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Transsexual, Transgender, Trans: Reading Judicial Nomenclature in Title VII Cases

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INTRODUCTION[1]

When you ask Siri, the voice-activated search engine embedded in the iPhone, "What's Bruce Jenner's real name?" she will first let you know she is "checking," and soon you will receive this answer, and subtle castigation: "The full name of Caitlyn Jenner is Caitlyn Jenner." The response to the question "What is Bruce Jenner's gender?" is, invariably, "female."[2] What Siri is telling us is that there is a single way to refer to Jenner, which is by using the name and gender she has chosen for her present identity. This identity belongs to a female-gendered person. In other words, "Bruce Jenner" does not simply have a new

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1. This article was completed in November 2016, well before recent developments in the interpretation of Title VII's application in transgender law under the Trump administration. Clearly the treatment of transgender people under the law is shifting rapidly and unpredictably. However, our analysis here is not of regulatory or legislative change, but rather of the meaning of the rhetorical strategies plaintiffs, defendants, and courts use in describing the stakes of Title VII for transgender people. We believe that this analysis can be useful to understand whatever changes lie ahead.
2. Alissa Greenberg, "Siri Will Correct You if You Call Caitlyn Jenner 'Bruce'," Time, 16 July, 2015, https://perma.cc/23SL-QZLP.

name because "Bruce Jenner" does not really exist—only Caitlyn Jenner does. In her electronic efforts to be helpful, Siri is simplifying something that many non-transgender people have found complicated, reflecting non-transgender people's anxieties and concerns about nomenclature and identity surrounding gender transition. In a world in which many people outside of transgender communities[3] experience anxiety about being "caught" at "getting it wrong,"[4] Siri provides a calming, guiding hand. Ask her what the "right" thing is to do, and you can receive a single unambiguous answer.

However comforting such definitive responses may be, individualized answers regarding preferred naming do not address larger political and cultural questions about the multilayered politics of the nomenclature of gender variance, and naming itself is not simply a personal or individual issue. Names matter. Struggles over the names of places, nations, and ethnic and racial groups demonstrate that naming oneself or others is not trivial because group classifications carry an enormous amount of information about the political, social, and cultural status of the set of people they embrace. Groups identify themselves or are identified by others by names that change along with the political and cultural significance of what the group is, what the group means to itself, and what inclusion in that group signifies. The shifts of racial nomenclature over the twentieth century—from Native American to American Indian to indigenous person, or, alternatively, to referring only to more specific regional or language-group affiliations for the descendants of native peoples in the U.S.—reflect multiple attempts by Americans of various racial and ethnic backgrounds to take back control over their naming from white supremacy.[5]

It is hardly surprising, then, that transgender and gender nonconforming communities have similarly tried to control their representation by calling for specific designations that they themselves choose. For transgender people, the ability to choose and use a new name is a central concern because it is a claim to a self-authored identity and a refusal of a gender that feels externally and even

3. Like other scholars analyzing (trans)gender issues, we have thought long and hard about what kind of nomenclature we want to use, which only reinforces our observation that naming and classification are themselves sticky wickets. Since these are the terms the transgender activists and advocates with whom we are most familiar use to describe themselves, our practice here is to use "transgender" or "trans" for a range of gender nonconforming people who primarily identify with a gender other than the one they were assigned at birth. We tend not to use the term "cisgender" to refer to people who identify with the gender assigned to them, preferring "non-transgender," as a way to emphasize the primacy and centrality to this Article of trans experiences and gender expressions.

4. The question of "what am I supposed to call him/her?" also points to the sometimes aggressive insistence of non-trans people to refer to transgender people by their former names, and the political power many trans people feel in renaming themselves to reflect the gender they feel they occupy.

5. S*ee generally* Borgna Brunner, "American Indian *versus* Native American*:* A Once-heated Issue Has Sorted Itself Out," InfoPlease, https://perma.cc/4MWT-FYZQ; Russell Means, "I Am an American Indian, Not a Native American!" https://perma.cc/XY6Q-ABF3 (explaining that "Native American" is a term used generically "to describe all the indigenous prisoners of the United States," and that he and fellow activists would "call ourselves any damn thing we choose.").

violently imposed, as evidenced by the resources transgender advocacy organizations devote to the process.[6] Consequently, as this Article observes, the language used to identify and describe gender nonconformity has changed substantially in recent decades.[7] These changes have entailed, encouraged, and been strengthened by the desire by transgender people to determine the language by which they are discussed and the rhetorical venues into which they are allowed entrance.

Little wonder, then, that in this rapidly-shifting landscape of naming, U.S. courts have been having a difficult time determining what language they are supposed to be using when deciding cases that involve transgender litigants or implicate transgender issues. The intricacies of preferred nomenclatures and their many meanings necessarily affect courts as they go about their business addressing legal issues specific to transgender people. First, judges face the more general concern of discerning what terminology is most current. Yet, this underlies a more difficult and ultimately important concern: understanding what transgender identity or affiliation actually *means*.

We found that usage does not exist in a simple chronology. Some terms, like "transsexual," are still common but are fading in popularity, while others, such as "transgender" or "trans" have gained significant traction. As we argue in Part I below, this nomenclature has been in flux for several decades, and although "transgender" has been on the ascendant, its adoption has occurred in fits and starts. These shifts have not been random or arbitrary. Each set of terms carries with it specific connotations that represent political, cultural, and particular gendered meanings that have accrued over time, with usage or abandonment. The words used to identify trans and gender nonconforming people have specific significance and meaning beyond current fashion.

These changes in language have accompanied much greater visibility of transgender people, both as individuals and as communities with political, social, and legal concerns specific to their gender identities. As transgender people bring a variety of issues to the judicial systems, including employment discrimination, child custody, and relationship disputes, courts must choose how they will refer to those people and how they will determine the legal stakes and significance of these issues. The questions we focus on here are: what does it mean when the courts adopt particular language to refer to transgender people and their legal status? Are they also adopting the changing theoretical conceptions that

6. *See, e.g.*, "The Name Change Project," Transgender Legal Defense and Education Fund, https://perma.cc/M9LB-2HTK (providing "free legal name change services to transgender people" throughout the Northeast and Midwest); "Know Your Rights: FAQ About Identity Documents," Lambda Legal, https://perma.cc/39LN-ZVEY (featuring no fewer than three separate questions and answers dealing with name change issues out of only nine separate subheadings).

7. Which also explains that while we are much indebted to Susan Etta Keller's thoughtful examination of legal rhetoric in transgender jurisprudence, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 Harvard Civil Rights-Civil Liberties Law Review 329 (1999), its late-90s publication date means that the work already lacks currency.

underlie these linguistic shifts? Would it achieve both salutary cultural change and progressive judicial decision-making to adopt one specific kind of nomenclature over another?

We move from an examination of the common nomenclature options, and the connotations and conceptions underlying each, to an examination in Part II of recent cases in which trans plaintiffs raise Title VII of the 1964 Civil Rights Act employment discrimination claims. We then consider whether the language used to describe trans litigants does in fact correspond to the courts' grasp of the theoretical underpinnings that their linguistic choices would suggest. We conclude that there is not an easy one-to-one relationship between the naming of trans people and genuinely grasping the unique texture of their lives, let alone an obvious correlation between what language the courts use and who wins. Finally, we wonder what kind of judicial changes might help bring into being an equitable, justice-oriented practice for people of all genders.

I. TRANSSEXUAL V. TRANSGENDERED V. TRANSGENDER V. TRANS/TRANS*/TRANS-

In May 2010, the Gay and Lesbian Alliance Against Defamation (GLAAD) posted a detailed guide to terminology to refer to various kinds of gender nonconforming people.[8] The guide lays out the wide range of terms available, from "transsexual" to "transgender," "transman/woman," "genderqueer," "trans," and "crossdresser."[9] As an organization that describes itself as the "communications epicenter of the LGBT movement," GLAAD sees its work in defining these terms as a way to create a blueprint for the culture at large. As the organizations says of itself: "GLAAD works with print, broadcast and online news sources to bring people powerful stories from the LGBT community that build support for equality. And when news outlets get it wrong, GLAAD is there to respond and advocate for fairness and accuracy."[10]

Printed out, this guide extends for nine pages. It establishes the foundational distinctions between sex, gender, gender expression, gender identity, and sexual orientation, and provides guidelines for reporting on transgender people, such as "always use a transgender person's chosen name" or "ask the person, 'What pronouns do you use?'", as well as a list of "Terms to Avoid."[11] "Problematic terms" include "transgender" as a noun, "transgendered" as an adjective ("transgender" is preferred), and "transgenderism" as a state of being.[12]

8. "GLAAD Media Reference Guide—Transgender," GLAAD.org, 2010, https://perma.cc/8ACJ-SB8H.
9. *Id.*; *see generally* "GLAAD Media Reference Guide—In Focus: Covering the Transgender Community," GLAAD.org, 2016, https://perma.cc/2RAR-7FV8 (discussing GLAAD's positions on how transgender media stories should be constructed).
10. "About GLAAD: Our Areas of Expertise," GLAAD.org, https://perma.cc/CK3G-RVXC.
11. GLAAD Media Reference Guide, 2010.
12. GLAAD's opposition to "transgendered" focuses more on grammatical parallelism than on the politics of identity: "An '-ed' suffix adds unnecessary length to the word and can cause tense confusion and grammatical errors. It also brings transgender into alignment with lesbi-

GLAAD's guide is in many ways a snapshot of where the LGBT establishment—embodied by large policy and legal organizations such as the Human Rights Campaign,[13] the National Lesbian and Gay Task Force,[14] and GLAAD itself—believe that current discourse on gender and transgender issues is and should be.[15] Designed as a reference to recommended current usage, it conveniently crystallizes the results of what has been a complex and contested set of conversations around, not to mention decades of struggle over, nomenclature. Indeed, by necessity it presents its guide as an authoritative terminus to changes in terminology that trans and non-trans medical professionals, activists, cultural workers, and academics have supported and opposed since the term "transvestite" was first coined by Magnus Hirschfeld in Germany in the 1920s[16] and then imported into Anglo-American medical discourse as "transsexual" twenty years later.[17] As GLAAD implies, "transsexual" has had its day, and at best refers to people who actively seek surgical and hormonal change: the Media Guide is clear to point out that unlike "transgender," "*transsexual* is **not** an umbrella term."[18]

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an, gay, and bisexual. You would not say that Elton John is 'gayed' or Ellen DeGeneres is 'lesbianed,' therefore you would not say that Chaz Bono is 'transgendered.'" Vox, *Why you should always use "transgender" instead of "transgendered,"* 18 Feb. 2015, https://perma.cc/33R5-CE3H.

13. "Reporting About Transgender People? Read This," Human Rights Campaign, https://perma.cc/B4L3-6ANF (covering similar ground to the GLAAD guide, although in less detail).

14. Victoria M. Rodríguez-Roldán and Elliot E. Emse, *Valuing Transgender Applicants and Employees: A Best Practices Guide for Employers* 5 (2016), https://perma.cc/S4X4-CLW9 (proffering its own list of "Definitions," which are similar but not precisely congruent to GLAAD's).

15. Nomenclature in this area is certainly still evolving. Lambda Legal and other organizations have recently been using TGNC (trans and gender nonconforming) in discussions of trans people. "Know Your Rights, FAQ: Answers to Common Questions about Transgender Workplace Rights," Lambda Legal, https://perma.cc/L9VD-LCRH. Meanwhile the Audre Lorde Project, a "center for gender variant people of color" uses LGBTSTGNC (lesbian, gay, bisexual, two-spirit, trans, gender nonconforming) to describe its membership and client base. "About ALP," The Audre Lorde Project, https://perma.cc/9F2E-K64J.

    While we are hesitant to predict that a long and unwieldy acronym like LGBTSTGNC will ultimately find a mainstream audience, we cannot be sure: who would have imagined that in accepting the 2016 Republican nomination for President, Donald Trump would have felt compelled to attempt to name the LGBTQ community, however awkwardly? *See* Politico Staff, "Full Text: Donald Trump 2016 RNC Draft Speech Transcript", Politico, 21 July 2016, https://perma.cc/5UDL-HMD5 (including two uses of the acronym); *but see* Nolan D. McCaskill, "HRC President: 'Trump struggled to read the letters L-G-B-T-Q,'" Politico, 28 July 2016, https://perma.cc/ZN8M-2D8K (discussing the candidate's apparent awkwardness with the term).

16. *See* Ralf Dose, *Magnus Hirschfeld: The Origins of the Gay Liberation Movement*, 46 (Edward H. Willis trans.) (2014).

17. *See* David O. Cauldwell, "*Psychopathia Transsexualis*," in *The Transgender Studies Reader*, 40–44 (eds. Susan Stryker & Stephen Whittle) (2006).

18. GLAAD Media Reference Guide, 2010 (emphasis in the original). Other commentators make a similar point, but more centrally emphasize the "multifaceted" meaning of transgender, and the fact that it incorporates non-binary notions of gender experience as complex, and not always understandable as either being in the "right" body or the "wrong" one. *See*, *e.g.*, Susan Scutti, "What's the Difference Between Transsexual and Transgender?"

The shift from transsexual to transgender is fairly recent. In 1998, when Jay Prosser published his groundbreaking study of transgender narratives, *Second Skins*,[19] the book's subtitle "The Body Narratives of Transsexuality" was uncontroversial. Prosser acknowledged that a shift was in process towards "transgender," [20] but even so moved comfortably between "transsexual," "transgender" and, the now verboten according to GLAAD, "transgendered."[21] He traces "transgender" from the original coinage, "transgenderist" which described "a male subject with a commitment to living as a woman more substantial than that denoted by 'transvestite' or 'crossdresser'" who "crossed the lines of gender but not those of sex."[22] At the same time, he sees the directions "transgender" is heading, as "a container term, one that refers not only to transgenderists but to those subjects from whom it was originally invented to distinguish transgenderists: transsexuals and drag queens, transvestites and crossdressers, along with butches and intersexuals, and any subject who 'trans-es' sex or gender boundaries."[23]

Twelve years is not a long time, but it seems like an eon between Prosser's casual invocation of "transgenderists" and GLAAD's horrified repudiation of the term, which it defines as "used by anti-transgender activists to dehumanize transgender people and reduce who they are to a 'condition.'"[24] It is significant that a scholar who is himself transgender and whose work explicitly champions narratives by trans people about their experiences unselfconsciously invokes terminology that, just over a decade later, the acknowledged authorities on appropriate modes of trans representation explicitly identify with "anti-transgender activists." How did we get to this point? What were the way stations along the road? Indeed, is there even meaningful consensus among transgender people as to which terms and identities best fit them (despite GLAAD's best efforts)?

Hirschfeld's invention of "transsexual" as a way to understand people who desired to change their physiological sex accompanied the first efforts at what later came be to be called "sex reassignment surgery" (SRS) and publication of his results in medical journals.[25] Although newspapers in the 1930s occasionally featured stories in which "'sex reversals,' 'sex changes,' and 'sex metamorpho-

Medical Daily, 17 Mar. 2104, https://perma.cc/9SEN-X5XN (explaining that the term transgender not only includes people who are gender nonconforming, multigendered, androgynous, and so forth, but also can incorporate these people's present experience whatever it may be, thus moving away from the emphasis "transsexual" appears to place specifically on gender transition).

19. Jay Prosser, *Second Skins: The Body Narratives of Transsexuality* (1998).
20. *Id*. at 175.
21. *Id*. at 174.
22. *Id*. at 176.
23. *Id*.
24. GLAAD Media Reference Guide, 2010.
25. Joanne Meyerowitz, *How Sex Changed: A History of Transsexualism in the United States*, 6, 15, 19, 43 (2004). Hirschfeld's output was prodigious, but given its controversial nature and World War II, it took some time for it to be translated into English and generally recognized outside of his Berlin-based Institute for Sex Research, or *Institut für Sexualwissenschaft*, which was established in 1919.

ses' appeared in American newspapers and magazines from the 1930s on,"[26] "transsexual" as a category of gender identification did not reach the popular imagination until the mid-1940s, through the work of David Cauldwell, a medical doctor and sex educator. Harry Benjamin, a German-born protégé of Hirschfeld's who came to the United States in the early 1910s, championed this category in the United States.[27] Working with Alfred Kinsey in the 1940s, Benjamin developed a protocol for transsexual people that endures to the present day: treatment with hormones to assist the body to take on secondary sexual characteristics of the desired gender, a transition to living permanently as the other sex, and surgery to remove primary and secondary sexual organs (breasts, testes, body hair, ovaries, and the like).[28] These procedures presupposed the narrative that came to define popular understandings of transsexual experience, that is, that the transsexual person is "trapped" in the body of the unwanted gender. The interventions Benjamin standardized were designed to "free" the "trapped" person to be able to live out their life in their "real" gender.[29]

Benjamin championed Christine Jorgensen, who came to public attention when she attempted to marry her male fiancé and had to present her birth certificate, which carried a male sex designation.[30] Benjamin was instrumental in establishing the first clinic, at Johns Hopkins medical school, that specialized in SRS. He also formulated standards of care (Benjamin SOC) for transsexual people that combined endocrinology, psychotherapy, sex reassignment surgery, and behavioral therapy.[31] The goal of the SOC was to help people transition "successfully" to their chosen gender to fit into existing standards of masculinity and femininity.[32] Time was spent on retraining gendered habits of body and comportment, masculinizing or feminizing patients' self-presentation so that they

26. *Id*. at 16.

27. For a detailed discussion of the history of transsexualism in the United States, *see generally id*.

28. *See* Harry Benjamin, *Clinical Aspects of Transsexualism in the Male and Female*, 18 American Journal of Psychotherapy 458, 458–469 (1964).

29. Meyerowitz, *How Sex Changed*, at 4–9.

30. *What's a Woman? City Bureau Baffled by Christine Jorgenson*, New York Daily News, 31 Mar. 1959, at 3.

31. The standards that Benjamin determined for masculine and feminine behavior were inextricable from a middle class performance of gender. As the chapter on Benjamin in the website "A Gender Variance Who's Who" demonstrates, the vast majority of the clinic's clients were from the middle and upper classes. Zagria, "A Gender Variance Who's Who," 11 Oct. 2012, https://perma.cc/8RTL-5ETF.

32. World Professional Association for Transgender Health, *Standards of Care: for the Health of Transgender, Transsexual, and Gender Nonconforming People, Purpose and Use of the Standards of Care*, 1 (7th version, 2005). Though the SOC have changed over time, and are currently on their seventh iteration, they retain an overall goal "to provide clinical guidance for health professionals to assist transsexual, transgender and gender nonconforming people to achieving safe and effective pathways to achieving lasting personal comfort with their gendered selves . . . . This assistance may include primary care, gynecologic and urologic care, reproductive options, voice and communications therapy, mental health service . . . , and hormonal and surgical treatment." *Id.*

could embody maleness or femaleness convincingly to the larger society.[33]

The disadvantage of the Benjamin standards, and their attendant "transsexual" descriptions, was their inextricability from medical and psychiatric pathologizing. The year after the SOC was released, the American Psychiatric Association included "gender identity disorder" (GID) in its *Diagnostic and Statistical Manual* (*DSM*) for the first time.[34] From the early 1980s into the 1990s, transsexuals were thoroughly medicalized, and needed to undergo a battery of anatomical, psychiatric, and personal protocols in order to be approved for SRS.[35] Moreover, in the American cultural imagination, to be transsexual was to be on a specific and unidirectional path towards hormone treatment, surgery, and total transformation. Of course, the expense of surgery and the uneven results, especially for transsexual men[36] threw up road blocks along that path, but genuine transsexual identity required a commitment to anatomical, endocrinological, and cosmetic change.[37]

However, not all gender nonconforming people fit at this end of the spectrum. The term "transgender," which had initially emerged in the 1960s was designed to distance gender change from sexual orientation,[38] and acted as an umbrella for a variety of gender nonconforming people.[39] During the 1980s and 1990s, "transgender" referred to any kind of identification away from one's birth sex, whereas "transsexual" referred more narrowly to people who elected for as "complete" a gender transition as possible.

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33. *See generally* Joanne Meyerowitz, *How Sex Changed: A History of Transsexualism in the United States*, 41–67 (2004) (providing a history of transsexuals working to convince the American medical establishment to perform gender reassignment surgery).

34. Gender Identity was first included in 1980 in the American Psychological Association, *Diagnostic and Statistical Manual*, 264 (3d ed. 1980). GID as a diagnosis has its own complicated history. In the most recent version of the DSM, GID diagnoses have generally been replaced by "Gender Dysphoria," which is manifested by "a marked difference between the individual's expressed/experienced gender and the gender others would assign him or her" for at least six months. "Gender Dysphoria," American Psychiatric Publishing, 2013, https://perma.cc/KA9Z-CDKS. In the words of Jack Drescher, a member of the committee that rewrote the category, "[w]e know that there is a whole community of people out there who are not seeking medical attention and live between the two binary categories. We wanted to send a message that the therapist's job isn't to pathologize." Camille Beredjick, *DSM-V to Rename Gender Identity Disorder 'Gender Dysphoria,'* The Advocate, 23 July 2012, at 12.

35. *See generally* Evan Vipond, *Resisting Transnormativity: Challenging the Medicalization and Regulation of Trans Bodies*, 8:2 Theory in Action, 21 (2014) (detailing and critiquing the historically medicalized requirements for sex reassignment surgery).

36. *See generally* "Sex Reassignment Surgery" The Encyclopedia of Surgery, https://perma.cc/6UYC-NABE ("female to male surgery has achieved lesser success").

37. Current medical clinics that treat people seeking SRS explicitly list the requirements for acceptance. *See* "Prerequisites," The Philadelphia Center for Transgender Surgery, https://perma.cc/VW8T-YGZV. Insurance companies have similar requirements in order to cover the medical elements of gender transition. *See* "Gender Reassignment Surgery," Aetna, https://perma.cc/7B96-M8S3.

38. *See generally* John F. Oliven, *Sexual Hygiene and Pathology: A Manuel for the Physician and the Professions*, 514–19 (2d ed. 1965).

39. *See generally* Cristan Williams, *Transgender*, 232 Transgender Studies Quarterly, 232–34 (2014) (documenting heterosexual cross-dresser Virginia Prince's self-description in the late 1960s through the 1970s as "transgenderal" and a "transgenderist").

Over the course of the 1990s, variations on "transgender" all but replaced other kinds of terms.[40] Even then, there was no total consensus on what language was most appropriate. One example of this contestation was the sharp disagreement between proponents and opponents of "transgendered" rather than "transgender." According to Julia Serano, "transgendered" was "*de rigueur* among trans activists" in the 1990s, but by the early 2000s it was swiftly losing currency.[41] Some objections to "transgendered" were philosophical. For instance, by deploying a term that implied a past tense, users of "transgendered" were suggesting that transition was a discrete process with a beginning and an end, much as transsexualism was constructed in the 1970s and 1980s. "Transgender," by contrast, "is something you are, not something you do," an ongoing and open-ended process.[42]

The preferability of "transgender" over "transgendered" has generated many commentaries, webpages, and blog posts, which side with "transgender" as the most accurate and representative term.[43] The Rogue Feminist's argument is more pragmatic and grammatically minded: "Describing someone as 'transgendered' does not make sense, because that person has not been *transgendered* by anything. Transgender did not happen to that person, they just are transgender."[44]

Although there seems to be consensus on the differences between "transgender" and "transgendered," there is minimal distinction made between "transgender" and "trans." Instead, "trans" is frequently deployed as an abbreviation of transgender and is interchangeable with it.[45] At the same time, some scholars of gender theory have proposed further permutations of "trans," such as "trans*" or "trans-." "Trans*" deploys the asterisk, like an electronic Boolean search, to signify all combinations of "trans" with any suffix.[46] As Avery Tompkins observes, "[*t*]*rans** is thus meant to include not only identities such as

40. *See generally* Cristan Williams, "Transgender Timeline," Ehipassiko, 10 Aug. 2012, https://perma.cc/8BDZ-K9T2 (a thorough historical timeline of "the development of the trans+gender lexical compound").

41. Katy Steinmetz, *Why It's Best to Avoid the Word 'Transgendered'*, 15 Dec. 2014, https://perma.cc/Q4KJ-K2NZ.

42. "Why It's 'Transgender' Not 'Transgendered,'" *Here & Now*, National Public Radio broadcast, 17 May 2016, available at https://perma.cc/29NV-8NZ7.

43. *See* Autumn Asophodel, "Difference Between Transgender & Transsexual," 8 May 2014, hosted by YouTube, available at https://www.youtube.com/watch?v=HK62l3xV-AI; Joanne Herman, *Transgender or Transgendered?*, Huffington Post, 25 May 2011, https://perma.cc/JM94-G4CW; Big Queer Blog, 8 Apr. 8, 2007, https://perma.cc/Q32D-ZPQW; *Transgender vs. Transgendered*, Semanticide, 4 Nov. 2012, https://perma.cc/2V5F-2D2C.

44. The Rogue Feminist, "Why the Term is 'Transgender' and not 'Transgendered,'" 3 Dec. 2013, hosted by Tumblr.com, available at https://perma.cc/B7YT-TFUD (emphasis in original).

45. *See, e.g.*, "Trans and Other Gender Nonconforming Identities," Planned Parenthood, 2016 https://perma.cc/UU94-FMKU (explaining that "sometimes the word transgender is shortened to just trans, trans*, or trans male/trans").

46. Hugh Ryan, "What Does Trans* Mean, and Where Did It Come From?" Slate, 10 Jan. 2014, https://perma.cc/QA5F-XC7S.

transgender, transsexual, trans man, and trans woman, that are prefixed by trans- but also identities such as genderqueer, neutrois,[47] intersex, agender, two-spirit,[48] cross-dresser, and gender fluid."[49] Susan Stryker, Paisley Currah, and Lisa Jean Moore have argued for "trans-" as a self-sufficient term, categorized by an openness and indefiniteness not available to "transgender":

> Rather than seeing genders as classes or categories that by definition contain only one kind of thing (which raises unavoidable questions about the masked rules and normativities that constitute qualifications for categorical membership), we understand genders as potentially porous and permeable spatial territories (arguable [sic] numbering more than two), each capable of supporting rich and rapidly proliferating ecologies of embodied difference.[50]

In any of its variations, "transgender," as currently understood by many trans people, works to resist the historical pressures of medicalization that were built into "transsexual," along with the mandates of hormones, surgery, and teleology. At the same time, this flexibility is not always strategically useful for transgender people who do want to transition from one discrete gender to another and seek the interventions of hormone therapy and surgery, even if they do not see themselves as men trapped in a woman's body.[51]

"Transgender" seems to have become the dominant mode to talk and think about gender nonconformity and transition to other genders. Yet, there has historically been considerable variation in the terms trans people themselves have chosen, let alone non-transgender people. Moreover, these debates and decisions have diffused fairly unevenly throughout U.S. culture, especially outside of academic circles. Similarly, the courts have had an equally difficult time settling on

47. *See generally* "Agender. Neutral-gender. Neither Male nor Female," Neutrois.com, 2016, available at https://perma.cc/SUD9-29JA. ("Neutrois is a non-binary gender identity that falls under the genderqueer or transgender umbrellas. There is no one definition of Neutrois, since each person that self-identifies as such experiences their gender differently. The most common ones are: Neutral gender; Null-gender; Neither male nor female; Genderless; Agender.").

48. *See generally* Sandra Laframboise and Michael Anhorn, *The Way of the Two-Spirited People: Native American Concepts of Gender and Sexual Orientation*, Dancing to Eagle Spirit Society, 2008, available at https://perma.cc/229U-2BDZ ("The two-spirited person is a native tradition that researchers have identified in some of the earliest discoveries of Native artifacts. Much evidence indicates that Native people, prior to colonization, believed in the existence of cross-gender roles, the male-female, the female-male, what we now call the two-spirited person").

49. Avery Tompkins, *Asterisk*, 1 TSQ: Transgender Studies Quarterly, 26–27 (2014), https://perma.cc/X2J6-HCXC.

50. Susan Stryker et. al., *Introduction: Trans-, Trans, or Transgender?* 36 WSQ: Women's Studies Quarterly, 12 (eds. Stryker, et al.) (2008).

51. As just one example, see the interview with Patrick Califia (then Patrick Califia-Rice) in the *San Francisco Gate*, in which Califia explains that he chose gender transition because "I feel like I can put on a credible performance as both a woman and as a man, and at various points in my life have done both of those things. But neither one is really a very good fit for me." Rona Marech, *Radical Transformation/Writer Patrick Califia-Rice has Long Explored the Fringes: Now the Former Lesbian S/M Activist is Exploring Life as a Man*, SFGate, 27 Oct. 2000, https://perma.cc/287L-7SXD.

a standard point of reference.

Transgender activists and advocates have been very clear, as the GLAAD guidelines and other articles demonstrate, that naming signifies—it carries with it specific meanings that in turn may indicate political, cultural, and ideological assumptions about the human and civil rights, and dignity of transgender people. Our earlier work has made similar arguments in terms of courts' rhetorical choices in naming marginalized people and how these choices can be, if not predictive of decision-making, at least strongly correlative.[52]

As we turn to the cases dealing with the protection of transgender people under Title VII: language does matter. The courts are making decisions about how to refer to the plaintiffs who bring their complaints of discrimination to them. They are choosing how to gender the plaintiffs via pronoun use. Even the most unsympathetic courts use the plaintiffs' chosen pronouns, however grudgingly, which is a significant departure from usage in some of the earlier cases.[53] These courts take on the new name that transgender plaintiffs have selected for themselves. To that extent, decades of transgender activism and advocacy have successfully shifted cultural assumptions and practices about the gender with which trans people affiliate.

It is more challenging to draw other types of conclusions about the courts' uses of nomenclature for transgender people or even where courts stand in relation to structures of "gender" and/or "sex" and/or "gender transition." In the following section we analyze a number of contemporary employment discrimination cases brought by transgender people, and trace the dynamic and uneven interactions between transgender plaintiffs, the role of Title VII, and how courts recognize transgender people and make decisions accordingly.

II. COURTS' LANGUAGE CHOICES

Let's start with some good news: in the dozens of cases we reviewed, from local family courts, to appeals courts, to federal circuit courts, that addressed transgender issues in courts, including issues other than Title VII, we did not

52. For example, we have found courts using the term "homosexuals" to have very different concepts of what and who they were talking about than courts which refer to "gay men and lesbians." Sarah E. Chinn, *Technology and the Logic of American Racism: A Cultural History of the Body as Evidence*, 132–40 (2000) (discussing the naming of Japanese Americans as "loyal" to the U.S. during World War II); Kris Franklin, *The "Authoritative Moment": Exploring the Boundaries of Interpretation in the Recognition of Queer Families*, 32 William Mitchell Law Review 655 (2006) (examining how courts use authority and citation of sources to further their interpretations of legal rules).

53. Examples of courts referring to litigants by the gender they were assigned at birth rather than their chosen gender designators abound. *See generally In re McIntyre*, 1996 WL 942100, 1 (Pennsylvania Court of Common Pleas 8 Aug. 1996) (referring to Petitioner by his original name of Robert Henry McIntyre, and using male pronouns no fewer than twelve times within the first three paragraphs of the opinion, despite acknowledging petitioner's testifying to having lived "openly as a woman" for more than 5 years, and "being known generally in the community as Katherine Marie McIntyre").

find a single case of courts misgendering a transgender litigant.[54] This represents real progress from some of the earlier cases dealing with transgender people's rights as spouses, parents, heirs, and workers.[55]

We reviewed cases between 2008 and 2016. We identified all cases, published and unpublished, that referenced "trans!" people. We were pleasantly surprised to find dozens, so we decided to narrow the focus of our inquiry to recent cases examining claims within the same body of law. We chose to center our study on the sixteen or so most recent cases in which trans plaintiffs, or the EEOC on their behalf, raised claims of employment discrimination under Title VII. We then grouped the cases based on what language they were using to refer to the trans litigants, and attempted to discern any commonalities and differences both within and among the groups. We acknowledge that these cases require a level of privilege on the part of the plaintiff, which may not be true for the many transgender people who would not be represented in these cases and who do not have access to the judicial system because they are marginally employed and insecurely housed due to the intersecting pressures of transphobia, racism, homophobia, and classism.[56]

While we did not make an exhaustive study of all cases involving transgender litigants, there is a clear trend that transgender litigants' chances of winning have increased. This is especially true in the personal arenas of name change and family law.[57] Of course, an increase in favorable rulings does not

54. There is extensive commentary on the rudeness of misgendering, that is, referring to the litigant by a pronoun and/or name other than the one the litigant chose. *See* Kali Holloway, *"He" or "She" Doesn't Work for Everyone: Why "Misgendering" Matters*, Salon, 10 Feb. 2016, https://perma.cc/8R2F-PDLU. Perhaps the most powerful proof of the ongoing controversy over how offensive it may be to refer to a person by a different one than he or she uses is evidenced in the public brouhaha over whether under New York City Human Rights Law, the city's Human Rights Commission could fine businesses for instances of misgendering trans customers. *See generally* Miranda Katz, *No, NYC Did Not Just Introduce A $250,000 Fine For Any Incorrect Use Of Gender Pronouns*, Gothamist, 19 May 2016, https://perma.cc/N3RP-9FQH (describing, according to the Human Rights Commission, inaccurately, the Commission's December 2015 guidelines for references to Transgender people).

55. In the 1990s and early 2000s some judicial opinions used trans litigants' preferred gender, and some did not. It is notable, though misgendering does not always correspond with favorable or unfavorable outcomes for trans litigants, nor does gender neutral or gender appropriate language correlate to positive outcomes. For example, one of the earliest trans cases avoided gender pronouns altogether even while ruling that transgender petitioners could not obtain a new birth certificate with a change of gender designation. *Anonymous v. Weiner*, 50 Misc. 2d 380, 381 (1996) (stating that, "[t]he petitioner is a transsexual" and using no pronouns in the opinion); *but see In the Matter of Robert Wright*, 816 A.2d 68 (Maryland Appellate Ct. 2003) (referring to petitioner seeking a name change to Janet as "he" throughout the opinion while vacating lower courts' refusal to grant petitioner a name change order) with *Littleton v. Prange*, 9 S.W.3d 223, 231 (Texas Appellate Ct. 1991) (referring to Christie Lee Littleton as "she" and "female" throughout its opinion, even while declaring her marriage to deceased husband as invalid due to the fact that she was "born male.").

56. For a detailed discussion of the challenges many transgender and gender nonconforming people face from the legal system and social services, especially those who are poor and of color, *see generally* "Our Approach and Principles," The Sylvia Rivera Law Project, 2016, https://perma.cc/LF49-B3FV.

57. There are, of course, startling exceptions. A notable example is the 2005 decision *In re Mar-*

mean victory across the judicial system writ large, and courts are strikingly uneven in terms of outcomes, but there is a general trend towards courts' accepting transgender people.

One of the more fraught areas of law around transgender people and their rights at present remains those claims rooted in Title VII. Title VII prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.[58] The crucial phrase from Title VII on which claims of employment discrimination against transgender people rest is "because of sex," which is a fairly vague framework on which to hang these claims. The vexed interpretations of this law provide an insight into how the courts have described and understood the experiences of trans litigants, even as those courts' reasoning may have been focused or limited by the specific facts of the case at issue or by the specific precedent in their jurisdictions.

Many scholars and commentators have thoughtfully reflected on the courts' application of "because of sex" to trans litigants.[59] These intellectual interventions provide a solid foundation upon which this Article can rely, rather than us having to construct it from scratch. It is sufficient to note that early on, transgender litigants generally lost their claims under Title VII when courts concluded that the statute offered no protection against trans discrimination.[60] That

riage of Simmons, in which a court denied parental rights to a transgender man after divorce from his non-transgender wife. 355 Ill. App. 3d 942 (Illinois Appellate Ct. 2005). This case presented simultaneously a trans rights issue and a same-sex marriage issue. That is, once the court determined that Simmons was not a man, despite surgery to remove reproductive organs and a new birth certificate, it followed that his marriage was invalid, because it was between two women. With an invalid marriage, Simmons could therefore not claim parentage of his child, who was conceived through artificial insemination and initially legalized due to Simmons' status as the biological mother's husband. Ironically, even though in that case the court referred to Simmons as "he," it was careful to observe that "[t]his is done out of respect for petitioner and has *no legal significance*." *Id*. at 945 (emphasis added).

58. Title VII reads: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

59. *See, e.g.*, Alexandra Fiona McSpedon, *Employer Perceptions of Trans Women's Sex and Behavior in Title VII Sex Stereotyping Claims: the Case for Reading Price Waterhouse v. Hopkins as a Blanket Prohibition of Gender Policing by Employers*, 35 Cardozo Law Review 2505 (2014); Michael J. Vargas, *Title VII and the Trans-Inclusive Paradigm*, 32 Law & Inequality: A Journal of Theory and Practice 169 (2014); L. Camille Hébert, *Transforming Transsexual and Transgender Rights*, 15 William and Mary Journal of Women and the Law 535 (2009) (arguing that Title VII and other existing legislation should be understood to already cover transsexual and transgender individuals); Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 Temple Political & Civil Rights Law Review 573 (2009) (predicting that the U.S. Supreme Court may be open to interpreting Title VII's protections "because of sex" as extending to transgender plaintiffs); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: the Disaggregation of Sex from Gender*, 144 University of Pennsylvania Law Review 1, 33–50 (1995) (arguing against the disaggregation of sex and gender in sex discrimination jurisprudence).

60. *See Voyles v. Ralph K. Davies Med. Ctr*., 403 F. Supp. 456, 457 (N.D. California 1975); *Holloway v. Arthur Andersen & Co*., 566 F.2d 659, 663 (9th Cir. 1977); *Sommers v. Budget Mktg., Inc*., 667 F.2d 748, 750 (8th Cir. 1982); *Ulane v. E. Airlines, Inc*. 742 F.2d 1081, 1087 (7th Cir. 1984).

trend shifted dramatically after *Price Waterhouse*,[61] with its determination that Title VII's protections against sex discrimination prohibited employers from discrimination based on sex stereotyping.[62] Following *Price Waterhouse*, most trans plaintiffs positioned their claims in terms of discrimination based on gender stereotyping, rather than on their transgender status itself.[63] And, at least sometimes, they began to win.[64] Even though these stereotyping claims were expedient and often successful, they could not work for their plaintiffs when or if the court viewed the employer to be acting not out of sex role stereotyping, but, instead, out of anti-trans animus.[65]

61. Indeed, the pre-*Price Waterhouse* line of trans cases was characterized as "eviscerated" in *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004).

62. A foundational case in gender employment law, *Price Waterhouse* established the now-standard shifting burdens approach to cases in which the parties allege mixed motivations, both discriminatory and not, in adverse employment actions. 490 U.S. 228, 237 (1988). The case originated in Ann Hopkins's claim that Price Waterhouse failed to promote her because of her "unfeminine" behavior and affect, while Price Waterhouse countered that their reasons for not promoting Hopkins were grounded in perceptions that she was uncollegial and difficult, regardless of her gender. *Id.* The plurality of the Supreme Court upheld the trial judge's determination that "Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping." *Id.* Consequently, it explained that "we take these words ['because of such individuals'. . . sex'] to mean that gender must be irrelevant to employment decisions." *Id*. at 240.

63. For a detailed analysis of *Price Waterhouse* and its ramifications for transgender litigants, *see* Jason Lee, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination under Title VII*, 35 Harvard Journal of Law & Gender 423, 435–39 (2012); Sue Landsittel, *Strange Bedfellows? Sex, Religion, and Transgender Identity under Title VII*, 104 Northwestern University Law Review 1147, 1157–61 (2010).

64. However, similar arguments by non-transgender people in challenging gender stereotypes have not always succeeded. *See, e.g.*, *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006), in which the plaintiff, Darlene Jespersen, sued Harrah's casino for what she saw as a discriminatory dress code that required female employees to wear make-up and style their hair in typically feminine ways, and also forbade male employees from wearing nail polish or growing their hair below the collar. The court found for the defendant on the grounds that Harrah's policy was not discriminatory under Title VII:

> The policy does not single out Jespersen. It applies to all of the bartenders, male and female. It requires all of the bartenders to wear exactly the same uniforms while interacting with the public in the context of the entertainment industry. It is for the most part unisex, from the black tie to the non-skid shoes. There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear. The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement.

Id. at 1111–12.

65. For examples of cases denying transgender protection under Title VII after *Price Waterhouse* was decided, *see Equal Employment Opportunity Commission v. R.G. and G.R. Harris Funeral Homes, Inc*., 100 F. Supp. 3d 594 (E.D. Michigan 2015); *Etsitty v. Transit Authority*, 502 F.3d 1215 (10th Cir. 2007). For examples of courts denying transgender protection in Title VII cases prior to *Price Waterhouse*, see *Ulane*, 742 F.2d at 1081; *Sommers*, 667 F.2d at 748; *Holloway*, 566 F.2d at 659. *Price Waterhouse* was hardly a panacea for transgender people, even when it was applied to them in employment discrimination cases. As Landsittel points out, invoking *Price Waterhouse* forces trans litigants to argue that they are not actually transgender, but rather gender nonconforming non-transgender people. *See* Landsittel, *Strange Bedfellows?* For example, in order for Krystal Etsitty to claim discrimination under

At least a few courts read the term "sex" differently, however. For example, the court in *Schroer v. Billington* construed Title VII protections as extending to transgender people qua transgender, on the grounds that discriminating against someone because of a gender transition is in and of itself discrimination "because of sex."[66] In 2012, the Equal Employment Opportunity Commission (EEOC) articulated a new position in *Macy v. Holder*, interpreting anti-trans bias to be unequivocally and always actionable as sex discrimination under Title VII.[67] Thus the EEOC website currently states: "EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity . . . regardless of any contrary state or local laws."[68]

More than a few observers contend that this represents a "sea change," and that "top employment lawyers" predict that this interpretation may remain stable and unanimously supported by the courts.[69] Perhaps their buoyant predictions will ultimately prove correct.[70] Nonetheless, we find it overly optimistic—or perhaps purely tactical—for advocates to insist at the current moment that this is a settled question in law. At least one post-*Macy* court definitively concludes that "discrimination based on transgender status" is not per se actionable under Title VII.[71] Furthermore, there is still-valid precedent disagreeing with the EEOC's position in many jurisdictions.[72]

Even in the post-*Macy* era, many trans employment discrimination cases continue to be litigated at least in part under the sex-stereotyping framework.[73]

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the *Price Waterhouse* interpretation of Title VII, she would have to affirm that she was mistreated because she was a man behaving in non-masculine ways (wearing women's clothes and make-up, using a female name and female pronouns), rather than because she was transgender. Not surprisingly, then, the court determined that using a women's restroom did not fall under gender nonconforming behavior, but was inappropriate for any man, a category that Etsitty had to identify with. *Etsitty*, 502 F.3d at 1215.

66. 577 F. Supp. 2d 293, 306 (D.D.C. 2008). The court analogizes the situation of a transgender plaintiff to that of a religious convert: "No court would take seriously the notion that 'converts' are not covered by [Title VII's prohibition of discrimination on the basis of religion]. Discrimination 'because of religion' easily encompasses discrimination because of a *change* of religion." *Id.*

67. *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 at *11 (20 Apr. 2012), available at https://perma.cc/U8GZ-W43S (concluding that "intentional discrimination against a transgender individual because that person is transgender is, by definition 'based on . . . sex' and such discrimination therefore violates Title VII").

68. "What You Should Know About EEOC and the Enforcement Protections for LGBT Workers," Equal Employment Opportunity Commission, https://perma.cc/WYC8-D2PW.

69. *See generally* Dana Beyer et al., *Know Your Rights*: *New Title VII and EEOC Rulings Protect Transgender Employees*, Transgender Law Center, https://perma.cc/DV3Z-RMQL.

70. *But see EEOC v. R.G. and G.R. Harris Funeral Homes, Inc*., No. 14–13710, 2015 WL 9700656 at *1 (E.D. Michigan 24 Sept. 2015) (a post-2012 opinion where the court seems to take for granted that if the plaintiff was discriminated against based "solely" on her "status as a transgender person" she "would fail to state a claim under Title VII").

71. *Eure v. Sage Corp*., 61 F. Supp. 3d 651, 662 (W.D. Texas 19 Nov. 2014).

72. *See generally EEOC v. R.G. and G.R. Harris Funeral Homes. Inc*, 100 F. Supp. at 595 (unequivocally concluding that "transgender status is not a protected class under Title VII.").

73. *See generally Hart v. Lew*, 973 F. Supp. 2d 561, 561 (D. Maryland 2013) (see our discussion below, 29); *Parris v. Keystone Foods*, 959 F. Supp. 2d 1291 (N.D. Alabama 2013)

Several years after *Macy*, some federal circuits were still treating the question of whether transgender discrimination protection was included within Title VII as an unsettled and novel one,[74] while others continued to hold that employment discrimination based on anti-trans bias was not itself actionable under Title VII unless it could be shown to include a sex-stereotyping component.[75] These issues will likely continue to be litigated in the future, unless the Supreme Court weighs in.

The question this Article addresses, however, is not the appropriateness of Title VII as a remedy for employment discrimination against transgender people. We leave that question to the many scholars assiduously writing in this area,[76] and to the courts, which will undoubtedly continue to grapple with the legal doctrine until its meaning with regards to protection of prospective trans plaintiffs is universally resolved. Instead, we are essentially limiting ourselves to examining the Title VII cases as a sorting mechanism, narrowing our focus on discursive patterns used by courts in relation to transgender people.

The numbers of cases in a variety of areas brought by transgender people has multiplied exponentially in the past decade and so, to some extent, singling out any specific subset of cases is, by necessity, incomplete at best, and arbitrary at worst. Narrowing our focus to a single cluster of cases allows for an in-depth

(plaintiff alleged that she was discharged from her job at a chicken processing facility because of her "gender non-conformity"); *Chavez v. Credit Nation Auto Sales*, 49 F. Supp. 3d 1163, 1172 (N.D. Georgia 2014) (detailing the history of the case in which an EEOC investigator initially told the plaintiff that she could not file a discrimination claim against her employer because "transgender persons are not protected from discrimination on the basis of 'sex' under Title VII," only to find out that other trans plaintiffs had successfully filed complaints and gained the EEOC's support. Plaintiff returned to the agency and was subsequently permitted to file her claim).

74. *See generally Fabian v. Hospital of Central Connecticut*, 172 F. Supp. 3d 509, 518 (D. Connecticut 2016) (see our discussion below, 42–44); *Finkle v. Howard County*, No. SAG-13-3236, 2015 WL 3744336 at *5 (4th Cir. 2015) (the court ruled that the plaintiff, a volunteer auxiliary police officer, was an "employee" for Title VII purposes, and that her claim that she was discriminated against "because of her obvious transgendered status" raised a cognizable claim of sex discrimination).

75. *EEOC v. R.G. and G.R. Harris Funeral Homes, Inc*., 100 F. Supp. 3d at 595.

76. The utility and efficacy of Title VII claims is a debated topic among legal scholars working in transgender law. For some, Title VII, while imperfect at best, has proven to protect some trans people from employment discrimination. *See generally* Camille Hébert, *Transforming Transsexual and Transgender Rights* 15 William & Mary Journal of Women and the Law 535 (2009), (arguing that "courts should recognize discrimination against transsexual and transgendered individuals as classic sex discrimination under Title VII of the Civil Rights Act of 1964"); Deborah Anthony, *Sex at Work: Title VII Discrimination and the Application of "Because of Sex" to Transgender Employees*, 36 Women's Rights Law Reporter 112, 135 (2014) (insisting that "Title VII is up to the task" of providing discrimination protection for transgender plaintiffs). *But see* S. Elizabeth Malloy, *What Best to Protect Transsexuals from Discrimination: Using Current Legislation or Adopting a New Judicial Framework*, 32 Women's Rights Law Reporter 283, 322 (2011) (claiming that "neither disability law nor Title VII is the most appropriate remedy for transgender discrimination"); Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 Columbia Human Rights Law Review 713, 753 (2005) (maintaining that transgender advocates might do well to abandon Title VII and instead look to the Equal Protection and Due Process Clauses of the Fourteenth Amendment for a more robust defense of gender nonconforming people.).

study that can offer more meaningful analysis of the discursive changes in naming patterns. Since alleged employment discrimination against trans people offers a rich body of opinions with an extensive ongoing examination of the meaning of trans experience, we believe these cases provide valuable insight into the courts' discourse.

Our purpose in this Article is to explore how courts are naming and describing transgender litigants' place, in view of broader cultural changes in the larger definitions of gender identity, and to consider whether and how naming and terminology relates to courts' actual understanding of the stakes for transgender people in workplace discrimination. We ask whether there is any correlation between the language courts use and their conceptualization of transgender experiences and identities.

By this logic, it would be reasonable to presume that courts that deployed the discourse of "transsexualism" would have a less flexible concept of gender difference than those who used the language of transgender. On the other hand, as the notion of a gender continuum has gained more currency in LGBT communities, "transgender" and "trans" have predominated. Moreover, since "transgender" is a term embraced by advocates of trans people, and reflects a more current understanding of gender, we could assume that courts using that particular nomenclature would also adopt a more progressive, advocacy-oriented position. One of the most surprising outcomes of our research is that although this seems like a perfectly reasonable set of assumptions, it is not reflected in the cases themselves.[77]

Certainly, as we describe below, courts are more likely to use "transgender" than "transsexual" over the past decade or so, but their language choice varies considerably, sometimes even within a single decision, or a single paragraph. Courts are also far more comfortable using "transgendered" and "transgender" interchangeably; in fact they seem to favor the former somewhat more. In some jurisdictions, especially those located in areas in which there is significant political support for LGBT people, courts are close to the cutting edge of naming and analyzing gender nonconforming experiences.[78]

Strikingly, many opinions confidently proceed as though their readers are equally well informed about issues of gender identity and transition as the courts feel themselves to be. This is a significant shift from even 15 years ago, when courts seemed compelled to spell out the various permutations of gender noncon-

77. This also seems to be true in the academic literature, in which terminology varies widely, even among scholars who are squarely in the pro-trans equality camp. Nomenclature in recent law review publications includes: transpersons, trans persons, transgender individuals, transsexuals, trans-identifying people, transgender people, gender nonconforming people, transsexual individuals, and transgendered individuals.

78. *See generally Wilson v. Phoenix House*, 42 Misc. 3d 677, 686–89 (Superior Ct. of Kings County 10 Dec. 2013) (quoting at length and approvingly from materials produced by the trans advocacy group the Sylvia Rivera Law Project, which defines the many layers of transgender identities and self-expressions. It also cites publications by transgender legal scholars that speak to a cultural movement beyond a coercive regime of binary gender, and describe the specific legal needs of gender nonconforming people).

formity in order to define transsexuality as a specific phenomenon.[79] More recently, this desire to elaborate the meanings of terms being used has fallen away, which we read as an assumption by the courts of shared knowledge about gender identity issues and law.

In the remainder of this section we analyze Title VII cases that hinge on complaints of employment discrimination against transgender people. We categorize those cases based on the language they use to refer to the litigants: transsexual, transgender/transgendered, or the interesting cases in which courts attempt to sidestep using any nomenclature at all. Since within the LGBT community the difference between "transsexual" and "transgender" is linked to gender binary frameworks or a rejection of them, and the levels of embrace or rejection of the standard transition narrative, we are looking to learn whether the terminology courts use is directly reflected in or reflects what appear to be their conceptions of trans experience or not.

This analysis will pose a few crucial questions: Where is the courts' language about transgender people coming from? Does the language correspond with who wins, or how they win? Do courts draw actual distinctions between and among terms? Can we draw any conclusions about a general judicial mindset in terms of transgender people in relation to employment discrimination law? Finally, how might those conclusions provide some clues as to where transgender people and their advocates could go to find more reliable protections against employment discrimination?

A. Transsexual

"Transsexual" has been in use by courts on and off from the beginnings of trans-related law up to the present day.[80] Cases that do use this term seem generally to ascribe to the model of "sex change," via surgical and hormonal processes that move a person from one distinct gender to another, which is not to say the "opposite." These cases also understand gender transition through what we might call the "classic" transsexual narrative, i.e. being trapped in the "wrong" body. In his study of transsexual narratives, Jay Prosser observes that "transsex-

79. *See generally Lie v. Sky Publishing Corporation*, 15 Mass. L. Rptr. 412 (Superior Ct. of Massachusetts 7 Oct. 2002) (not reported) (the Massachusetts Superior Court labored through a lengthy explanation of the differences it saw between "transsexual" and "transgendered individual," which it regarded as an "umbrella term used to describe all individuals who exhibit a gender identity that does not conform to societal expectations, including transsexuals, transvestites, and others who engage in a gender expression that is different from that associated with their biological sex"). The *Lie* court countered the defendant, who referred to the plaintiff variously as a "cross-dresser," a "transvestite," and a "transsexual," inconsistencies that for the court went "to the heart of at least one of the counts of the complaint." *Id.* But we would argue that the *Lie* court, and others, were at least in part taking on this indiscriminate naming to broadcast to its readers, presumably a court of higher appeal, that it had mastery over the nomenclature and the classifications those names identified. *See id.*

80. The most current cases we found using the term were decided as recently as 2015. *See generally Lewis v. High Point Regional Health System*, 79 F. Supp. 3d 588, 589 (E.D. North Carolina 2015).

ual subjects frequently articulate their bodily alienation as a discomfort with their skin or bodily encasing; being trapped in the wrong body is figured as being in the wrong, or an extra, or a second skin."[81] For Prosser, this narrative gambit is not coincidental; he argues "transsexuals continue to deploy the image of wrong embodiment because being trapped in the wrong body is simply what transsexuality feels like . . . the feeling of a sexed body dysphoria profoundly and subjectively experienced."[82]

The court in *Etsitty v. Utah Transit Authority*[83] exemplifies this discursive representation of "wrong embodiment" in reporting the self-image of Krystal Etsitty, "a transsexual" who "identifies herself as a woman and has always believed she was born with the wrong anatomical sex organs."[84] While Etsitty defines herself as "a pre-operative transgender individual,"[85] the court understands her, and invariably names her, as "transsexual."[86] For this court, then, to be transsexual has a kind of teleological inevitability: Etsitty has not had genital surgery because she is "*pre*-operative;" that is, she expects to have surgery but has not yet done so.[87]

Etsitty herself brings the case under Title VII protections against discrimination based on sex, and argues that she had been let go because "she was a transsexual and because she failed to conform to UTA's expectations of stereotypical male behavior."[88] More specifically, Etsitty claims, "because a person's identity as a transsexual is directly connected to the sex organs she possesses, discrimination on this basis must constitute discrimination because of sex."[89] The court, in deploying the vocabulary of transsexualism, implicitly concurs with Etsitty's premise that the case concerns sexual organs, as it conceives of transgender experience as being about "sex change."

But for the *Etsitty* court, transsexuality is only about results, rather than self-description. Etsitty may conceive of herself as a transgender woman, but she still has male genitals, so it is impossible in the court's view that she has achieved transsexuality. Rather, she is in an uncomfortable interstitial place, an aspirational transsexual. In fact, the court denies her claim that being banned

81. Prosser, *Second Skins*, at 68.

82. *Id*. at 69. This analysis is taken up by Malloy who begins her article with a quotation from Mario Martino, *Emergence: A Transsexual Autobiography* (1977): "Unless you have actually experienced transsexualism, you cannot conceive of the trauma of being cast in the wrong body." Malloy, *What Best to Protect Transsexuals from Discrimination* at 283. Malloy points to "the ongoing agony of being 'trapped in the wrong body'" as the ontological reality of transgender people, a trauma intensified and multiplied by social and legal discrimination. *Id*.

83. 502 F.3d 1215 (10th Cir. 2007).

84. *Id*. at 1218.

85. *Id*.

86. *Id*. at 1218–22, 1224, 1226.

87. *Id*. at 1218. A little later in the decision, the court reports that when asked "where she was in the sex change process," Etsitty responded that "she still had male genitalia because she did not have the money to complete the sex change operation." *Id*. at 1219.

88. *Id*. at 1220–21.

89. *Id*. at 1221.

from using women's restrooms is a Title VII violation, via *Price Waterhouse*, by explaining that there is no way that it "requires employers to allow biological males [in this case, Etsitty] to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes."[90]

While the court's logic here may seem byzantine, it in fact comports with many of the elements of the transsexual narrative. The foundation of that narrative is that Etsitty is a woman trapped in a man's body. Ergo, until she is able to fully shed that integument, she is still a man, or at the very least a transsexual woman who is not yet a woman. If she were actually a transsexual woman, meaning that she had to have completed her transition via hormones and surgery, then she would have more standing under Title VII, perhaps arguing that women should not be barred from women's restrooms. Yet, as a pre-operative transsexual, who in the eyes of this court makes her a biological man rather than a transsexual woman, there is no part of Title VII that she can cling onto.

It is not axiomatic, however, that cases employing this transition-based language for pre- (or non-) operative "transsexuals" will inevitably conclude that anti-trans discrimination cannot be covered by Title VII protections. *Glenn v. Brumby* holds that it can,[91] while still relying upon a fairly standard medicalized and transition-focused narrative of its plaintiff's experience, and while acknowledging that she is "in the process of becoming a woman:"[92]

> Vandiver Elizabeth Glenn was born a biological male. Since puberty, Glenn has felt that she is a woman, and in 2005, she was diagnosed with GID, a diagnosis listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders.[93]

The defendant made the court's finding of Title VII violation under *Price Waterhouse* remarkably easy. Rather than expressing discomfort with Glenn's transition, Brumby explicitly objected to Glenn being "dressed in women's clothing with male sexual organs inside that clothing."[94] The court found Title VII to be a good fit because the defendant himself characterizes Glenn as "a woman in a dress," rather than simply objecting to the fact of her transition or her identity as a transsexual woman. Glenn's employer "fired Glenn because he considered it 'inappropriate' for her to appear at work dressed as a woman and that he found it 'unsettling' and 'unnatural' that Glenn would appear wearing women's clothing. Brumby . . . [fired her] based on his perception of Glenn as 'a man dressed as a woman and made up as a woman."[95]

When the *Price Waterhouse* claim comes solely from the plaintiff's inter-

90. *Id.* at 1224.
91. 663 F.3d 1312, 1316 (11th Cir. 2011).
92. *Id.* at 1314.
93. *Id.*
94. *Id.*
95. *Id.* at 1320.

pretation of Title VII, however, things get tougher, such as in the Maryland District Court's decision in the more recent case *Hart v. Lew*.[96] The court defines plaintiff Sydney Hart immediately as a "male-to-female transsexual"[97] who, unlike Etsitty, "underwent gender reassignment surgery"[98] a few years prior. Between the beginning of her transition and her surgery, Hart's superiors had refused to allow her to use the women's restroom because she "still had male genitalia."[99] Although neither the court nor Hart invokes the "trapped inside a man's body" narrative, the case's focus on genitalia points towards the centrality of sexed bodies to a person's authenticity as transsexual.

Interestingly, the *Hart* court split its decision, and the difference between transsexual and woman: it found for the defendant and dismissed Hart's claims based on sex discrimination and retaliation for complaining, but denied the defense's motion to dismiss Hart's Title VII claim that she was fired because of her (trans)gender. In both these findings, the court's logic conforms to the transsexual narrative. Implicitly, Hart cannot claim gender discrimination for being barred from the women's restroom because she was still anatomically male as a pre-operative transsexual. However, by the time she was fired, she was post-operative, and able to occupy the subject position of an authentic transsexual woman.

These decisions have at least an internal uniformity in their use of terminology and some measure of conceptual consistency. However, some courts have more trouble deciding on what kind of terminology to use to refer to transgender people, especially as more terminology becomes culturally available.[100] Occasionally, they go for a maximalist approach, as the court in *Lewis v. High Point Regional Health System*[101] does. Laying out the background for the case, the court identifies the plaintiff, Xyaira Lewis as "a transgendered male who identifies with the female gender. Though Ms. Lewis is anatomically a male, she is currently undergoing hormone replacement therapy in preparation for a sexual reassignment surgery."[102] Yet, in the same paragraph, the court narrates her claim that "she alleges she was interviewed by a group of CNAs [certified nursing assistants] who harassed and ridiculed her about her status as a transsexual."[103]

The *Lewis* court seems confused to the point of absurdity: surely "transgendered male" would mean someone who is transitioning to male status? What does it mean to be "a transgendered male who identifies with the female

96. 973 F. Supp. 2d 561 (D. Maryland 2013).
97. *Id.* at 564.
98. *Id.* at 565.
99. *Id.* at 567.
100. For a full explication and analysis of the multiple and changing ways of naming trans people, *see* Susan Stryker & Paisley Currah, *Keywords in Trans Studies*, 1 Transgender Studies Quarterly 1, (2014).
101. 79 F. Supp. 3d 588 (E.D. North Carolina 2015).
102. *Id.* at 588.
103. *Id.* at 589.

gender"?[104] Is that a transgender man who likes women? Who is feminine? It is only at the next sentence that the court manages to make its meaning clear. In fact, Lewis falls squarely into the transsexual narrative of someone who is "anatomically a male" and is not just taking hormones, but is "in preparation for a sexual reassignment surgery."[105]

Similar, but somewhat less internally contradictory, is *Creed v. Family Express Corporation*.[106] The court hedges its bets by leading off with Amber Creed's diagnosis of GID, "a condition in which one exhibits a strong and persistent cross-gender identification . . . and a persistent discomfort about one's assigned sex."[107] It refers to her "gender transition,"[108] and the fact that Creed referred to herself as "transgender."[109] By the end of the decision, the court temporarily adopts the language of transgender before switching over to "transsexual."[110] Ironically, the medicalization of her self-identification and the rejection of her *Price Waterhouse* claim[111] take her self-identification as transgender seriously, but deny the possibility that transgender status is more than just a condition, which leads the court to reason that she is not protected by Title VII.[112]

When these courts use the word "transsexual," then, they all mean in essence the same thing, consistent with the usage of "transsexual" in the larger cultural and political arenas: a person's transition from one discrete sex to another, whether being contemplated, in process, or "completed." We would argue that this framework has an internal logic that courts feel confident working within; it allows the transgender litigant to be seen as not in any way disrupting binarized gender, but simply switching teams. Whether the courts are more comfortable with this because it fits individual judges' conception of how gender operates, or whether it is simply more strategic or expedient for the purposes of applying a legal standard not designed for gender outside a binary, is not clear. Regardless of which of these is the case, the results for the trans litigant, whether they prevail or not, always end up flattening what could be a richer and more complicated narrative of life on the gender continuum.[113]

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104. *Id.* at 588.
105. *Id*. at 588.
106. No. 3:06-CV-465RM (N.D. Indiana 2009).
107. *Id*. at 1.
108. *Id*. at 1.
109. *Id*. at 3.
110. *Id.* at 10.
111. In an odd turn of phrase, the court maintained that although it had "referred to Ms. Creed as female in this opinion in deference to her self-identification, she must be considered male for the purposes of Title VII." *Id.* at 8. The court's acknowledgment of Creed's transsexuality, then, spells doom for her Title VII claim, since it cannot treat her as both female for the purposes of gender transition resulting from GID and male in order to qualify under Title VII. Men wearing dresses are challenging gender stereotypes and hence covered by Title VII; transgender women expressing their gender identity are not.
112. *Id.* at 11.
113. There are deeper political implications to this framework, even when it succeeds for the individual plaintiff. Setting hormonal and surgical intervention as the gold standard, or even the ultimate goal, for transgender and gender nonconforming people reinforces a cultural

B. Eschewing Terminology Altogether

As social and political norms around the usage of terminology for trans people have rapidly shifted and evolved, some courts seem altogether intimidated by the possibility of getting the nomenclature "wrong."[114] Consequently, they try studiously to avoid naming the plaintiffs' gender identity at all. It could be that these cases represent a way station on the road to more uniformly accepted terminology, as the courts become increasingly comfortable with the term transgender. The fact that in all the cases we looked at for this Article, courts are attempting to respect in some way or other, the names, pronouns, and terms transgender plaintiffs choose for themselves suggests that this sidestepping of terminology will become a thing of the past.

For example, in *Fowlkes v. Ironworkers Local 40*,[115] the Second Circuit refers to the plaintiff as someone who "self-identifies as male but was born biologically female."[116] In articulating the case's factual background, the court again describes Fowlkes as "born biologically female and was named 'Colette,' [but] now self-identifies as a man, preferring to be called 'Cole' and to be referred to in the masculine."[117] Although much of Fowlkes's Title VII claim is rooted in harassment he endured because of his gender expression, the court narrates the complaint as a more straightforward issue of discrimination on the basis of sex similar to *Price Waterhouse*, even as it does not identify which sex it believes he is.

Meanwhile, the court in *Gottschalk v. City and County of San Francisco*,[118] ducks the troublesome issue of trans nomenclature, but it may be doing so for a very different reason. Here, rather than referencing trans language explicitly, the court leans on the all-purpose acronym LGBT.[119] This case is something of a legal outlier because the plaintiff's claims are wide-ranging, and range from discrimination on the basis of age, race, sexual orientation, gender identity, religion, and national origin, as well as accusations of racketeering, liability, fraud, and political discrimination. It is notable that the court is openly frustrated with the

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conception that many in the trans community are actively working to challenge, or, for reasons of poverty and lack of access, may not be able to avail themselves of, even if they want those interventions. Any given "win" may benefit the individual trans person bringing suit, but it does not change the larger economic, social, or political context.

114. On the one hand, we could see this as a salutary development. Courts are recognizing that the LGBT community has worked towards promoting the use of nomenclature that is sensitive to trans people's experience, as the GLAAD guidelines illustrate. Courts recognize, that is, that the language one uses is connected to a political perspective. However, as we argue in this section, rather than actually listening to trans people's representation of their own experience with gender, courts seem to be more concerned with identifying the "correct" usage, and would rather avoid the issue altogether. We cannot comment on whether this is the result of liberal anxiety or the larger mandate that legal language always be precise, unambiguous, and knowable, a dictate that trans people inevitably disrupt.

115. 790 F.3d 378 (2d Cir. 2015).

116. *Id.* at 380.

117. *Id.* at 381.

118. 964 F. Supp. 2d 1147, 2013 WL 557010 (N.D. California 2013).

119. *See, e.g.*, *id.* at *3, *6.

plaintiff, whose complaint is "incoherent, repetitive, and written in a stream of consciousness style,"[120] contains information "with little to no discernable relevance,"[121] and is "disjointed" enough to make it "difficult if not impossible, to evaluate"[122] on the merits. It could be, then, that unlike in some of the other cases, the district court's avoidance of nomenclature for the trans plaintiff here is less about the court's discomfort with trans naming and more tactical: using LGBT in this instance allows the court to consolidate the plaintiff's claims of discrimination on the basis of gender identity into her larger claim on the basis of sexual orientation, both taking it and the other claims as seriously as possible, while resisting the request on the part of the plaintiff to define this as a gender identity-specific case.

Chavez v. Credit Nation Auto Sales is a more typical example of the terminology-averse cases; it avoids adopting specific nomenclature for its trans plaintiff by taking a kitchen sink all-these-terms-are-interchangeable approach.[123] The opinion cites the plaintiff's membership in a "transsexual support group"[124] and her sense of herself as "a transgender person,"[125] mentions how various Title VII decisions permitted transsexuals to "bring actionable sex discrimination claims based on gender-nonconformity,"[126] and quotes Chavez's decision to go to the EEOC "after hearing news reports about transgender individuals filing complaints with the EEOC."[127] Nonetheless, the court does not actually identify her as transsexual or transgender. Rather, the decision repeatedly invokes Chavez' "transition from male to female," or "transition."[128] The court describes at length the plaintiff's struggles to get access to a women's or unisex restroom, as well as the extra vacation time she received for what it calls "her gender transition," while neatly sidestepping the issue of having to attach a specific identity to her, preferring instead to focus on "[p]laintiff's decision to transition from a male to a female."[129]

120. *Id*. at *1.
121. *Id*. at *3.
122. *Id*. at *4.
123. 49 F. Supp. 3d 1163 (N.D. Georgia 2014).
124. *Id*. at 1168.
125. *Id*. at 1175.
126. *Id*. at 1191.
127. *Id*. at 1186. It is worth noting, however, that the court makes a very similar statement at p. 1180, with the only notable difference being the substitution of the word transsexual for transgender.
128. *Id*. at 1168–69. This studious avoidance was especially noticeable in the court's discussion of Plaintiff's *prima facie* case: "Here, Plaintiff has presented evidence that she was qualified for her position, that she began the process of transition from male to female, including presenting herself as female, undergoing gender transition surgeries, and wearing dresses, and informed her employer that she was making that transition." *Id*. at 1197.
129. *Id*. at 1168–69. *See also id*. at 1174 (explaining that plaintiff could assert a cognizable sex discrimination case because she was "transitioning from a male to a female.").

C. Transgender(ed)

While some courts continue to toggle between references to "transgender" and "transgendered" as if they are equivalent and interchangeable, more are deploying the community-preferred, and GLAAD approved usage: "transgender."[130] However, what this language choice actually means to the courts and the plaintiffs varies significantly. In some instances, "transgender(ed)" is really just another word for "transsexual," and the court, to a greater or lesser extent, subscribes to the transsexual narrative. With the exception of *Lopez* discussed below, all of the recent cases we found that used either "transgender" or "transgendered" rather than "transsexual" were heard within months of each other, and all were decided after both the EEOC policy shift of 2012 and the publication of the *DSM V* in 2013. *Fabian* is the most recent of the decisions we analyze here and we are loath to impute any kind of narrative of progress in the use of "transgender" as an identifying term. Rather, we would argue that what we have here is closer to a cacophony of voices, each speaking a different kind of definition of "transgender" to fit its own sense of how gender and gender discrimination operate.

Lopez v. River Oaks Imaging & Diagnostic Group is an excellent example of this change in naming without an accompanying conceptual shift.[131] Throughout its opinion the court refers to the plaintiff, Izza Lopez, as "transgendered" and compares her to other "transgendered persons."[132] However, the specter of the transsexual narrative is not far distant: the court introduces its analysis of the facts not by identifying Lopez as transsexual or transgender, but by stating that she "suffers from Gender Identity Disorder ('GID')," citing directly from the *DSM IV*.[133] "Accordingly," the court continues, "while she is biologically male,[134] she lives her life as a woman, consistent with accepted medical and therapeutic protocols for her condition. Lopez plans to undergo sex reassignment surgery when she is financially able to."[135] Later on in the decision the court (approvingly?) notes that Lopez did make the effort to "inform the company of her biological sex"[136] on her birth certificate. The court muses whether "there is a genuine fact issue whether Lopez's actual sex was of any consequence" to her employer, by which it means her birth sex.[137]

130. In fact, one court goes so far as to explain in a footnote that it uses the term "transgender" or "transgender woman" to describe the plaintiff specifically to accord with the GLAAD guidelines, even though the plaintiff herself uses the term "transgendered." *Finkle*, No. SAG-13-3236, at *1 n.1.

131. 542 F. Supp. 2d 653 (S.D. Texas 2008).

132. *See id*. at 655, 659–60, 667.

133. *Id*. at 655.

134. *Id.* The court refers to Lopez's "biological sex" or "actual sex," used interchangeably, numerous times in its decision, making a clear distinction between her "assumed" female identity and her underlying, actual, and material male sex. *Id.* at 655, 667.

135. *Id.* at 655.

136. *Id*. at 664.

137. *Id*. at 667.

In this case, then, the use of the term "transgendered" bears minimal relationship to the meanings of "transgender" laid out in the GLAAD guidelines. Rather, the court believes it knows the difference between Lopez's "actual sex" and the gender identity she has adopted due to her medical condition. It uncritically accepts the narrative proffered by defendant River Oaks Imaging, that the employer rescinded its job offer after, in the court's phrase, "a background check revealed that she was male."[138] While the court does not find there to be a legal obligation for Lopez to "reveal her GID, and accordingly, her biological sex, to a prospective employer,"[139] the court's language here suggests that Lopez's assigned gender is materially relevant to her current identity as a transgender*ed* woman, that is, a woman whose femaleness is the result of a teleological, if ongoing, process that is defined as much by its origins in maleness as its destination in femaleness.[140]

A later case, *Eure v. The Sage Corporation*,[141] gets to the heart of the transsexual narrative, despite what the plaintiff says about herself. While we read it as likely being a case about gender nonconformity, the court sees it as an issue of gender transition. Rather than invoking GID, the court deploys language much closer to the terminology recommended by advocates of transgender and gender nonconforming people. Plaintiff Eure, the court reports, "was assigned female at birth and presents as male."[142] Operating only from the court's opinion, rather from the litigation documents, it is unclear to us whether what the court really means here is "male" as in gender identity, or "masculine" as in gender presentation. It is unclear from the opinion what steps Eure has taken to implement masculine gender presentation, especially since the complaint uses a female-coded name, Loretta Eure, and when the court uses pronouns to refer to Eure, which is seldom, it uses "she." Eure's supervisors were clearly unsettled by her masculine gender presentation, referring to her as "that" and a "cross gender."[143] Eure responded to a supervisor's complaint that "I've never had to deal with something like this" with the question "Because I'm gay?" [144] Eure's gender self-identification throughout the initial hearing is fluid; Eure comments, "I learned my [masculine presenting] gender was an issue with management," and at the same time defines herself as "a gender non-conforming female instructor."[145]

138. *Id*. at 656.
139. *Id*. at 664.
140. The invocation of "biological sex" is not always this nefarious, however. In *Parris v. Keystone Foods*, the court describes the plaintiff as someone who "identifies as transgender, was born biologically male but presented as female at the time of her hire." 959 F. Supp. 2d 1291, 1297 (N.D. Alabama 2013). This court does not see Parris's assigned gender or sexual anatomy as relevant to the case and judges her complaint on the merits *i.e*. was she qualified for the position she applied for and were other gender nonconforming employees also mistreated.
141. 61 F. Supp. 3d at 651.
142. *Id*. at 655.
143. *Id*. at 656.
144. *Id*. at 656.
145. *Id.* at 659.

This case seems tailor-made for a claim organized around *Price Waterhouse*. Eure's gender expression is masculine even while she names herself as female. Indeed, the court lays out the stakes of the *Price Waterhouse* precedent for gender nonconforming people, as opposed to transgender people, citing *Etsitty* as a prime example of the latter.[146] But astonishingly, the court maintains that "[a]ll the testimony Eure has presented related to [the supervisor's] animus couches [her] alleged discrimination in terms specifically related to Eure's status as a transgender person, not in terms related to her conformance with gender stereotypes."[147] From there the court throws up its hands, surrendering to the lack of precedent from either the Fifth Circuit or the Supreme Court that would protect transgender people from gender-based discrimination under Title VII.[148]

What do we make of this? The plaintiff identifies herself as female, and her gender as nonconforming to femininity. One might even see the supervisor's use of the un-gendered pronoun "that" as an expression of discomfort with Eure's gender fluidity. Yet, once the court uses the word "transgender" to identify the Title VII issues at play in the case, it erases the conceptual distance between gender nonconforming, transgender and transsexual, until Eure's own definition of her gender—"a gender-nonconforming female"—is replaced entirely by the identity "transgender person." All appearances to the contrary, the court does not believe that Loretta Eure is someone who "presents masculinely";[149] it classifies her as a transgender man and hence not protected by Title VII.

This lack of protection of transgender status under Title VII was maintained despite the EEOC's firm stance in 2012 explicitly including gender identity in its purview of regulating and enforcing Title VII.[150] However, despite its own guidelines, the EEOC was not always able to bring discrimination on the basis of gender identity as a distinct and cognizable Title VII claim, separate from "sex stereotyping." We see this conundrum at work in *EEOC v. R.G. and G.R. Harris Funeral Homes, Inc.*[151] Initially, the EEOC brought suit on behalf of Aimee Stephens because, according to the complaint "Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to [the defendant's] sex- or gender-based preferences, expectations, or stereotypes."[152] The EEOC was not able to pursue this multilayered claim in District Court, however, since a judge presiding over an earlier iteration of this case had ruled that Stephens's "salient claim is limited to 'gender stereo-

146. *Id.* at 661.

147. *Id.* at 662.

148. *Id.*

149. *Id.* at 655.

150. In *Macy*, No. 0120120821, 2012 WL 1435995, at *11.

151. No. 14–13710, 2015 WL 9700656 (E.D. Michigan 2015) (resolving discovery motions). *See also R.G. and G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d at 595–96 (denying defendant employer's motion to dismiss on the merits).

152. *R.G. and G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d at 595–96. In the wording of this complaint, we can see that the EEOC is covering all its bases: it makes a claim for Title VII applicability to gender identity and gender transition, but hedges that claim with recourse to the language of *Price Waterhouse.*

typing,'"[153] a definition to which the EEOC conceded in this case.

As part of its defense, the funeral home had apparently asked in discovery for information about Stephens's genitals, a copy of her birth certificate, updates about her gender transition (including medical and psychological records), and information about her family background and relationships.[154] According to the judge, however, the exclusion of any claim beyond gender stereotyping rendered information about her transition irrelevant "because [the requested documents and information] do not demonstrate how R.G.'s supervisors actually perceived Stephens before the company terminated her."[155]

Nonetheless, the court does not wholly disapprove of the defendant's requests for documentation pertaining to Stephens's legalized gender or the state of her genitals, indicating that these inquiries "may have been proper if Stephens's 'transgender' and 'transitioning' claims remained live."[156] How do we unpack the logic behind this contention? After all, if Stephens's transitioning had remained at issue as a cause for discrimination, why would it matter where in her transition she was, or the state of her genitals, or the results of her medical and/or psychological treatments? When yoked to the concept of transition, "transgender" would seem to preclude the need for determinative information about SRS. Moreover, this opinion was issued two years after the publication of the *DSM V* and its removal of GID as a diagnosis. Stephens was open about her decision to transition, writing a letter to her coworkers that she "was undergoing a gender transition from male to female and intended to dress in appropriate business attire to work as a woman,"[157] and thus was unlikely to be diagnosed with Gender Dysphoria under the new criteria. It was not Stephens who had a problem with her transition; it was her employer. Yet, the court cannot fully integrate these elements—the revision of the *DSM*, Stephens's own characterization of her experience, and the irrelevance of surgical intervention—into a concrete understanding of what "transgender" could mean.

The court's representation of the defendant's discovery requests constitutes a series of hypothetical "if/then" constructions, all rooted in the transsexual narrative. If the EEOC had been allowed to bring a claim of discrimination due to gender transition and identity then the elements of "sex change"—surgery, hormone treatment, psychological and medical consultations—would have been relevant, to the extent that "transgender" really means "transsexual," and "transsexual" really means post-operative. If these elements are relevant, then the defendant has every expectation of knowing whether Stephens actually "is" transgender, that is, whether she has had SRS, her endocrine levels, and the like. This information is treated as irrelevant to the court, then, not because Stephens's self-identification and the EEOC's representation of her is as

153. No. 14–13710, 2015 WL 9700656 at *2.
154. *Id.* at *1.
155. *Id.* at *3.
156. *Id.* at *2.
157. *Id.* at *1.

transgender and transitioning, but, to the contrary, solely because that representation has been ruled out of bounds by a prior determination.[158] Ironically, the EEOC's seemingly progressive stance that discrimination according to gender identity is actionable might have been used here against gender identity, to calcify the distinction between "real" and "partial" transsexuality.

Much like the *Lopez* court, this court straddles the divide between older understandings of transsexuality, rooted in reassignment surgery and gender identity disorder, and newer definitions of transgender and transitioning as processes that have any number of elements, none of which requires or precludes the other. Stephens' gender transition might have been solely sartorial: she wanted to identify as a woman and wear business clothing appropriate to that identification. Yet, her employer, and the court, cannot fathom a circumstance organized around gender transition that did not have genital surgery and psychological intervention at its core.[159]

One of the few cases we could identify in which the term "transgender" was employed in a way that reflected the political and cultural redefinitions of the term that transgender advocates have supported was *Fabian*.[160] Here, the court refers to the plaintiff first as "an orthopedic surgeon" and then as "a transgender woman."[161] This is a meaningful choice: in identifying Dr. Fabian first by profession and only then by gender, the court already foreshadows its perception that the most important information in the case is Fabian's qualification as a surgeon, rather than her gender identity.

After dispensing with some technical details, the court proceeds to the question of the law itself. The court first runs through the precedential cases, acknowledging the "split in the caselaw on the question whether employment discrimination on the basis of transgender identity is prohibited by Title VII."[162] It then focuses on the heart of the matter: "If an employer does not discriminate against women as a class or against men as a class, but does discriminate against transgender people as a class (regardless of whether they are transgender men or transgender women), does that employer violate Title VII?"[163] The repetition of "transgender" as a modifier, attached always to what the court seems to see as more concrete nouns such as "people," "men," and "women," gestures towards the multiple modes in which a person could be transgender. If discrimination against transgender plaintiffs is legally actionable under Title VII irrespective of

158. This raises an interesting question of whether the implicit invocation of stare decisis by the court here is disingenuous. It is not clear whether the court truly is deeming the information legally irrelevant because of the prior determination, because of the client's self identification, or because of some combination of the two. If it were the latter, we could infer that the court was not being clear about its own legal reasoning.

159. We can speculate that in making this rhetorical move, the court is implicitly endorsing Stephens's employer's expressed concern that her gender nonconformity would alienate the public and be bad for business.

160. 172 F. Supp. 3d at 513.

161. *Id.* at 513.

162. *Id.* at 525.

163. *Id.* at 518.

the absence or presence of sex-role stereotyping, then gender as a phenomenon is the subject under analysis, not how well or poorly any person fulfills the mandates of masculinity or femininity.

Consequently, although the *Fabian* court agrees with precedent applying *Price Waterhouse* to transgender people, it goes one step further with a remarkable analogy that recasts "sex" itself as something much larger than the narrow reading of "plain meaning" that had been used to exclude transgender people from protection:

> "Male" or "female" is a relatively weak definition of "sex" for the same reason that "A, B, AB, or O" is a relatively weak definition of "blood type": it is not a formulation of meaning, but a list of instances. It might be an exhaustive list, or it might not be, but either way it says nothing about why or how the items in the list are instances of the same thing; and the word "sex" refers not just to the instances, but also to the "thing" that the instances are instances of. In some usages, the word "sex" can indeed mean "male or female," but it can also mean the distinction between male or female, or the property or characteristic (or group of properties or characteristics) by which individuals may be so distinguished.[164]

Once the court expands the meaning of sex beyond "male" and "female," the plain meaning of sex is radically transformed. Indeed, the court offers multiple variations of what "because of sex" might mean: "discrimination on the basis of gender stereotypes, or on the basis of being transgender, or intersex, or sexually indeterminate, constitutes discrimination . . . [and] that discrimination is literally discrimination 'because of sex.'"[165] Laying claim to the "plain meaning" of sex as anything connected to sexual anatomy and/or gender expression and/or gender identity and/or gender stereotypes, as well as the more conventional binary classifications of male and female, the *Fabian* court's reasoning permits a truly progressive reading of Title VII beyond even the EEOC's policy.

III. PEOPLE ARE DIFFERENT FROM EACH OTHER[166]

So is *Fabian* a watershed moment, a bright line between ways of understanding transgender people and experiences that shows future courts where they should go, or is it an outlier in a legal corpus that struggles to interpret a piece of legislation for purposes for which it was not intended? It is hard to know, especially since we are at a moment in transgender employment law that we might

164. *Id*. at 526.

165. *Id*. at 527.

166. We take this observation from Eve Kosofsky Sedgwick's masterful essay "Axiomatic," which is also the introduction to her now-classic *Epistemology of the Closet*, 22 (1998). As Sedgwick observes, "It is astonishing how few respectable tools we have for dealing with this self-evident fact," and our conceptual toolbox could do with a "*nonce* taxonomy, of the making and unmaking and *re*making and re-dissolution of hundreds of old and new categorical imaginings concerning all the kinds it may take to make up a world." *Id*. at 22–23.

define as a *potentiality*. In José Esteban Muñoz's formulation, a potentiality is not merely possibility, "a thing that simply might happen," but rather "a certain mode of nonbeing that is eminent, a thing that is present but not actually existing in the present tense."[167] Many potentialities are in play here that could help us rethink, rework, and disarticulate gender from bodies and the binary: the EEOC ruling, ENDA, changes in judicial interpretation of Title VII, not to mention the potential reorganizing of gender itself. In this section, we explore these potentialities, where they might lead us, and what they might mean.[168]

So far, when courts use "transgender," most of the time they still mean something more akin to "transsexual," or at the very least, they see transgender experience through the lens of the transsexual narrative and the gender binary. Thus, even as they succeed in their attempts to adopt the language used by transgender advocates, they fail to meaningfully expand their sense of what that language can describe. This is not to say that these judges are necessarily antagonistic towards transgender litigants who bring Title VII claims, although it is not to say that they are not. Rather, it is that they find themselves hemmed in by the twin forces of precedent and an inflexible understanding of gender.[169]

The courts we have scrutinized envision themselves as compelled by precedent to align themselves with a certain line of argument about the operations of gender and the law that the "plain meaning" of "sex" is "male" and "female," and that anything beyond those binary, opposed categories cannot find a place in Title VII protection. Given that assumption, advocates have had limited options, and "gender stereotyping" has been the Procrustean bed on which transgender clients have had to fit themselves. The judges crafting these opinions almost unanimously recognize transgender people *as* transgender, and even that transgender people need protection under the law from employment discrimination. Nevertheless, they cannot imagine how existing legislation that protects citizens "because of sex" could possibly apply to trans people. Even the most sympathetic courts, with the exception of *Fabian*, throw up their hands and default to a binary gender regime.

To a certain extent, vocabulary itself is the problem. In the main, courts see "sex" as "actual sex," "biological sex," "male," and "female," as well as "sexual organs." "Sex" is a category that overlaps with gender, but is distinct from it and, more to the point, a category covered by Title VII in ways that "gender" is not. The courts are operating within the classic second-wave feminist concept of the

167. José Esteban Muñoz, *Cruising Utopia: The Then and There of Queer Futurity*, 9 (2009).

168. We have yet to see whether the 2012 EEOC ruling will take hold in all jurisdictions; certainly, if it did, the landscape of transgender employment discrimination would look very different. Alternatively, the passage of ENDA would render the need to fit transgender people's experience into Title VII claims redundant. Until either Congress or the courts conceive of transgender people as needing protection from employment discrimination, we will have to imagine other remedies.

169. Unfortunately, this generally means that perforce, the trans litigants are equally hemmed in along with them.

sex/gender system,[170] in which sex is the irreducible anatomical ground upon which culture does the work of creating gender difference.[171] This definition of the distinction between sex and gender is not self-evident, however. In the wake of Judith Butler's groundbreaking work on what she calls the "discursive limits of sex,"[172] scholars have argued that what we call biological sex takes on meaning only within the binary structure of gender.[173] That is, binary sex is compelled into being by heterosexuality, which requires only two, opposite, complementary sexes in order to maintain an internal logic. The hegemony of heterosexuality, then, decides which sexes make sense and which do not. In Butler's words, since "the materiality of sex is demarcated in discourse, then this demarcation will produce a domain of excluded and delegitimated 'sex,'"[174] exactly the situation transgender people find themselves in when they attempt to inhabit the protections of Title VII.

What *Fabian* achieves that is new, and that we would hope other jurisdictions might someday soon emulate, is the recognition that "transgender" is a descriptor of a complex of ways of inhabiting gender, not simply a unitary taxonomic category. Gender has the potentiality, however, to slip out of the binary of male and female that heterosexuality requires.[175] As the *Fabian* court points out, "sex" exists in any number of instances that combine to constitute it, but that do not exemplify "sex" in and of themselves.[176] Moreover, other jurisdictions might learn from its invocation of seemingly non-parallel identities—"transgender, or intersex, or sexually indeterminate"[177]—that invoke gender identity, genital arrangement, and gender expression alongside the more conventional categories of gender we call "male" and "female." In this understanding, "sex" could be defined as a proliferating set of ways to have a sexed body, live within a gendered identity, or create an alternative kind of gender, or possibly no gender at all ("sexually indeterminate").

The courts will not have to go it alone in reconceptualizing gender. Several

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170. For a more extensive elaboration of this concept, see Gayle Rubin, "The Traffic in Women: Notes on the 'Political Economy' of Sex," 157–210 in *Toward an Anthropology of Women* (ed. Rayna R. Reiter) (1975).

171. Rubin's explanation of this dynamic is elegant in its economy: "Gender is a socially imposed division of the sexes." *Id*. at 179.

172. Judith Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* (1993).

173. Melena Constantine Bell, *Gender Essentialism and American Law: Why and How to Sever the Connection,* Duke Journal of Gender Law and Policy 163 (2016) (considering ways that the legal system can relinquish its role in reinforcing binary gender); Richeal Faithful, *(Law) Breaking Gender: in Search of Transformative Gender Law*, 18 American University Journal of Gender, Social Policy, and the Law 455 (2010).

174. Butler, *Bodies That Matter*, at 16.

175. Perhaps the most immediate example of this was the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which extends statutory marriage to same-sex couples. There is little question that the decoupling of marriage from the gender of the participants will have far-reaching effects on our legal and cultural conceptions of marital relationships as heterosexuality and marriage become disarticulated.

176. 172 F. Supp. 3d at 527.

177. *Id.*

scholars of transgender legal theory have already put this redefinition of sex at the center of their theoretical work, drawing upon a variety of different models. Andrew Gilden cites the example of traditional Navajo society, in which gender is not necessarily fixed throughout a person's life, but can change depending on that person's aptitudes, sense of self in the gender arrangements of the community, and/or spiritual calling.[178] Gilden notes that in this model, the Navajo "directly refute any necessary linkage between a pre-social 'sex' and one's gender identity."[179] Using the Navajo as a conceptual springboard, Gilden calls upon his readers to "challenge dominant ideologies . . . that continue to plague not only transgender persons, but all persons oppressed and constrained by social norms."[180] Instead of gender norms, he proposes we see gender as a series of "volitional acts,"[181] an approach that he sees as leading towards a politics of (trans)gender liberation.

David B. Cruz shares this liberatory impulse, arguing for a "gender autonomy," which would "vest primary authority for determining the gendered directions of our lives to us individually."[182] His goal is "the disestablishment of sex and gender" under which "almost all sex distinctions in law would be unconstitutional."[183] This concept of gender self-determination similarly guides Franklin H. Romeo's analysis of transgender rights under the law: "Transgender rights could be greatly expanded if courts were to adopt a model of gender that recognizes that people have the inherent right to determine their own gender identity and expression. Under such a model, discrimination against gender nonconforming people could be more easily remedied through sex discrimination statutes."[184]

We might characterize these scholars as sort of gender libertarians: insisting that ideally, to the greatest extent possible, government should get out of the business of defining, regulating, perhaps even recognizing gender. For these scholars, as for Melina Constantine Bell, gender is, at its root, a "nonpolitical identit[y],"[185] and it is unjust for the state to impose gendered identities on individuals who "ought to have a say about what their personal identities are."[186]

178. Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 Berkeley Journal of Gender, Law & Justice 83 (2008).

179. *Id*. at 122.

180. *Id*. at 144.

181. *Id*.

182. David B. Cruz, *Getting Sex 'Right': Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship*, 18 Duke Journal of Gender Law and Policy 203, 222 (2010), available at https://perma.cc/X6XW-8HM2.

183. *Id*.

184. Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 Columbia Human Rights Law Review 713, 753 (2005).

185. Bell, *Gender Essentialism and American Law*, at 204. While Bell does not cite it, this argument is in its conception remarkably similar to Kate Bornstein's suggestion that we "imagine belonging to gender in the same way that we belong to: the Kiwanis/Book-of-the-Month Club/The Democratic Party/A health club/ . . . A singles club/A 12-step program . . . What if the bi-polar gender system *really was a group*, just like the Elks or the weekly bridge club?" Kate Bornstein, *Gender Outlaw: Men Women, and the Rest of US*, 101–102 (1995).

186. Bell, *Gender Essentialism*, at 204.

Because "the gender system is profoundly damaging and unjust" to all people,[187] Bell advocates that gender be removed from all government documents, such as driver's licenses and passports, given that the state has no compelling interest in a person's gender.[188]

Thus, gender libertarianism identifies the state as an enforcer of the misery of binary gender. We certainly concede that it is not wholly wrong. We can only imagine how gender might operate in a world in which it is no longer recorded not just on birth certificates, but also on college applications, marriage certificates, census forms, and internet quizzes. However, the state is far from unitary and its effects are multifarious; it also provides the legal mechanisms by which we can protect people against gender discrimination, however flawed those mechanisms might be at present.

Furthermore, like other kinds of libertarianism, gender disestablishmentarianism tends to imagine that once the state has been divested of its regulatory and enforcement powers, the power relations that were being regulated and enforced will melt away.[189] We are skeptical of this, to say the least. For example, the Supreme Court's ruling in *Loving v. Virginia* determined that the state had no interest in the relationship between racial difference and marriage, and the Voting Rights Act decreed that race should have no role in an American citizen's access to the vote, and the Civil Rights Act prohibited all kinds of discrimination on the basis of race.[190] We would vehemently disagree, though, with the claim that the lifting of state regulation on access to restrooms and romantic partner of one's choice, let alone the mechanisms of democracy itself, has ever actually achieved erasure of invidious racialized difference.

Moreover, civil and voting rights legislation included explicit directives for state intervention in the abrogation of people's rights based on race.[191] As a branch of government implicated in, and often comfortable with, the distribution of economic, political, and social power, the judiciary generally does not see as

187. *Id*. at 206.

188. *Id*. at 211.

189. We invoke disestablishment as a way to analogize the mandate of binary gender to the maintenance of a state religion: disestablishmentarianism was originally used to describe the process by which the power of the state was taken out of the workings of the church (for example, in the North American colonies: at the founding of the colonies, churches were financially and politically underwritten by taxes. By the 1700s, however, this link was undone). Similarly, we argue that gender disestablishmentarianism argues that gender is propped up by state support, which should be removed. For a discussion of the mechanisms behind disestablishmentarianism in the North American colonies, *see* Nicholas P. Miller, *Theology and Disestablishment in Colonial America: Insights from a Quaker, a Puritan, and a Baptist*, 19 Journal of the Adventist Theological Society 137 (2008), available at https://perma.cc/2L3N-B3YE.

190. *Loving v. Virginia*, 388 U.S. 1 (1967); Voting Rights Act of 1965, 52 U.S.C. §§10101, 10301–14, 10501–08, 10701–02; Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat 241.

191. For example, Title II of the Civil Rights Act prohibited discrimination in access to all public accommodations on the basis of race, national origin, religion and sex. Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat 241, 243. Section 2 of the Voting Rights Act prohibits all state and local governments from imposing laws that results in discrimination in access to voting based on race. Voting Rights Act of 1965, 52 U.S.C. §10301.

its mandate to critique existing hierarchies. Hence, it is not surprising that courts are slow to acknowledge that anti-transgender discrimination is rooted in heteronormative enforcement of the gender binary. They seldom integrate an analysis of transphobia and gender fundamentalism in their decisions, nor, on the whole, do they question the structuration of gender on which the precedent to which they look is based. Even *Fabian*, which comes closest when it acknowledged that transgender discrimination always carries with it "sex," did not explicitly lay out the hierarchies and policing that produce gender discrimination.[192]

CONCLUSION

The courts have proven to be a powerful instrument for achieving social, political, legal, or economic equality, albeit sometimes a fairly blunt one, and often with unanticipated consequences. At their best, they expand the potentialities of the lives of the citizens who are affected by their decisions. Yet, it runs counter to experience to expect judges to always take progressive stances toward fraught social issues. They carry their cultural expectations and ideological outlooks into the courtroom with them, as do we all. As courts become more sophisticated in the ways that they describe and name trans identities and experiences, it seems possible, even likely, that the more rigidly uniform and binary transsexual narrative will continue to wither, to be supplanted by language and concepts more closely reflecting the complex actualities of transgender people's lives.

But advocates for and theorists of trans rights and trans people want more than courts merely—even if respectfully—using whatever is the current terminology. They are implicitly hoping that the culture at large will absorb the richer and more complex understandings of gender expression that this language signifies. This raises the question of what we can reasonably expect. Is it beyond imagination that the courts might also absorb the more radically politicized analysis of gender that many advocates and theorists propose? Is it even possible for courts within the existing framework of antidiscrimination law to recognize the multiplicity of gender expressions and determine that difference itself is a thing to be protected?

The stakes of this potentiality are high for people of all genders. Transgender experience(s) is about transgender people, but it is also about gender writ large; just as the Gay Liberation movement of the 1970s saw its mission as not just erasing prejudice against gay people, but also as changing social expectations about sexual desire, sexual behavior, and sexual politics,[193] justice for transgender people can help generate larger shifts in cultural understanding of the relationships between gender and embodiment. To put it differently, with a genuinely trans(formed) conception of how sex and gender operate, we might see transgender and gender nonconforming people as having standing to Title

192. 172 F. Supp. 3d at 12–13.

193. For a kaleidoscopic view of the aims and beliefs of gay liberation, see *Out of the Closets: Voices of Gay Liberation* (eds. Karla Jay & Alan Young) (1972).

VII protection *exactly* "because of sex," insofar as gender and the sexed body are mutually constitutive. To recognize this is to begin to imagine the ways that constructions of sex and gender might look different.[194] This does not necessarily mean a "proliferation of genders, as if a sheer increase in numbers would do the job,"[195] especially when the expressions and identities we might choose would not be outside of larger discourses of gender that shape the binary system we live with today. Moreover, gender *is* political to the extent that it is about power, and hence always in conversation and contestation with social norms, state regulation, and economic structures.

As we have argued throughout this Article, naming is both at the core of this complex of issues, and also exceeded by them. The GLAAD guidelines with which we began our analysis are well-intentioned, and their recommendations that the media "Always use a transgender person's chosen name," "Whenever possible, ask transgender people which pronoun they would like you to use," and "When describing transgender people, please use the correct term or terms to describe their gender identity,"[196] do provide basic guidance for journalists unfamiliar with transgender protocol. Whether directly or indirectly, these kinds of efforts seem successfully to have influenced courts in their language usage.

What troubles us, however, is the possibility that those following GLAAD's how-to could conclude that their respectful references are all the work that needs to be done to understand their trans or gender nonconforming subjects. Nominal compliance can reassure all of GLAAD's readers that they have done enough, much as the use of the term "transgender" can convince judges that they fully understand what is at stake in a transgender person's Title VII claim for discrimination "because of sex." Yet as we have seen, deploying the "right" language without meaningful comprehension of either the theoretical underpinnings or the specific lived experiences of the people being referred to, and the structures of power that produce them, is a chimera, appearing to have substance but dissolving into air when any analytical pressure is brought to bear.

And this, in the final analysis, is what this Article is about: power. We began by arguing that naming is power. In retrospect, that is not quite true. The prerogative to name is a penumbra of power, as is the prerogative to decide what names do and do not mean. It is not enough for trans advocates to "reform" naming practices. As we have shown, that constitutes part of the battle, but it is hardly the whole fight. Indeed, those reforms can provide the appearance of a conflict resolved, even as they shunt to the side the actual inequities that differences in naming signify. Ultimately, we would argue, naming is a first step towards reimagining how gender might operate if the courts were to acknowledge the

194. For a more thorough discussion of construction of gender, *see* Butler, *Bodies That Matter*, at 4–16. *See also*, Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, 1–34 (1990) (introducing Butler's notion of gender, distinct from biological sex, as stylized and performative, yet not freely chosen).

195. *Id.* at 237.

196. GLAAD Media Reference Guide, 2010.

theoretical and analytical implications of the terminology they have adopted.

The trick here for legal scholars, trans advocates, and, ideally, courts will be to simultaneously: a) work politically to disarticulate gender, the dimorphic model of sex, and male dominance; b) support and defend the many varying gender identities that people affiliate with[197] (transsexual, transgender, gender nonconforming, gender conforming); c) collaborate with advocates to devise strategies to move courts away from the transsexual narrative and instead to see those various identities as worthy of state protection; and d) recognize the power relations within which judges, legislators, employers as well as employees, litigants, and advocates are all gendered. This work is challenging and difficult, but it is essential if we want to effect justice for people of all genders. Justice is complicated, as is power, and we would do well to remember Frederick Douglass' warning: "Power concedes nothing without a demand. It never did and it never will."[198]

197. We are leery of representing this affiliation as "choice" because gender is never entirely freely chosen from an infinite menu of options. Culture perforce shapes what kinds of gender are available to us, and in which combinations. A useful analogy: in a restaurant, you can order the food that is listed on the menu. You can also occasionally order "off the menu," but only in limited ways, only if the kitchen will cooperate, and only in the genre of cuisine that the restaurant prepares. We might ask to substitute tofu for chicken in a Chinese restaurant, but we wouldn't expect to be able to get a pizza.

198. Frederick Douglass, "The Significance of Emancipation in the West Indies: An Address Delivered in Canandaigua, New York, 3 August 1857," 1855–63 in *The Frederick Douglass Papers, Series One: Speeches, Debates and Interviews, Volume 3*, 204 (ed. John W. Blassingame) (1985).