarian theory views punishment as a harm to be avoided, focusing on deterrence, incapacitation, and rehabilitation⁹⁴ to maximize social good and minimize future crime. Retributivism, by contrast, is a backwards-looking theory focused on morality-based punishment: wrongdoers should be punished because they deserve it—they get their “just deserts”—not because it will result in fewer crimes.⁹⁵ In both contexts, the question remains: should a person be punished for involuntary acts? For retributivists, punishment is only deserved if the wrongdoer chose to violate a rule of society—involuntary actions are not subject to the same eagerness to punish. On the other hand, utilitarianism “can [be used to] justify the punishment of a person known to be innocent of wrongdoing.”⁹⁶

Michel Foucault theorized that a main justification for punishment and imprisonment was to create “docile bodies . . . bodies that were both efficient in performance and obedient to author-

⁹⁴ Proponents of utilitarianism view punishment as the means to achieve the goal of general deterrence (punishing one person deters others from committing similar acts) as well as specific deterrence by incapacitation (being locked up and prevented from misconduct), intimidation (people are afraid of incarceration and conform their behavior to the law to avoid punishment), and rehabilitating the defendant to help him to reform his actions. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 14–15 (5th ed. 2009).

⁹⁵ Three main subsets of retributivism are theoretically prominent. The first is revenge-based, whereby the victim uses the state to take out his anger and hatred of the wrongdoer. The second subset views punishment as a way of achieving “social balance” in a society where one of its members has breached the social contract by choosing not to be burdened with rules that otherwise benefit everyone. The third subset sees punishment as a means to right a wrong—getting even by making the victim whole through the punishment of the perpetrator. *See* DRESSLER, *supra* note 94, at 14–19. *See also* Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 *OR. L. REV.* 631, 638–43 (2004) (providing an overview of utilitarian and retributive theories of punishment); CYNTHIA LEE & ANGELA HARRIS, *CRIMINAL LAW CASES AND MATERIALS* 6–7 (2d ed. 2009) (same).

⁹⁶ DRESSLER, *supra* note 94, at 20.

ity.”⁹⁷ Prisons discipline the bodies of those locked up within them by manipulating, classifying, examining, and constantly surveilling them; this discipline “make[s] them more useful for mass production and at the same time easier to control.”⁹⁸ According to Foucault, normalization is also a goal of punishment, as prisons were ostensibly designed to “inscribe the norms of the society in the bodies of criminals by subjecting them to reconstructed patterns of behaviour.”⁹⁹ The military’s punishment system recognizes discipline explicitly as a *modus operandi*: “it might be said that discipline is as important as liberty interests.”¹⁰⁰

B. *The Rights of People Accused of Crimes and the Role of Defense Counsel*

Once involved in the criminal or military punishment system, a person facing jail or prison time arguably needs the assistance of counsel to navigate those intentionally complex legal systems; in this light, the role of the defense attorney is to keep her clients from being locked inside a cage in jail or prison for any amount of time.¹⁰¹ How forcefully a defense attorney should counsel her client with regards to a particular defense strategy to that end is debatable. Crucially, the role of defense counsel is to advocate for her client regardless of whether the person is guilty or innocent.

People accused of crimes have a right to *effective* assistance of counsel, both in military and state criminal courts.¹⁰² Effective assistance is often referred to in terms of how the defense attorney per-

⁹⁷ Todd May, *Foucault’s Conception of Freedom*, in MICHEL FOUCAULT: KEY CONCEPTS 71, 75–76 (Dianna Taylor ed., 2011).

⁹⁸ Johanna Oksala, *Freedom and Bodies*, in MICHEL FOUCAULT: KEY CONCEPTS 85, 87 (Dianna Taylor ed., 2011).

⁹⁹ *Id.* at 89.

¹⁰⁰ MASON, *supra* note 25, at 2.

¹⁰¹ With regards to representing transgender people who face incarceration, it must be noted that “verbal harassment, physical abuse, and sexual assault and coercion create an exceptionally dangerous climate for transgender, gender non-conforming, and intersex people in prison,” particularly for transgender people of color who are most likely to be locked up. THE SYLVIA RIVERA LAW PROJECT, *IT’S WAR IN HERE* 26 (2007), available at <http://srlp.org/files/warinhere.pdf>.

¹⁰² *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984) (finding that to establish that their attorney was ineffective, the person represented must show that 1) the attorney’s performance “fell below an objective standard of reasonableness,” and 2) that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”). See also *McMann v. Richardson*, 397 U.S. 759 (1970); ELSEA, *supra* note 17 (noting that in the military court context, a defendant’s appointed counsel must be “certified as qualified and may not be someone who has taken any part in the investigation or prosecution, unless explicitly requested by the defendant” (citing 10 U.S.C. § 827)).

forms during trial, but one area that has been studied, debated, and affected by recent Supreme Court decisions, is the extension of the duty of effective assistance to pre-trial counseling with respect to whether to go to trial or take a plea.¹⁰³ When counseling a client about whether or not to take a plea, defense counsel may utilize varying degrees of persuasion—from remaining neutral and making suggestions to advising and even urging.¹⁰⁴ Neutrality comports with a client-centered model of defense lawyering, but the Second Circuit found that such a “hands-off” approach did not rise to the level of *effective* assistance.¹⁰⁵ Another key concern with regards to deciding the appropriate level of persuasion is “[t]he danger[] of paternalism, and the attorney’s subordination of her client,” to the attorney’s own ideas of what is best for her client.¹⁰⁶

The ethical rules themselves are mere guideposts—the answer to the debate comes down to personal ethics.¹⁰⁷ While the person accused has the “ultimate authority” to make all fundamental decisions such as whether or not to plead guilty, testify, or waive a jury trial,¹⁰⁸ the Comments to Model Rule 1.2 suggest that defense counsel is charged with making tactical or strategic decisions. Crucially, however, “concern for third persons who might be adversely affected” is assigned to the client.¹⁰⁹ Model Rule of Professional Conduct 2.1 provides: “In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic,

¹⁰³ See Josh Bowers, *Lafler, Frye, and the Subtle Art of Winning by Losing*, 25 FED. SENT’G REP. 126, 126 (2012) (“[I]f a prosecutor makes an offer that is too good to refuse, the defense attorney must not only inform the defendant of the offer but perhaps also take steps to persuade the defendant to accept.”). See also Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 852–53 (1998), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2103&context=bclr>.

¹⁰⁴ See generally Zeidman, *supra* note 103 (giving an overview of what defense counsel must and may do with regards to informing clients of plea offers and the consequences of taking them).

¹⁰⁵ See *id.* at 847–48; see also *id.* at 908 (“Although posited as a response to lawyers’ paternalistically telling their clients what to do, neutrality, premised on notions that clients will be unable to make independent judgments once their lawyer advises a particular choice, treats clients as inherently incapable of listening to advice, weighing it and reaching an autonomous decision. In order to free clients from attorney influence, counsel withholds information—her opinion—which might be important for the client to evaluate in order to make a fully informed decision.”).

¹⁰⁶ *Id.* at 900.

¹⁰⁷ ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 201, at 339 (5th ed. 1988) (“The limits of allowable persuasion are fixed by the lawyer’s conscience.”).

¹⁰⁸ Zeidman, *supra* note 103, at 853 (quoting *Jones v. Barnes*, 463 U.S. 745, 751 (1983)).

¹⁰⁹ MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 2 (2011).

social and political factors, that may be relevant to the client's situation." Model Code EC 7-9 provides that, while a lawyer should always act consistent with the best interests of her client, "when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action." However, Model Code EC 7-8 provides that "the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for the lawyer." And Model Rule 1.16(b)(4) states that a lawyer has discretion to withdraw from representation if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

A new ethical rule was considered by the ABA as a revision to Model Rule 8.4, the rule defining attorney misconduct, in the 1990s; the rule would have prohibited the use of bias-based defenses, but it was not adopted.¹¹⁰ Massachusetts did enact ethical rules that comported with the proposed revision to the Model Rule, but they were limited by qualifying language that specified the rules do not "preclude legitimate advocacy when race, sex, national origin, disability, age, or sexual orientation, or another similar factor is an issue in the proceeding."¹¹¹

The following debate illustrates two views about what defense counsel should do when she disagrees with her client about a particular defense tactic or strategy based on the potential harm or benefit to the individual or the community.

C. Zealous Advocacy v. Anti-subordination

Defense strategies may be extremely controversial, potentially invoking negative stereotypes about a marginalized community for the good of the individual person accused. For example, the "gay panic" defense draws on provocation and "heat of passion" defenses to mitigate the culpability of an individual who reacts ("understandably") violently to the sexual advances of a person of the same sex; it does this by legitimizing straight male fear and abhorrence of gay male sexuality, with the end goal being a reduced

¹¹⁰ See, e.g., Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO J. LEGAL ETHICS 1, 24 (1994). The rejected rule provided that "[i]t is professional misconduct for a lawyer to . . . manifest by words or conduct, in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status. *This paragraph does not preclude legitimate advocacy with respect to the foregoing factors.*" *Id.* (emphasis added).

¹¹¹ *Id.* at 24 n.98.

charge (usually from murder to manslaughter).¹¹² Based on the same reasoning, “transgender panic” has been used in cases of assault or murder of trans individuals, most notably in the case of Gwen Araujo.¹¹³ This genre of defense has been successful with juries, in that defendants’ convictions have been reduced from murder to manslaughter; however, the defense was disallowed in the famous Matthew Shepard case and has been roundly criticized for legitimizing homophobia and pandering to jury bias.¹¹⁴ Note as well that the controversial and movement-damaging defense was disallowed in the case of a white, gay, cisgender man, while it was allowed in the case of a transgender Latina woman—racism and classism are clearly at play in all parts of the criminal system, including defense strategies. To frame the debates that follow, the question of the ultimate effect on society of such defenses is key. Those who oppose their use ultimately argue that defenses like “gay and trans panic” signal to people that violent attacks on trans and queer people are excusable.¹¹⁵

The two schools of thought discussed below differ in how they approach the use of race, culture, gender, and sexuality by defense attorneys. Prof. Muneer Ahmad tackles the debate by posing the question whether “the ethical rules permit, or even require, lawyers to strategically deploy racist, sexist or homophobic narratives that will advance their clients’ interests?”¹¹⁶ These approaches contextualize the “tension that arises between the progressive [defense] lawyer’s political commitment to anti-subordination on the one hand,

¹¹² See Teresa Marie Garmon, *The Panic Defense and Model Rules Common Sense: A Practical Solution for A Twenty-First Century Ethical Dilemma*, 45 GA. L. REV. 621, 633 (2011); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 489 (2008).

¹¹³ Victoria L. Steinberg, *A Heat of Passion Offense: Emotions and Bias in “Transgender Panic” Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 499, 501 (2005). See also Jillian T. Weiss, *Banning the “Trans Panic Defense,”* BILERICO PROJECT (Sept. 23, 2008, 7:00 PM), http://www.bilerico.com/2008/09/banning_the_trans_panic_defense.php.

¹¹⁴ Garmon, *supra* note 112, at 635.

¹¹⁵ Though beyond the scope of this Note, a related concept is the current debate on hate crimes legislation, which was created to signal moral indignation for bias-based violence by imposing harsher penalties (i.e., more time locked up in prison) for those alleged to have committed hate crimes. Several queer and trans organizations, however, have come out against hate crimes legislation, arguing that increasing punitive responses to homophobia only serves to structurally reinforce violence by promoting incarceration and the violence of the prison industrial complex. For a broad overview of this topic, see Che Gossett, Reina Gossett & AJ Lewis, *Reclaiming Our Lineage: Organized Queer, Gender-Nonconforming, and Transgender Resistance to Police Violence*, THE SCHOLAR & FEMINIST ONLINE (2011), <http://sfonline.barnard.edu/a-new-queer-agenda/reclaiming-our-lineage-organized-queer-gender-nonconforming-and-transgender-resistance-to-police-violence/0/>.

¹¹⁶ Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER SOC. POL’Y & L. 117, 117 (2002).

and the particular demands of an individual client's case on the other," including the client's constitutional right to effective assistance of counsel.¹¹⁷

i. Zealous Advocacy and Public Defenders

The philosophy of zealous representation was famously articulated by Lord Brougham in 1821:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.¹¹⁸

Abbe Smith, a prominent legal scholar and former public defender who has written extensively on the topic, agrees that zealous advocacy is an imperative, especially for public defenders.¹¹⁹ Smith explicitly defends the use of stereotypes to paint a certain picture of the defendant or complaining witness or to poke holes in the government's theory, if this will advance her clients' interests: "[d]efense lawyers cannot afford to be color-blind, gender-blind, or even slightly near-sighted when it comes to race, gender, sexual orientation, and ethnicity, because jurors will be paying close attention and they have come to the trial with their own feelings about these issues."¹²⁰ Smith defended the use of male pronouns when

¹¹⁷ See *id.*

¹¹⁸ 2 Trial of Queen Caroline 8 (London, J. Robins & Co. Albion Press 1820–21).

¹¹⁹ See Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 135–36 (2003) ("[A]dversarial zeal is most important when the stakes are high, the adversary powerful, and the level of trust between the lawyer and client low. The only way to compensate for the disadvantage in resources and power is to allow a more fiercely adversarial ethic on behalf of intimidated and isolated clients who lack the means to hire their own attorneys. Only through zealous advocacy can there be meaningful access to justice."). Importantly, while Smith premises her ethics on the fact that zealous advocacy is imperative in an adversarial system, many dispute that the criminal system is in fact adversarial. See Jed S. Rakoff, *Frye and Lafler: Bearers of Mixed Messages*, 122 YALE L.J. ONLINE 25 (2012), <http://yalelawjournal.org/2012/06/18/rakoff.html> (noting that 97% of federal criminal convictions and 94% of state criminal convictions are the result of guilty pleas, a cooperation between defense and prosecuting attorneys that do not force the prosecution to its burden of proof beyond a reasonable doubt, which in turn leads many innocent people to plead guilty).

¹²⁰ Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 954–55 (2000). See also Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433, 480 (1995) [hereinafter Smith, *Criminal Responsibility*] ("Like many criminal defense lawyers . . . I often raise a

cross-examining a transgender woman complaining witness, and endorsed pointing out her birth-assigned sex (male) despite the fact that she explicitly identified as a woman, where defense counsel represented a cisgender male accused of assaulting her.¹²¹ Persuasion, she claims, is the defender's main tool, and persuasion often involves "playing on the sympathies and prejudices of an audience . . . you get them to identify with the position you're advancing, or at least identify less with your opponent's position."¹²² Another supporter of this view states that zealous advocacy is a moral responsibility, making it necessary for the defense attorney to "separate her individual beliefs and morals from those of her client. . . . The means used and the end attained are not reflective of the lawyer's principles."¹²³

In an interesting career twist, however, Smith was contacted to represent crime victim Claudia Brenner, after she and her partner were shot at in the woods—Brenner was wounded and her partner was killed.¹²⁴ The defendant used the gay panic defense, claiming that after watching the women have sex in the woods he was provoked into shooting them because he had suffered abuse as a child, had been sexually assaulted by men in prison, experienced frequent rejection by women, and because his mother was a lesbian.¹²⁵ While maintaining that she did not find fault with the defense attorney's ethical choices, Smith admitted to feeling good about being on the "right side" in that case.¹²⁶ She cites another case in which she represented a person who was abused by police and falsely accused of assault once it was discovered the person was trans: "Representing this client was entirely consistent with much of what motivates me to be a criminal defender: I was defending a

kind of cultural defense, if the facts allow. I'm likely to suggest that my client's intent was seduction, not rape, and that his ungentlemanly method was the product of machismo and bravado, not a criminal state of mind. . . . Perhaps I am exploiting cultural stereotypes, as opposed to raising a formal cultural defense, but I'm not sure the two are so different. The cultural defenses raised on behalf of newly arrived immigrants and accused rapists sound alike: my client did not intend to commit a crime; he thought he was doing what was expected of him in his cultural milieu; my client didn't do it, the male culture did.")

¹²¹ Abbe Smith, *The Complex Uses of Sexual Orientation in Criminal Court*, 11 AM. U. J. GENDER SOC. POL'Y & L. 101, 110 (2002) ("Though this may have been unseemly, it was an entirely appropriate defense strategy.")

¹²² *Id.* at 115.

¹²³ Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 210 (2000).

¹²⁴ Smith, *supra* note 121, at 111.

¹²⁵ *Id.*

¹²⁶ *Id.* at 112–13.

marginalized member of a social minority (who also happened to be poor and black) who was a victim of ill treatment at the hands of the police.”¹²⁷ She then claims that criminal defense attorneys should follow trends of social justice, not set them, exploiting stereotypes as long as they exist:

[A]s our society becomes more enlightened and accepting, so will criminal practice. There are some who believe that lawyers—and especially criminal trial lawyers, who are sometimes in the public light—ought to lead the way to this new day. I do not think so. I think we ask enough already of those who defend the least popular and least powerful among us.¹²⁸

David Luban, a critic of the absolute imperative of zealous representation, has theorized about a model of legal advocacy which centralizes human dignity and the interactions between attorneys and those they serve, not merely a series of judicial adjudications.¹²⁹ He claims that the professional ideal of “moral activism . . . imposes on lawyers the moral responsibility to ‘break role’ in compelling moral circumstances to respond to the human pathos of those on whom harm would be visited as a result of adhering to professional role obligations.”¹³⁰ He has admitted, however, that his theory applies most strongly to civil legal advocacy, where the parties to the dispute are arguably more equal in terms of power and control; criminal defenders are different—those accused of crimes, particularly low-income people assigned public defenders, face the power of the state with their liberty at stake.¹³¹ Another scholar finds that, while considerations of negative stereotypes and detrimental community effect should be talked about between the attorney and client, the ultimate decision of whether or not to utilize such stereotypes as part of an advantageous criminal defense are ultimately up to the client; the lawyer’s feelings about it should not preclude such a defense.¹³²

The zealous advocacy approach has been criticized for its disregard for the “truth” and its willingness to rely on potentially neg-

¹²⁷ *Id.* at 113.

¹²⁸ *Id.* at 114 (“The criminal lawyer routinely stands between his or her client and the purgatory we call criminal punishment. This is an honorable vocation and one that is essential to our adversarial system of justice.”).

¹²⁹ See Katherine R. Kruse, *The Human Dignity of Clients*, 93 *CORNELL L. REV.* 1343, 1343–48 (2008).

¹³⁰ *Id.* at 1348.

¹³¹ See David Luban, *Are Criminal Defenders Different?*, 91 *MICH. L. REV.* 1729, 1756–58 (1993).

¹³² Gerald F. Uelman, *Lord Brougham’s Bromide: Good Lawyers As Bad Citizens*, 30 *LOY. L.A. L. REV.* 119, 122 (1996).

ative stereotypical narratives—often about race, culture, gender, and sexuality—so long as those stereotypes advance their clients’ interests.¹³³ It is true that defense attorneys put forth to the judge or jury their *client’s* side of a story—in gay and trans panic cases, defense attorneys are merely relating the very real prejudice their client experienced, and which they claim led to their actions. It is certainly not the attorney’s fault if the person accused suffered from bias. However, as Smith alluded, a savvy defender will not rely on a prejudicial stereotype which is not commonly held. The issue is whether the defense attorney must wait for negative stereotypes to fall out of favor before ceasing to exploit them in the courtroom.

ii. Dignitary and Anti-humiliation Postures—Ivory Tower Luxury?

Scholar Anthony Alfieri takes issue with the use of narratives, constructed either by defense attorney or client, that uphold dominant beliefs and assumptions which perpetuate racist stereotypes in cases involving crimes of violence committed by people of color against whites.¹³⁴ The fact that such narratives, which play on the prejudices of the audience and damaging stereotypes, are very persuasive (and thus effective for the defendants who use them) is the main reason not to employ them. Critical race theorist Richard Delgado stated that Alfieri’s critical “attention to the narrative side of lawyering can enable lawyers representing the poor and disenfranchised to achieve a better brand of justice.”¹³⁵ Alfieri agrees with Luban’s model as applied to preserving the human dignity of criminal defendants of color and their communities, but rejects the idea that criminal defense is different.¹³⁶

Smith openly criticized Alfieri for suggesting that defense attorneys should sacrifice their clients’ liberty for the good of the broader community.¹³⁷ To follow Alfieri’s reasoning would be to “completely transform criminal defense lawyers from defenders of

¹³³ See Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1345–49 (1998) (“For defense lawyers, truth is undiscoverable and, moreover, immaterial. Crudely postmodern, they claim a situated truth linked only to standpoint—the standpoint of judge and jury.” *Id.* at 1345.).

¹³⁴ See *id.* at 1345–50.

¹³⁵ RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 51 (2d ed. 2012).

¹³⁶ See Anthony V. Alfieri, *Jim Crow Ethics and the Defense of the Jena Six*, 94 IOWA L. REV. 1651, 1656–59 (2009).

¹³⁷ See Abbe Smith, *Burdening the Least of Us: “Race-Conscious” Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1589–90 (1999).

individuals accused of crime, a difficult enough enterprise, to protectors of the community.”¹³⁸ She ultimately boils it down to this stark prediction: “In practice, Alfieri’s communitarianism would serve to expedite the prosecution and incarceration of the most marginalized.”¹³⁹ Another scholar finds that Alfieri’s thesis “openly restricts defense lawyers [in interracial violence cases] to certain legal arguments, regardless of their value or proximity to ‘objective’ truth.”¹⁴⁰

Alfieri writes primarily about high-profile interracial violence cases in which African-American men are charged with some form of violent assault against a white person. Smith recognized that high-profile cases involving media coverage may indeed mean the defense attorney should abandon strategies she might otherwise employ if such strategies would hurt the defendant’s community.¹⁴¹ Ahmad, by contrast, does not distinguish between high-profile and “smaller” cases in his assertion that negative stereotypes should not be used in defense tactics:

[A]s individual, as particularized, and as client-centered as a representation may be, it does not occur in a vacuum . . . just as the [defenders’] efforts in an individual representation will not eradicate racism, sexism, or homophobia, nor will a client’s individual case, by itself, resolve the systemic oppression of poor people by the criminal justice system. Both efforts depend upon our aggregate efforts, and rely upon the notion that our individual actions, no matter how small, are of consequence. They matter. They are subject to moral scrutiny. Even in the smallest of cases, we are as lawyers creatures in an ecosystem that shifts and responds as we do.¹⁴²

¹³⁸ *Id.* at 1590.

¹³⁹ *Id.* at 1590 n.34.

¹⁴⁰ Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788, 792 (1996).

¹⁴¹ Smith, *supra* note 137, at 1596.

¹⁴² Ahmad, *supra* note 116, at 126. Ahmad continues:

Assume that use of the term “Muslim fundamentalist” will find favor with the judge and that it will be to the client’s advantage. . . . It is, in my mind, not a stretch at all to think that an immigration judge’s subscription to the broad application of the term “Muslim fundamentalist” might affect her judgment on whether to permit [another Arab or Muslim] immigrant’s detention. We must be honest in our recognition of the lawyer’s role and responsibility in shaping this judge’s judgment, and how it might affect others in the future.

The lawyer-client relationship may be a confidential one, but it is not wholly a private one. We can learn from queer theory the value of transparency, of understanding that the acts of individuals are of consequence to the collective. Is there a tension between zeal to the

Ahmad (then a criminal defense clinic professor) ultimately concluded that lawyers should “engage their clients in a meaningful discussion of the potential negative consequences to others of their specific narrative choices.”¹⁴³ Another defense clinic professor agreed with this approach, and wrote about her experience supervising student-attorneys who spoke with their clients about the negative biases that would likely be fueled by defenses they had contemplated, which led the clients to ultimately choose “a fair fight with family members [complaining witnesses] for whom they held complex feelings.”¹⁴⁴

The next section will compare controversial defense strategies that rely on characteristics of the accused and appeal to bias in an attempt to mitigate culpability or obtain a reduced sentence. It will analyze both the justifications and the criticism of these strategies in an attempt to decipher the wisdom of Coombs’ GID defense.

IV. DON’T CRIMINALIZE—PATHOLOGIZE!

The following controversial storytelling tactics—insanity, battered women’s syndrome, rotten social background, and cultural defenses—are used by defenders to present mitigating evidence of personal or cultural characteristics of people accused to show they did not have the mental culpability required by the offense charged.¹⁴⁵ These theories have been criticized as exploitative and reductionist, as racist, anti-feminist, and homophobic. Alternately, they are criticized for letting people off the hook who don’t truly “deserve” it—the genre has been referred to disparagingly as “abuse excuse.”¹⁴⁶ Those who defend these strategies argue that they can humanize defendants and educate judges and juries about the tragedies that occur at the intersections of crime, culture, race, poverty, gender, and mental illness. More importantly, they can produce positive results for people accused of crimes by keeping

individual client and commitment to anti-subordination? Of course there is. But our fidelity to ourselves as lawyers depends upon the honest embrace of such tension as a threshold step to its resolution.

Id. at 126–27.

¹⁴³ *Id.* at 125. See also Nilsen, *supra* note 110, at 23 n.92.

¹⁴⁴ Nilsen, *supra* note 110, at 23 n.92.

¹⁴⁵ These tactics are not directly related to Manning’s case because they deal with racism and communities of color; however, they analogously address the use of negative stereotypes as a criminal defense.

¹⁴⁶ See J. Thomas Parker, *The Abuse Excuse and Other Cop-Outs, Sob Stories, and Evasions of Responsibility*, 150 MIL. L. REV. 410 (1995) (book review) (quoting from book by Alan M. Dershowitz defining “abuse excuses” as “legal tactic[s] by which criminal defendants claim a history of abuse as an excuse for violent retaliation”).

them from being locked up, overturning convictions, or reducing time spent incarcerated. Crucially, they are employed in the face of much more abusive tactics by judges and prosecutors, whose discriminatory attitudes fuel the majority of the racist, classist, and homophobic discourse and behavior in criminal courtrooms. It is important to note that the defenses are not frequently used, and when used they are not often successful—they are often a gamble taken as a last resort.

A. *Insanity Defense—Psychological Evidence*

The longest-standing, and perhaps most infamous, of the narrative defense strategies is the insanity defense. Insanity is a legal term of art, and is not synonymous with mental illness as defined by the APA or the DSM.¹⁴⁷ The test for insanity is notoriously difficult to conform to¹⁴⁸ and is also highly politicized, having undergone scathing criticism.¹⁴⁹ When used successfully, the defense may result in acquittal by reason of insanity, a reduced sentence in capital cases, or the accused being declared incompetent to stand trial altogether.¹⁵⁰

The analogous defense in the military context is lack of mental responsibility.¹⁵¹ Coombs leaned heavily towards this defense at the Article 32 hearing by focusing on the mental instability he associated with Manning's gender identity. GID symptoms could never approach the level of psychological incapacity required for an insanity defense, but Coombs did not attempt to take the strategy that far. Instead he presented a series of inferences: Manning had GID; therefore, she suffered from emotional distress which is severe enough to be listed as a psychiatric disorder in the DSM; it followed that she had a diminished capacity to either rec-

¹⁴⁷ DRESSLER, *supra* note 94, at 348–49.

¹⁴⁸ *Id.* at 365.

¹⁴⁹ *Id.* at 339 (explaining that the defense was highly criticized when used in John Hinckley's defense after his attempt to shoot President Reagan). See also Christopher Slobogin, *A Defense of the Integrationist Test as a Replacement for the Special Defense of Insanity*, 42 TEX. TECH L. REV. 523 (2009); Jennifer S. Bard, *Re-Arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Illness Violates Public Health, Ethical, and Constitutional Principles and Therefore Cannot Be Made Right by Piecemeal Change*, 5 HOUS. J. HEALTH L. & POL'Y 1, 72 (2005).

¹⁵⁰ LEE & HARRIS, *supra* note 95, at 697–98.

¹⁵¹ MASON, *supra* note 25, at Summary Page. Before the Article 32 hearing, a Rule for Court-Martial (RCM) 706 board examination, comprised of military medical personnel, was held to determine whether Manning was fit to stand trial; Manning was found fit in April 2011. See Michelle Lindo McCluer, *RCM 706 Board Finds Manning Fit to Stand Trial*, NAT'L INST. OF MILITARY JUST. BLOG (Apr. 29, 2011, 4:42 PM), <http://www.nimjblog.org/2011/04/rcm-706-board-finds-manning-fit-to.html>.

ognize the nature of wrong and right or conform her behavior to fit the law; and thus, she should not be punished because she did not intend to act as she did, and the Aiding the Enemy statute requires intent.

B. Rotten Social Background—Sociological Evidence

Rotten Social Background (RSB) is a defense strategy that seeks to introduce evidence of severe environmental and economic deprivation to show the accused lacked mental and moral culpability and therefore should not be punished.¹⁵² Critical race theorist Richard Delgado posited that “[a]n environment of extreme poverty and deprivation creates in individuals a propensity to commit crimes.”¹⁵³ Ultimately, Delgado argued that an RSB defendant should not be punished for transgressing the rules of a culture that actively marginalizes and abuses him.¹⁵⁴ This defense has not been successfully used to mitigate culpability on the merits; however, RSB evidence is often considered in sentencing, especially in capital cases.¹⁵⁵

The sociological RSB factors are analogous to those on which Coombs based the GID defense. As opposed to arguing that the accused lacks all mental capacity, RSB allows defense attorneys to focus on the environmental aspects of crime and mental disorder. Poverty, homelessness, health issues, and environmental deprivation are realities for many transgender folks, especially trans people of color. Manning, like other trans people, had a history of

¹⁵² This evidence includes, but is not limited to, lack of emotional support within the family, squalid living conditions, alcoholism, abuse, and marginalization from middle-class society. This concept was first articulated by Judge David Bazelon in his dissent in *United States v. Alexander*, 471 F.2d 923 (D.C. Cir. 1973). In *Alexander*, a divided circuit court affirmed, *inter alia*, a jury instruction to disregard a psychiatrist’s testimony that the defendant’s impoverished upbringing—replete with traumatic incidents of racism and minimal emotional support from his family—caused him to experience an “irresistible impulse to shoot” when he was verbally assaulted by a racist marine. *Id.* at 957–59 (Bazelon, C.J., dissenting). Bazelon later explored how people from economically disadvantaged backgrounds could utilize a defense predicated on “disease” models like insanity to mitigate their culpability. See David Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); David Bazelon, *The Crime Controversy: Avoiding Realities*, 35 VAND. L. REV. 487, 489–92 (1982).

¹⁵³ Richard Delgado, “Rotten Social Background”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 54 (1985).

¹⁵⁴ See *id.* at 68–75.

¹⁵⁵ See *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000) (stating that a capital defendant had a constitutional right at sentencing to present evidence of “nightmarish childhood” and borderline mental retardation); see also Mythri A. Jayaraman, Note, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327 (2002), available at <http://scholarlycommons.law.wlu.edu/wlucdj/vol14/iss2/6/>.

social isolation and ostracization at school and home, so she arguably is not bound by the social contract in the same way as are others in our society who are better cared for. However, RSB, as Delgado envisioned it, applies more to people of color growing up in low-income urban environments.

C. *Battered Woman Syndrome—Relational Evidence*

Battered Woman Syndrome (BWS), a subcategory of Posttraumatic Stress Disorder in the DSM, refers to “psychological changes that occur after exposure to repeated abuse”¹⁵⁶ and is used to support a justification defense for women who kill or attempt to kill their abusive partners. BWS has been successfully used to support claims of self-defense in situations such as where the abusive partner was asleep.¹⁵⁷ By utilizing trauma theory, BWS focuses on evidence such as “oppression, powerlessness . . . [and] learned helplessness” to explain the psychological impact of abuse and argue that some women are justified in killing their abusers.¹⁵⁸

BWS has been criticized by many,¹⁵⁹ including critical race feminists who argue that it creates a caricature of women as helpless victims with no personal agency,¹⁶⁰ a dangerous oversimplification that has had a damaging effect on all women, particularly women of color who have historically had vastly different experiences of patriarchy than the white women on whom the definitions of oppression embedded in BWS are based.¹⁶¹ This applies with force to Manning’s GID defense. Fitting oneself into oppressive or unattainable categories can be imperative for a BWS defendant, whereas GID pathologizes individuals who don’t fit coercive and stifling gender norms. Many see this as victim-blaming, and as a cop-out instead of fighting to change the dominant culture. This was briefly acknowledged by Coombs in his Article 32 closing argu-

¹⁵⁶ Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321, 326 (1992).

¹⁵⁷ *Id.* at 321. See also DRESSLER, *supra* note 94, at 223–25.

¹⁵⁸ Walker, *supra* note 156, at 326–37.

¹⁵⁹ See, e.g., Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL’Y 13, 33–36 (2011); Kimberly D. Bailey, *Lost in Translation: Domestic Violence, “The Personal is Political,” and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255, 1255 (2010); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 458 (1991).

¹⁶⁰ Smith, *Criminal Responsibility*, *supra* note 120, at 468–69.

¹⁶¹ See Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1249 (2001); Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN’S L.J. 191, 191–92 (1991).

ment, where he lamented the “disorder” label while proceeding to use it anyway.

D. Cultural Defense—Anthropological Evidence

Other defenses use “cultural evidence by immigrant and/or racial minority defendants seeking to refute or mitigate criminal charges.”¹⁶² The evidence is used to show that the person accused should not be punished (or should be punished less severely) for conforming to his or her own cultural norms.¹⁶³ While a distinct defense does not exist, cultural evidence has successfully been admitted as mitigating evidence in a very few cases, resulting in convictions for lower charges and even some being overturned.¹⁶⁴

The use of cultural evidence is controversial; Professor Leti Volpp has pointed out that “[c]ulture is not some monolithic, fixed, and static essence.”¹⁶⁵ Problems of essentializing cultures and “othering” occur, and Volpp noted that there is a “general failure to look at the behavior of white persons as cultural, while always ascribing the label of culture to the behavior of minority groups.”¹⁶⁶ Some feminists oppose the use of culture evidence to mitigate culpability in cases involving violence against women, arguing that the defense condones such violence.¹⁶⁷ Those who support the use of this tactic claim that culturally “othered” defendants are already disadvantaged in court, and cultural evidence can create much-needed context for the accused’s actions, thereby humanizing her in a vital way for the judge and jury.¹⁶⁸

¹⁶² Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 915 (2007).

¹⁶³ *Id.* at 915–16. See also Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 102–03, 115 (1997).

¹⁶⁴ See generally Kim, *supra* note 163. See also Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 37 (1995); Lee, *supra* note 162, at 920.

¹⁶⁵ Leti Volpp, *Talking “Culture”: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1589 (1996); *id.* at 1592.

¹⁶⁶ Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1189 (2001).

¹⁶⁷ See Kim, *supra* note 163, at 110–11; Maguigan, *supra* note 164, at 44.

¹⁶⁸ Maguigan, *supra* note 164, at 58–59. *But cf.* Lee, *supra* note 162, at 940–41. (“Judges, jurors, and prosecutors attempting to be culturally sensitive often end up reinforcing negative stereotypes about the racial or ethnic group of the defendant.” *Id.* at 941.).

V. DISCRIMINATION AGAINST TRANSGENDER DEFENDANTS
IN COURT—CAN A GID-TYPE DEFENSE
EVER BE USED SAFELY?

The courtroom is no exception to the discrimination transgender people face daily—trans defendants are usually not called by their correct names and incorrect pronouns are used,¹⁶⁹ and they have been portrayed as deceitful,¹⁷⁰ diseased,¹⁷¹ or degraded and debauched.¹⁷² So-called deviant sexuality and gender expression are presumptively criminal, as evidenced by lewd conduct statutes (enforced disproportionately against queer and transgender individuals) and frequent arrests for “walking while trans” where police target transgender women walking, especially at night, and profile them as performing sex work.¹⁷³ Once in the courtroom, trans defendants are often treated terribly by court staff, judges, prosecutors, and their own attorneys.¹⁷⁴

Is it possible, then, for a defense attorney to use GID safely, in a way that helps her client, when the courtroom is teeming with institutional and particularized homo- and transphobia? Using GID in a criminal case is a gamble: it could potentially garner sympathy or vitriol. One capital case that reached the Supreme Court¹⁷⁵ illustrates an example of the defense going well, while many others demonstrate the defense going very badly.¹⁷⁶

¹⁶⁹ See NAT'L CTR. FOR LESBIAN RIGHTS & TRANSGENDER LAW CTR., SOME COURTROOM CONCERNS OF THE TRANSGENDER COMMUNITY, <http://www.transgenderlaw.org/resources/courtroomconcerns.pdf>.

¹⁷⁰ See MOGUL ET AL., *supra* note 81, at 30, 35–36, 73, 76–77 (referring to transgendered individuals as “tricking” those around them, and the jurors, into thinking they are normatively gendered).

¹⁷¹ See *id.* at 30, 43 (giving examples and noting portrayals of transgender people as psychologically and emotionally unstable, neurotic, and compulsive).

¹⁷² See *id.* at 31–34 (noting archetypal characterizations of transgender people as pedophiles, sexually depraved, and incapable of controlling their perverse sexual impulses).

¹⁷³ See *id.* at 59–61. See also Smith, *supra* note 121, at 103 (“[T]he vast majority of openly gay or transgendered people who wind up in criminal court are charged with solicitation or prostitution.”).

¹⁷⁴ *Id.* at 72–75.

¹⁷⁵ See, e.g., *Lockett v. Ohio*, 438 U.S. 586 (1978). In *Lockett*, a plurality of the Supreme Court concluded that the Eighth and Fourteenth Amendments require consideration of mitigating evidence to justify the death penalty. *Id.* at 604. Therefore, in death penalty cases, a court could decide to consider evidence relating to sexuality or gender identity if it was found to have mitigated culpability in some way (i.e. caused emotional distress, required therapy, caused the accused to be disowned). See *id.*

¹⁷⁶ The cases below examine defendants who identified (or were identified) as transgender, gender-nonconforming, and/or gay. These distinct categories are lumped together for two reasons: first, people are often identified by others as gay based on their gender expression, regardless of these individuals’ actual sexual orien-

A. *The “Good”—Leslie Ann Nelson*

A complicated, tragic, and ultimately somewhat successful example of the use of GID as a mitigating factor in the death penalty context was the case of Leslie Ann Nelson, who pleaded guilty to killing two police officers and to second-degree aggravated assault of a third officer and was sentenced to death.¹⁷⁷ During the penalty trial, the defense relied heavily on GID and (allegedly) attendant mental illness as mitigating evidence to avoid the death penalty, to no avail.¹⁷⁸ Nelson was sentenced to death, but the New Jersey Supreme Court vacated the death sentence based on a *Brady* violation.¹⁷⁹ A new penalty trial was held but a majority of jurors found that the aggravating factors outweighed Nelson’s long history of psychological issues.¹⁸⁰ However, the New Jersey Supreme Court once again overturned the death penalty, finding that the instructions to the jury regarding balancing aggravating and mitigating factors were misleading.¹⁸¹ In this opinion, the court reviewed the extensive psychological and social history put forth by mental health experts at trial, including detailed stories about Ms. Nelson’s ostracization based on her gender, the violence she experienced, as well as depression, anxiety, and transition.¹⁸²

The court found that the jury did not properly consider Ms. Nelson’s psychological and emotional history, and reversed the death penalty and ordered a third penalty trial.¹⁸³ Ms. Nelson was transported off death row, where she had been the only woman inmate, and was transferred to a women’s correctional facility where she received an “Inmate of the Month” award for helping other women in the law library.¹⁸⁴ The New Jersey Supreme Court re-abolished the death penalty in 2007 before Ms. Nelson’s third

tation (i.e. “feminine” men are presumed gay and “masculine” women presumed lesbians); second, gay people who are also gender-nonconforming face additional stigma and are often treated worse than more gender-conforming folks.

¹⁷⁷ See *State v. Nelson*, 173 N.J. 417, 429–32 (2002).

¹⁷⁸ See *State v. Nelson*, 155 N.J. 487, 511 (1998).

¹⁷⁹ *Nelson*, 173 N.J. at 432–33.

¹⁸⁰ *Id.* at 433–34.

¹⁸¹ *Id.* at 446, 459–60.

¹⁸² See *id.* at 434–40.

¹⁸³ See Laura Mansnerus, *Briefing: The Courts; Death Sentence Reprieve*, N.Y. TIMES (Aug. 4, 2002), <http://www.nytimes.com/2002/08/04/nyregion/briefing-the-courts-death-sentence-reprieve.html>; Laura Mansnerus, *Top Court Again Rejects Sentence of Death*, N.Y. TIMES (July 31, 2002), <http://www.nytimes.com/2002/07/31/nyregion/top-court-again-rejects-sentence-of-death.html>.

¹⁸⁴ See *Double Cop Killer Honored as ‘Inmate of the Month,’* NJLAWMAN.COM (Oct. 30, 2005, 11:56 PM), <http://www.njlawman.com/Editorials/Inmate-of-the-Month.htm>.

trial took place.¹⁸⁵ While evidence about Ms. Nelson's gender identity was cited as contributing to commuting her sentence, it can easily be argued that the New Jersey Supreme Court's reluctance to kill Leslie Ann Nelson had less to do with its concern for a transgender woman with a history of abuse, trauma, and depression, and more with its growing inclination to abolish the death penalty entirely.

B. The "Bad"—The "Deviant" Archetype

A much more significant number of cases suggest that being openly or visibly gay, queer, or transgender in criminal court makes it *more* likely that a person will receive a harsher sentence. One example is the case of Calvin Burdine, a white gay man convicted of capital murder in a trial that lasted less than thirteen hours.¹⁸⁶ The most notorious aspect of the case was the homophobia Burdine suffered at the hands of every institutional actor in the courtroom, including his defense attorney who failed to object to multiple homophobic comments by the prosecutor, the most of egregious of which was in his closing statement to the jury: "[s]ending a homosexual to the penitentiary certainly isn't a very bad punishment for a homosexual, and that's what he's asking you to do."¹⁸⁷

Another example involved an African-American lesbian, Wanda Jean Allen, who was convicted of murdering her partner and sentenced to death.¹⁸⁸ At trial, the prosecutor informed the jury that Allen "wore the pants" and was "the man" in the family; he called the deceased's mother in to testify that Allen spelled her

¹⁸⁵ See Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST (Dec. 14, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/13/AR2007121301302.html>.

¹⁸⁶ See *Burdine v. State*, 719 S.W.2d 309, 313 (Tex. Crim. App. 1986) (Burdine was convicted of killing his ex-lover after attempting to get money from him and stealing his ATM card); Michael B. Shortnacy, *Guilty and Gay, a Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AM. U. L. REV. 309, 347 (2001); Richard Goldstein, *Queer on Death Row*, VILLAGE VOICE (Mar. 13, 2001), <http://www.villagevoice.com/2001-03-13/news/queer-on-death-row/>.

¹⁸⁷ Shortnacy, *supra* note 186, at 347. Burdine applied for habeas corpus relief and listed ten issues in his application, including the prosecutor's homophobic remarks; but the district court never reached that point—it granted habeas relief on the ground that Burdine's attorney had slept through "substantial portions" of the trial. *Id.* at 348–49.

¹⁸⁸ See LaDonna Childress, *To Fulfill a Promise: Using Canons 3B(5) and 3B(6) of the Judicial Code of Conduct to Combat Sexual Orientation Bias Against Gay and Lesbian Criminal Defendants*, 34 SW. U. L. REV. 607, 609 (2005).

middle “G-E-N-E,” not the feminine version “J-E-A-N.”¹⁸⁹ The appeals court approved the use of this evidence, saying it helped the jury to understand the relationship of the parties, and was evidence of Allen’s aggressive nature.¹⁹⁰ The district court, in considering her habeas petition, found that even if the statements by the prosecutor were improper, they did not unduly influence the jury’s decision or lead to an unfair trial. Allen was executed by the state of Oklahoma in 2001.¹⁹¹

In another case, a Latina lesbian, Bernina Mata, was charged with and convicted of murdering a man she had met that night at a bar.¹⁹² Mata claimed she acted in self-defense, but the prosecutor proffered evidence that “she was a ‘hard core’ lesbian, and that a lesbian was more likely to kill a man who made an unwanted pass at her than a heterosexual woman.”¹⁹³ He further stated that “[a] normal heterosexual woman would not be so offended by such conduct as to murder.”¹⁹⁴ The state brought ten witnesses to testify that Mata was a lesbian to support its theory.¹⁹⁵ Mata was convicted and sentenced to death, but her sentence was commuted to life imprisonment in 2003.

Finally, in a case where New York police officers were accused of physically and sexually assaulting a Haitian immigrant, the defense counsel for one officer claimed in his opening that the internal injuries the victim suffered were actually the result of consensual same-sex anal sex, not police brutality.¹⁹⁶ Critics of the defense spanned from LGBT activists who claimed the defense perpetuated a stereotype about rough or violent gay sex, to critics such as the Rev. Al Sharpton who considered calling the accused gay to be slander and character assassination.¹⁹⁷

C. *The “Different”*

Criminal defendants are undoubtedly discriminated against based on their sexual orientation or gender identity, and also based on their race and class. It is recognized by many that death

¹⁸⁹ *Id.*

¹⁹⁰ Shortnacy, *supra* note 186, at 343–44 (noting that the altercation occurred after a dispute between the two over the deceased’s welfare check).

¹⁹¹ *Id.* at 344.

¹⁹² Joey L. Mogul, *The Dykier, the Butcher, the Better: The State’s Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. CITY L. REV. 473, 484 (2005).

¹⁹³ *Id.* at 485.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Smith, *supra* note 121, at 107.

¹⁹⁷ *Id.* at 107–08.

penalty sentencing depends on the dehumanization of the defendant; therefore, it is easier for jurors to execute a person of a different race, class, sexual orientation, or gender identity/expression as themselves.¹⁹⁸ The mainstream, white LGBT community, too, tends to distance itself from its members when they are accused of crimes, while rallying publicly around victims of crimes (especially gay white victims). As noted above, Manning has not been hailed as a trans hero. As Abbe Smith puts it, “[b]eing a convicted murderer seems to eclipse one’s membership in the gay community.”¹⁹⁹

In some ways, then, Manning was in a better position for Coombs to have used a controversial defense that, if Manning were a person of color or visibly gender-nonconforming, would likely not have been effective. As a young, white, apparently gender-conforming person in a military uniform, the prosecution (a team of white JAG attorneys, with the lead prosecutor being a white man) and the judge (a white woman) could look at her and relate in some ways. However, Coombs’ use of a GID-diminished capacity defense in a military environment, known for enforcing homogeneity through regulations and violence, and for being institutionally transphobic, made the strategy look less than wise.

CONCLUSION

The ethical issues surrounding the use of negative stereotypical narratives as strategic mitigating factors in criminal defense cases remain complex and disputed. In Pfc. Chelsea Manning’s case, Coombs called attention to Manning’s emotional distress and attributed it to her gender identity, even though that was likely only one aspect of the distress. As there is no whistleblower disorder, GID was a diagnosable cause for Manning’s emotional disturbance. And Coombs used that argument despite perhaps having never talked to another transgender person in his life. However, a savvy defense attorney will always consider the mental health of those she represents. If a person is mentally ill, a defense attorney will likely call attention to that mental illness to show that the person accused was not acting voluntarily, or lacked the requisite intent. Here, the “mental illness” at issue was a highly contested diagnosis that pathologized an oppressed group of people.

The crux of Coombs’s early argument for using GID as a mitigating factor appears to be a commitment to zealous representa-

¹⁹⁸ Mogul, *supra* note 192, at 478.

¹⁹⁹ Smith, *supra* note 121, at 106.

tion.²⁰⁰ However, Coombs made no effort to reach out to trans activists or organizations about his strategies. Further, he has not fully acknowledged how controversial the tactic was, nor has he issued any statements about homophobia and transphobia in the military and how this could affect judgment against Manning.²⁰¹ Despite this, Coombs was not ethically obliged to forgo the defense, or to consult with community groups before doing so. However, the maelstrom around the defense could have been tempered by a public statement similar to the one made during the closing arguments at the Article 32 hearing, acknowledging that GID is not a disorder but that Manning nonetheless experienced emotional distress about her gender identity in the oppressive environment of the military. Such a statement would not likely have quelled all criticism, but it would have at least informed the public that Coombs had done some basic research on trans-related issues, without giving away any crucial information about his defense theory.²⁰²

Coombs *was* ethically obliged to argue zealously for Manning, and to use any defense he believed would help Manning avoid spending the rest of her life locked up in a cage. My endorsement of the defense strategy as ethically sound is contingent, however,

²⁰⁰ Coombs said as much in his first public comments, delivered in December 2012:

[I]t was and still is my belief that Bradley Manning deserves an attorney that is focused on what is happening in the courtroom and only what is happening in the courtroom . . . [The record of trial] will reflect one thing—that we fought at every turn, at every opportunity, and we fought to ensure that Brad received a fair trial. . . . When I'm in the courtroom, I stand up and I look to my right and I see the United States government, with all of its resources, all of its personnel. I see them standing against me and Brad, and I have to admit to you that [that] can be rather intimidating and I was intimidated, especially when the President of the United States says, "Your client broke the law." Especially, when Congress members say, "Your client deserves the death penalty."

Presentation by Bradley's Attorney David Coombs, Transcript and Video, PVT. MANNING SUPPORT NETWORK, <http://www.bradleymanning.org/activism/exclusive-presentation> (last visited Sept. 8, 2013).

²⁰¹ Coombs further distanced himself from the full implications of the early strategy in his interview with the *TODAY Show*: "The stress that he was under was mostly to give context to what was going on at the time . . . It was never an excuse because that's not what drove his actions. What drove his actions was a strong moral compass." See *TODAY: Bradley Manning: I Want to Live as a Woman*, *supra* note 1.

²⁰² This could also have been accomplished, however, by the publication of the transcripts of the hearing. Additionally, it should be noted that Coombs was the one to break the news about Pfc. Manning's preferred gender, name, and pronoun, and he has stated he is committed to ensuring that she will have access to gender-affirming treatment (medical and otherwise) while she is incarcerated awaiting appeal. See *id.* ("Coombs said he is 'hoping' that Fort Leavenworth 'would do the right thing' and provide hormone therapy for Manning. 'If Fort Leavenworth does not, then I'm going to do everything in my power to make sure they are forced to do so.'").

upon the assumption that Manning was not only on-board with this strategy, but that she had an active voice in its creation and implementation. If a person accused does not want to be outed as trans or gay, the defense attorney *must* respect that decision regardless of the outcome on the case.

In addition to ensuring that the person accused approves of the strategy, it is crucial that the potentially negative stereotypes in defense narratives are helpful to the person's case. This may be a nearly impossible determination to make in advance. It is clear from the foregoing that calling attention to a person's sexual orientation or gender identity in the toxic context of a criminal or military courtroom can be extremely damaging. One commentator cites a survey conducted by a Chicago newspaper that found that potential jurors were "more than three times as likely to think they could not be fair or impartial toward a gay or lesbian defendant as toward a defendant from other minority groups, such as blacks, Hispanics, or Asian-Americans."²⁰³ Other commentators are adamantly against the *prosecution* admitting evidence of sexual orientation or gender identity in criminal trials, and specifically in capital trials,²⁰⁴ although this evidence remains fair game for the defense attorney.

As a person not yet practicing as a criminal defense attorney, I am engaging in this debate from a somewhat academic standpoint—however, I have experience working with the queer community and strategizing for transformative social justice, which led me to law school. Grappling with the ethical issues inherent in the work of criminal defense is a crucial process for those of us who remain convinced, through the haze of legal indoctrination, that radical lawyering is possible as a public defender, and that our old notions of social justice don't have to be discarded in this new profession.

²⁰³ Mogul, *supra* note 192, at 479–80.

²⁰⁴ Shortnacy, *supra* note 186, at 356–57.

