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Misgendering as Misconduct

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ABSTRACT

As litigation regarding the civil rights of transgender persons blossoms, a curious trend has emerged: In briefs, pleadings, and motions advocating antitrans positions, attorneys have addressed trans parties with language at odds with their gender. Through a close review of the language in briefs for three recent Supreme Court cases, this Article exposes the extent to which intentional misattribution of gender has developed into a strategy to intimidate and harass transgender persons within the legal system.

Critically unaddressed by courts and legal scholarship, this Article argues that, because bar associations are best positioned to address discriminatory attorney behavior, the Rules of Professional Conduct have a central role to play in ending this practice. Specifically, the Article proposes that as objectively offensive conduct, misgendering might be addressed as attorney misconduct under Rule 3.4, which requires fair treatment of opposing parties and counsel; Rule 4.4, which protects the rights of third parties; and Rule 8.4, which prohibits conduct prejudicial to the administration of justice, as well as harassment or discrimination. From there, it closes by defending the proposal against the expected First Amendment counterarguments. Ultimately, the Article concludes that the Rules of Professional Conduct offer a practical and constitutionally permissible solution to attorney disparagement of transgender persons within their filings.

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INTRODUCTION

Lawyers must regularly toe the line between zealous advocacy and incivility. Quite often the division is a hazy one.[1] With increasing frequency, misgendering—the assignment of a gender with which a party does not identify—has been positioned at this conflux of strategy and discourtesy. In recent litigation involving the civil rights of transgender persons, advocates of anti-trans positions have incorporated these misidentifications into their legal filings. This development should give pause, and too, raise concern. Unlike a slip of the tongue at oral argument,[2] the intentionality inherent in writing indicates this is calculated, rather than careless.

Take the 2017 lead up to *Grimm v. Gloucester School Board*, for instance. There, despite Gavin Grimm being male both medically and legally, the authors of three amici went as far as to revise the case captions to read "G.G. by *her* next friend and Mother, Deirdre Grimm."[3] By some accounts this was strategic. Lawyers have claimed these alterations were necessary since referencing transgender parties with the appropriate titles, pronouns, and honorifics would be "antithetical to the[ir] legal positions."[4]

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1. *See* Charles F. Edgemon, *Verbal Misconduct in the Courtroom—Are Attorneys Immune?*, 11 SANTA CLARA LAW. 125, 125 (1970) (surmising "the line between verbal misconduct and statements within the bounds of legitimate argument is not a line at all: it is at best an unpredictable and erratically defined gray area"); Ty Tasker, *Sticks and Stones: Judicial Handling of Invective in Advocacy*, JUDGES' J., Fall 2003, at 17, 17 (2003) (noting the lack of "a bright line between ethically zealous argument and improper vituperation").
2. For example, while posing a hypothetical during the *Harris Funeral Homes* oral argument, Chief Justice Roberts misgendered a hypothetical trans woman, but quickly corrected the mistake. *See* Transcript of Oral Argument at 5, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. Oct. 8, 2019) (asking "[i]n other words, if the objection of a transgender man transitioning to [a] woman is that *he* should be allowed, *he or she*, should be allowed to use the women's bathroom, now, how do you analyze that?" (emphasis added)).
3. Mark Joseph Stern, *SCOTUS Reprimands Anti-LGBTQ Groups for Misgendering Trans Student Gavin Grimm*, SLATE (Feb. 24, 2017, 7:08 PM), https://slate.com/human-interest/2017/02/supreme-court-reprimands-groups-for-misgendering-gavin-grimm.html [https://perma.cc/EG8T-KNVN] (emphasis omitted and added).
4. Ed Whelan, *Supreme Court Clerk's Office as Pronoun Police?—Part 1*, NAT'L REV. (Feb. 27, 2017, 3:48 PM), https://www.nationalreview.com/bench-memos/caption-pronouns-gg-gloucester-county-clerks-letter [https://perma.cc/GXJ4-28PE]. Based on Whelan's own characterizations, the legal positions seem to be that Gavin Grimm was a girl, since transitioning is not "even biologically possible." Ed Whelan, *Supreme Court Clerk's Office as Pronoun Police?—Part 2*, NAT'L REV. (Feb. 27, 2017, 6:37 PM), https://www.nationalreview.com/bench-memos/caption-pronouns-gg-gloucester [https://perma.cc/W4H4-9FM5].

Whatever the truth of these arguments, at a minimum, intentional misgendering is generally considered a demeaning act. As Julia Serano reminds us, "[c]onsidering how big of a social faux pas it is in our culture to misgender someone, and how apologetic people generally become upon finding out that they have made that mistake, it is difficult to view . . . the deliberate misgendering of [transpersons]—as anything other than an arrogant attempt to belittle and humiliate."[5] Given this, courts addressing the issue have almost uniformly found the practice hostile, objectively offensive, and degrading,[6] and the Equal Employment Opportunity Commission (EEOC) has repeatedly held that purposeful misgendering constitutes harassment actionable under Title VII of the Civil Rights Act of 1964 (Title VII).[7] Moreover, a growing body of research evidence finds the practice inflicts measurable psychological and physiological harms.[8]

The distance between lawyers' accounts and the lived reality of transgender persons raises an immediate puzzle: Should misgendering in filings and court documents be considered simply a feature of rhetoric and advocate strategy, or as improper derision and invective?

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5. JULIA SERANO, WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 185 (2007).
6. *E.g.*, G. G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 716 (4th Cir. 2016) (finding misgendering "display[s] hostility"), *vacated*, 137 S. Ct. 1239 (2017) (mem.); Hampton v. Baldwin, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *2 (S.D. Ill. Nov. 7, 2018) (quoting medical testimony that "misgendering transgender people can be degrading, humiliating, invalidating, and mentally devastating"); Prescott v. Rady Children's Hosp.-San Diego, 265 F. Supp. 3d 1090, 1096 (S.D. Cal. 2017) ("For a transgender person with gender dysphoria, being referred to by the wrong gender pronoun is often incredibly distressing."); Rumble v. Fairview Health Servs., No. 14-CV-2037, 2015 U.S. Dist. LEXIS 31591, at *71 (D. Minn. Mar. 16, 2015) (rejecting defendant's characterization of misgendering as a "perceived slight[]" and instead concluding it was "objectively offensive behavior"); Doe v. City of New York, 976 N.Y.S.2d 360, 364 (N.Y. Sup. Ct. 2013) (concluding purposeful misgendering as "not a light matter, but one which is laden with discriminatory intent").
7. *See, e.g.*, Jameson v. Donahoe, EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013) (advising "[i]ntentional misuse" of gendered language "may constitute sex based discrimination and/or harassment"); Lusardi v. McHugh, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *11 (Apr. 1, 2015) (same).
8. *See, e.g.*, Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences with Misgendering*, 3 STIGMA & HEALTH 53, 58 (2018) [hereinafter McLemore, *A Minority Stress Perspective*] (noting transgender individuals find misgendering stigmatizing and psychologically distressing); Kevin A. McLemore, *Experiences With Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 SELF & IDENTITY 51, 60 (2015) [hereinafter McLemore, *Experiences With Misgendering*] (finding a correlation between frequency of misgendering and negative views of self).

This Article offers both an answer and a path forward. It argues, first, that misgendering in court documents should be disallowed as an offensive ad hominem attack. Then, assuming that court-initiated reprimands will likely be disharmonious and slow-moving,[9] the solution advanced is that bar associations can address the practice of misgendering as attorney misconduct.

I develop the argument in three steps. First, the Article seeks to balance the division between misgendering as a legal strategy and as verbal misconduct. Using the language in the amicus briefs of three recent U.S. Supreme Court cases as a point of departure, Part I entertains five defenses typically offered for the misidentifications. Through critical scrutiny, it will show that the justifications are all ultimately untenable.

Next, the reality that little has been done to prevent the premeditated disrespect of gender minorities within the legal system suggests that courts are not particularly moved to address this form of verbal violence. For this reason, Part II rethinks the source of redress. Because this kind of demeaning language is as equally discriminatory as it is unprofessional, and because it reflects negatively on the legal profession as a whole, state-adopted professional conduct rules might provide a viable intervention. Specifically, by using the example of the Model Rules of Professional Conduct (MRPC), the Part shows how misgendering in court and court documents can be addressed under MRPC rules 3.4, 4.4., and 8.4—and their state-adopted counterparts.

Last, like all prior attempts to curtail language that harms subordinated communities, I suspect my proposal will face resistance on First Amendment grounds. To preempt this, the Article closes in Part III by anticipating and responding to two likely critiques: that the proposal (1) unconstitutionally restricts lawyer speech; and (2) unconstitutionally compels speech. To the first, I will demonstrate that lawyer speech, and particularly speech which takes place within the practice of law, has always been subject to restrictions, and that the limitations on misgendering proposed here are not qualitatively different from those generally accepted without opposition. At the same time, the second objection fails since, quite

9. *Compare* Lynch v. Lewis, No. 7:14-CV-0024-HL-TQL, 2014 U.S. Dist. LEXIS 63111, at *4 n.3 (M.D. Ga. Mar. 24, 2014) (granting in part a trans plaintiff's "Motion for Feminine Form of Address and Use of Female Pronouns" requiring defense use female pronouns in court and filings), *and* Qz'etax v. Ortiz, 170 Fed. App'x. 551, 553 (10th Cir. 2006) (upholding pro se trans appellant's "motion for the continued usage of proper female pronouns"), *with* Howard v. Ga. Dep't of Corr., No. 5:10-CV-207 (MTT), 2010 U.S. Dist. LEXIS 93173, at *2 (M.D. Ga. July 7, 2010) (denying plaintiff's "Motion for Recognition" and refusing to order defendants use female pronouns).

simply, the proposal compels no speech. In total, then, the Article concludes that the First Amendment does not provide constitutional cover to willful misgendering in court documents.

I. EVALUATING COMMON JUSTIFICATIONS FOR MISGENDERING IN FILINGS

As a vehicle to investigate justifications for misgendering, this Part evaluates the language of amici briefs in three recent cases: *Gloucester County School Board v. G.G.*,[10] *Kenosha Unified School District v. Whitaker*,[11] and *R.G. & G.R. Harris Funeral Homes v. EEOC*.[12] Between the three cases, amici submitted a total of 146 briefs. From there, each brief was classified based on whether the language aligned with the transgender party's identity; used a nongendered stand-in term (i.e. "Respondent," "Petitioner," or the party's last name); misgendered the party; or did not discuss the party in sufficient detail to qualify for analysis.

In the first case, *Grimm v. Gloucester*, the Court considered whether Title IX required schools to "generally treat transgender students consistent with their gender identity."[13] The facts in *Grimm* arose in 2014, after fourteen-year-old Gavin Grimm came out as transgender.[14] Initially, when Gavin[15] informed Gloucester High School officials of his legal name change and social transition, he received permission to use the male restroom.[16] But that led to outcry from adults in the community, and as a result, the Gloucester County School Board voted to restrict Gavin to using only the school's private or single-stall facilities.[17] In response, the American Civil

10. 137 S. Ct. 369 (2016), *remanded to* Grimm v. Gloucester Cty. Sch. Bd., 869 F. 3d 286 (4th Cir. 2017).
11. 138 S. Ct. 1260 (2018).
12. 139 S. Ct. 1599 (2019) (mem.).
13. Petition for a Writ of Certiorari at i, *Gloucester Cty. Sch. Bd.*, 137 S. Ct. 369 (No. 16-273).
14. *See* Chan Tov McNamarah, Note, *On the Basis of Sex(ual Orientation or Gender Identity): Bringing Queer Equity to School With Title IX*, 104 CORNELL L. REV. 745, 747–49 (2019) (documenting the factual background of the case).
15. I refer to the parties as they refer to themselves in their briefs. *See* Brief for Respondent, *Gloucester Cty. Sch. Bd.*, No. 16-273 (U.S. Feb. 23, 2017) (referring to Gavin Grimm as "Gavin" throughout); Brief of Plaintiff-Appellee, Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034 (7th Cir. 2017) (referring to Ashton Whitaker as "Ash" throughout); Brief for Respondent Aimee Stephens, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. June 26, 2019) (referring to Aimee Stephens as "Ms. Stephens" throughout).
16. McNamarah, *supra* note 14, at 747.
17. *Id.* at 748.

Liberties Union initiated a suit under Title IX, alleging the school's policy preventing Gavin from using the boys' bathroom discriminated on the basis of sex.[18] The case was ultimately appealed up to the Supreme Court in the fall of 2016. Following the Trump administration's rollback of the Obama-era trans-protective interpretation of the statute, however, the Supreme Court remanded the case for consideration under new Department of Education (DOE) guidance.[19] Before remand, amici filed a total of sixty-one briefs. Of them, 54 percent of the amici filed in support of the School Board (that is, opposed to trans-inclusive bathroom policies) refer to Gavin without gender appropriate language.[20]

The second case, *Kenosha Unified School District v. Whitaker*, considered the same Title IX questions sidestepped in *Grimm*, as well as whether requiring students use bathroom facilities in line with their sex triggered heightened Equal Protection scrutiny.[21] There, Ashton Whitaker began the process of social transition in 2013, and legally changed his name in the fall of 2016.[22] During that time, Ash and his mother met with school administrators to request that he be permitted to use the boys' restrooms.[23] Reasoning that Ash was still listed as female in official school records, however, the school administration restricted Ash to using only the girls' or gender-neutral restrooms.[24] Subsequently, Ash commenced a lawsuit alleging the restriction violated Title IX, and the Equal Protection Clause.[25] The case was ultimately appealed to the Supreme Court in the fall of 2017. As in *Grimm*, however, the questions posed by *Whitaker* remained unanswered, since the Court denied the petition for certiorari. Before this, though, amici filed nine briefs in support of the School District, 89 percent of which refer to Ash without gender appropriate language.[26]

18. *Id.*
19. Order of March 6, 2017, *Gloucester Cty. Sch. Bd.,* 137 S. Ct. 369 (No. 16-273).
20. There were sixty-one briefs in total, with twenty-four opposed to Gavin's position. Of the fifteen that reference Gavin: five misgender; two use gender appropriate language; and the remaining eight refer to Gavin by name or "Respondent' in lieu of gendered language. *See infra* Appendix Table 1.
21. *See* Petition for a Writ of Certiorari at iii, *Kenosha*, 138 S. Ct. 1260 (No. 17-301).
22. Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1040 (7th Cir. 2017).
23. *Id.*
24. *Id.*
25. *Id.* at 1042.
26. There were nine briefs total, all of which were opposed to Ash's position. Of the eight that reference Ash: five misgender; and the remaining three refer to Ash by name or "respondent" in lieu of gendered language. *See infra* Appendix Table 2.

The third and only case in which the Court will actually publish a decision, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, considered Title VII applicability to transgender employees.[27] In *Harris Funeral Homes*, two years after Aimee Stephens began working for Harris Homes, she began to live her life consistently with her gender.[28] As a part of that process, Ms. Stephens sent a letter to her employer and co-workers, informing them of her social transition and her intention to begin wearing "[gender-]appropriate business attire."[29] Two weeks later, Harris Homes terminated Ms. Stephens, in part because she "wanted to dress as a woman."[30] Ms. Stephens filed a charge of discrimination with the EEOC who, in turn, filed a complaint alleging Harris Homes had violated Title VII by firing Ms. Stephens.[31] The case was ultimately appealed to the Supreme Court in the fall of 2018, and the petition for cert granted in the spring of 2019. Of the eighty-six amicus briefs filed at the Supreme Court level, nineteen briefs against Ms. Stephens's position (or 22 percent) refer to her without gender appropriate language.[32] These results are even more stark when juxtaposed with those filed in her favor: 100 percent of the supporting amici use language consistent with Ms. Stephens's gender.

Reviewing the briefs submitted in transgender rights cases finds amici regularly provide a justification for their use of misgendering language. These defenses largely fall along five lines: (1) that gender-appropriate language is a concession antithetic to advocates' positions; (2) that pronouns are strictly tied to biological sex; (3) that misgendering is not meant to be disrespectful; (4) that misgendering is acceptable since the trans parties' gender is "at issue" in the case; and (5) (a) that trans parties have no right to be addressed as they wish, or (b) if they did, it would trigger a slippery slope of increasingly ridiculous modes of address in court. Let us explore these in order.

27. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019) (mem.).
28. Brief for Respondent Aimee Stephens, *supra* note 15, at 6.
29. *Id.* at 7–8.
30. *Id.* at 9 (quoting the owner of Harris Homes).
31. *Id.* at 11–12.
32. There were eighty-six briefs in total, with thirty-nine opposed to Ms. Stephens's position. Of these, twenty-one discuss Ms. Stephens: six misgender; two use appropriate language; and the remaining thirteen refer to Ms. Stephens by only last name or "Respondent" in lieu of gendered language. See *infra* Appendix Table 3 for notes classifying the language used in each brief and further explanation.

A. Appropriate Language is a Concession Antithetical to Anti-Trans Positions

The most popular argument offered to support misgendering is that doing so concedes trans parties' gender identities.[33] It submits that to refer to a transwoman by the pronouns or honorifics corresponding with her gender, (that is, using she/her/hers pronouns or the titles Mrs. or Ms.), is to acknowledge and affirm that she is, in fact, a woman.[34] Because amici do not want to affirm parties' gender or otherwise give that impression, they do the opposite by choosing to use inappropriate pronouns.

The flaw here is obvious: The justification is overly simplistic. By that logic, nothing can be said without expressing some element of support or approval. And that is certainly not true. To the contrary, many everyday interactions call for agreeable behavior, without expressions of underlying agreement. By addressing a judge as "Your Honor," for instance, we do not normally mean to convey any messages about the honorability of the individual we address. Instead, the honorific is merely used to denote respect or courtesy.[35]

The same is true of pronouns and gendered titles. Ordinarily, they say very little.[36] Functionally and semantically, these terms do not have distinct

33. *E.g.*, Brief Amicus Curiae of Public Advocate of the United States et al. in Support of Petitioner at 5, *R.G. & G.R. Harris Funeral Homes*, No. 18-107 (U.S. Aug. 23, 2019), 2019 U.S. S. Ct. Briefs LEXIS 3633 (arguing that using Ms. Stephens's personal pronouns is a pro-trans concession); Amicus Brief of Free Speech Advocates in Support of Petitioner at 2, *R.G. & G.R. Harris Funeral Homes*, No. 18-107 (U.S. Aug. 22, 2019), 2019 U.S. S. Ct. Briefs LEXIS 3458, at *7 ("To refer to respondent Stephens with female pronouns is to prejudge a basic question at issue, namely, whether Stephens, despite his [sic] biology, is actually female."); *cf.* Brief for Amicus Curiae Center for Arizona Policy in Support of the Petitioner at 13, *R.G. & G.R. Harris Funeral Homes*, No. 18-107 (U.S. Aug. 20, 2019), 2019 U.S. S. Ct. Briefs LEXIS 3413, at *13 ("The use of particular pronouns expresses a reality underlying those words. Words are never 'mere words.'").

34. Adopting even more apocalyptic language, one amicus stated that using appropriate pronouns "affirm the transgender ideology." Brief of Amicus Curiae Foundation for Moral Law in Support of Petitioner at 2–3, *R.G. & G.R. Harris Funeral Homes*, No. 18-107 (U.S. Aug. 16, 2019), 2019 U.S. S. CT. Briefs Lexis 3346, at *5.

35. *Cf.* Armstead v. United States, 347 F.2d 806, 807–08 (D.D.C. 1965) (rejecting a lower court judge's instruction that defendants should not be addressed by titles as "needlessly" degrading and humiliating him); State v. Bright, 916 P.2d 922, 926 n.23 (Wash. 1996) (finding it "an abuse of formal courtroom protocol to address adult participants by first names only or nicknames without courtesy titles").

36. In saying this, I acknowledge what might appear to be an apparent inconsistency between the point that pronouns are typically semantically empty, and the Article's broader argument that the use of (correct) pronouns is meaningful and that pronouns can carry heavy personal significance. But I do not view the points as contradictory.

messages—they are only meant to signal the replacement of a noun or name, and are used to identify, address, or refer. Indeed, as sociolinguist Sally McConnell-Ginet rightly points out: "[P]ronouns do not standardly have content in the same way as ordinary common nouns do. . . . [R]ather than characterizing, they indicate a person or group."[37] Given the semantic emptiness of pronouns, then, it is difficult to make the argument that their use is intentionally meant to signal acknowledgement, affirmation, or agreement. To do so is to suggest that every time a speaker uses these words, they consciously intend to express messages about sex, gender, and the immutability of either. Viewed thus, respecting persons who are trans is one thing, while affirming their gender is another.

To my mind, terms of reference and address—pronouns, honorifics, titles, names, and the like—are *ordinary* signs of respect. That is to say, they are widely used, commonplace, and generally thought of as inconsequential. Conversely, we might think of withholding these terms as disrespectful: Doing so says, in effect, that the person we are referring to or addressing does not deserve the ordinary respect given to all other citizens.

Importantly, in the case of persons from groups that are discriminated against, the misuse or absence of these ordinary signs of respect takes on an even greater significance. To see this, consider that addressing professionals with titles like "Doctor," "Judge," "Sergeant," "Officer," etc. is ordinary. To specifically fail or refuse to use these terms with a Black person, though, would be considered discriminatory, because the context and history of discrimination against Black people matters. Recall that for decades, withholding the ordinary signs of respect—through a failure to use titles or by addressing Blacks persons by only their first names—was an integral part of the social practices that symbolized Black persons' purported inferiority. Thus, it is the deviation from ordinary treatment, against a backdrop of existing social discrimination that, when taken together, makes the conduct both meaningful and condemnable.

The same reasoning applies to pronouns, gendered titles, and the names of transgender persons. To fail to use these ordinary signs of respect by itself would be disrespectful. But the backdrop of widespread societal transphobia is what makes a deviation from the ordinary especially egregious. For instance, normally, using persons' preferred names—whatever they want to be called—is accepted. (We might, for example, refer to a person by their preferred name "Bob," when in actuality their legal name is "Robert.") And yet, to refuse to use a transgender person's preferred name or to deadname them, is a deviation from the ordinary, that takes on a new significance because of the social context of discrimination against transfolk. *See generally* SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 4 (2016), https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF [https://perma.cc/594T-6W63] (finding "disturbing patterns of mistreatment and discrimination" against transpersons in every dimension of social life). Likewise, ordinarily, we use gender pronouns that are in line with the person we are referring to or addressing (it just so happens that most people we discuss or address are cisgender). To fail to do so with transgender persons, however, is to deviate from the ordinary in a way that is especially meaningful.

37. Sally McConnell-Ginet, *"What's In a Name?" Social Labeling and Gender Practices*, *in* THE HANDBOOK OF LANGUAGE AND GENDER 69, 73 (Janet Holmes & Miriam Meyerhoff eds., 2003).

The number of briefs capable of taking anti-transgender positions but avoiding misgendering confirms this point. In all three cases, amici contested Stephens's, Grimm's, and Whitaker's position, even while addressing them appropriately.[38] To take one notable example, a *Harris Funeral Homes* brief authored by Ryan T. Anderson, renowned for taking anti-LGBT positions, vehemently argued that Ms. Stephens "is not a woman."[39] And yet, Anderson deliberately chose to refer to Ms. Stephens with she/her/hers pronouns throughout his brief.[40] This and other similar briefs testify that, at a minimum, even those who oppose the equal citizenship of gender minorities are capable of maintaining a necessary modicum of respect.

B. Pronoun Use is Strictly in Reference to "Biological Sex," and Therefore, Using Appropriate Language is Incorrect

Other amici offer justifications rooted in history. Traditionally, the argument goes, pronouns have always referred to the "biological sex" of the person being discussed.[41] To use them otherwise, some argue, is to "sacrifice[] the plain meaning of the English language on the altar of political correctness."[42]

Though attractive at first blush, on closer inspection, this account is incorrect on at least three fronts. In the first place, how language has been used in the past cannot obligate its use today. Language is, and has always been, remarkably dynamic. Usage at one time can, and does, change quickly to accommodate cultural shifts and other newly developed understandings. To see this, one need only consider how commonly-accepted terms or labels for racial and ethnic minorities, women, or lesbians and gay men have changed

38. *See infra* Appendix Tables 1–3.
39. *See* Brief of Ryan T. Anderson as Amicus Curiae in Support of Employers at 18, *R.G. & G.R. Harris Funeral Homes*, Nos. 17-1623 & 18-107 (U.S. Aug. 21, 2019).
40. *See, e.g.*, *id.* at 17.
41. *E.g.*, Brief of Amicus Curiae Alliance Defending Freedom in Support of Petitioners at 2 n.4, Kenosha Unified Sch. Dist. v. Whitaker *ex rel.* Whitaker, 138 S. Ct. 1260 (2018) (No. 17-301), 2016 WL 7449301; Amicus Brief of Free Speech Advocates in Support of Petitioner, *supra* note 33, at 3; *cf.* Brief of Amici Curiae Dr. Judith Reisman & the Child Protection Institute in Support of Petitioner at 47–48, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, No. 16-273 (U.S. Jan. 10, 2017), 2017 U.S. S. Ct. Briefs LEXIS 107, at *55–56 (suggesting using "names and pronouns that . . . do not correspond" with "physical characteristics," *id.* at 47, denies "biological reality," *id.* at 48).
42. Brief Amicus Curiae of Public Advocate of the United States et al. in Support of Petitioners at 4 n.2, *Kenosha Unified Sch. Dist.*, 138 S. Ct. 1260 (No. 17-301), 2017 WL 4404962.

over the past century.[43] And, from a wider view, similar traditionalist arguments unsurprisingly fall heaviest on those who have been traditionally oppressed.[44] Arguments rooted in history, then, must ring especially hollow in the context of modes of address for minority groups.

Secondly, somewhat ironically, the argument is patently ahistorical. Suggesting tradition and biology strictly dictate language usage, overlooks how gendered language has been used historically. For centuries, masculine language has been used to generically represent both men and women.[45] Today, no one suggests the Declaration of Independence's pronouncement that "all men are created equal," applies strictly to men.[46] Similarly, precedent using male pronouns and titles has never been read literally:[47]

43. Importantly, changes in the ways historically marginalized groups are addressed, are frequently a part and byproduct of movements led by these very same groups. For scholarship on the movement to change terms of address for Black persons, see generally Tom W. Smith, *Changing Racial Labels: From "Colored" to "Negro" to "Black" to "African American"*, 56 PUB. OPINION Q. 496, 496 (1992). For scholarship on women's work towards launching the title 'Ms.', see David W. Dunlap, *1986: 'Ms.' Joins the Times's Vocabulary*, N.Y. TIMES (Apr. 6, 2017), https://www.nytimes.com/2017/04/06/insider/1986-ms-joins-the-timess-vocabulary.html [https://perma.cc/JWP4-QDGJ]; Ben Zimmer, *Ms.*, N.Y. TIMES MAG. (Oct. 23, 2009), https://www.nytimes.com/2009/10/25/magazine/25FOB-onlanguage-t.html [https://perma.cc/4ZMW-YKRB]. For work on the decline of the term "homosexual" in favor of "gay," see Jeremy W. Peters, *The Decline and Fall of the 'H' Word*, N.Y. TIMES (Mar. 21, 2014), https://www.nytimes.com/2014/03/23/fashion/gays-lesbians-the-term-homosexual.html [https://perma.cc/5RUF-4Z4K].

44. One need only look at the traditional justifications used to resist rights for African Americans, women, and queerfolk. *See* Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 294–95, 322–33 (2011) (pointing out why traditionalist arguments should be viewed as suspicious in evaluating the treatment of minority groups).

45. *See, e.g.*, WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 59 (4th ed. 2000) ("The use of he as a pronoun for nouns embracing both genders is a simple, practical convention rooted in the beginnings of the English language." (emphasis omitted)); Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN'S L.J. 93, 93 (1990) (relating an instance of the term "gentlemen" to address female students); *see also generally* Anne Pauwels, *Linguistic Sexism and Feminist Linguistic Activism*, *in* THE HANDBOOK OF LANGUAGE AND GENDER, *supra* note 37, at 550 (documenting linguistic androcentrism and feminist reaction).

46. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

47. *E.g.*, Gideon v. Wainwright, 372 U.S. 335, 345 (1963) ("Even the intelligent and educated lay*man* has small and sometimes no skill in the science of law." (emphasis added)); United States v. Harriss, 347 U.S. 612, 617 (1954) ("The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that *his* contemplated conduct is forbidden by the statute. The underlying principle is that no *man* shall be held criminally responsible for conduct which *he* could not reasonably understand to be proscribed." (emphasis added)); Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of *men*." (emphasis added)).

Courts have not declined to apply the "reasonable man" or "prudent man" standards in cases involving women,[48] nor has statutory language written in masculine form been interpreted so narrowly.[49]

Third, the argument misses the mark because, typically, pronoun use corresponds not to sex but instead to the appearance of it. Put a different way, in ordinary use, we refer to others by pronouns related with the sex (or gender) they appear to be. Take the all too common experience of shorthaired women being addressed as "Sir," or when strangers misclassify babies since, barring overtly gendered clothing, their sex is usually not readily apparent. In both instances, the use of gendered language has nothing to do with biological characteristics; rather, it relies on assumptions made based on appearance. Precisely because of this, even persons who subscribe to the logic that pronouns are strictly determined by sex, will correctly address trans persons who "pass."[50]

At bottom, the argument that the sex of the addressee is dispositive is wrong for failing to recognize these realities: The ways language use changes, the wealth of ways in which gendered language has been applied and interpreted, and the ways it is actually used in everyday life.

C. Misgendering is Not Intended to be Disrespectful, or, Respect Should Have No Bearing on How to Refer to or Address Parties

Another justification turns on intent. Some amici justify their language by claiming they do not intend their language to offend. One brief in *G.G. v.*

48. Naomi R. Cahn, *Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1404 (1992).

49. This point is perhaps best demonstrated by the writing of Susan B. Anthony, who made the argument that if criminal statutes using masculine pronouns could be applied to punish women, then voting laws written in masculine must also extend to women as well. *See* DENNIS BARON, WHAT'S YOUR PRONOUN? BEYOND HE & SHE 46–49 (2020) (citing Susan B. Anthony, Woman Suffrage (1872) and Susan B. Anthony, Is it a Crime for a Citizen of the United States to Vote? (1868) (transcript available at https://etc.usf.edu/lit2go/185/civil-rights-and-conflict-in-the-united-states-selected-speeches/4855/is-it-a-crime-for-a-citizen-of-the-united-states-to-vote/ [https://perma.cc/57FT-PB2F])).

50. *See* Roberto Lopez, *Preferred Pronouns Laws and the First Amendment: When Transgender Activism Clashes With the Prohibition on Compelled Speech*, FIU L. REV. ONLINE (Jan. 2, 2019), https://law.fiu.edu/2019/01/02/preferred-pronoun-laws-and-the-first-amendment-when-transgender-activism-clashes-with-the-prohibition-on-compelled-speech [https://perma.cc/YFP2-SVXU]; *see also* Jae Alexis Lee, *What Does "Passing" Mean Within the Transgender Community?*, HUFFINGTON POST (June 10, 2017, 11:13 AM), https://www.huffpost.com/entry/what-does-passing-mean-within-the-transgender-community_b_593b85e9e4b014ae8c69e099 [https://perma.cc/8K4N-RXUJ] (defining passing as being "correctly perceived as the gender they identify as and beyond that, . . . *not* be[ing] perceived as transgender").

Gloucester made such a claim, suggesting its use of female pronouns was "not intended to be provocative or disrespectful."[51]

This reasoning should be easily dismissed. Intention is irrelevant when the conduct is, as a general matter, known to be offensive.[52] Consider a scenario in which someone addresses male colleagues by their professional titles, but strictly addresses female colleagues by informalities like "sweetie," "honey," and "darling." What credence would we give to the excuse that this behavior was not offensive since the speaker did not intend to be disrespectful or misogynistic? None. Because this disparate mode of address is obviously offensive, intention cannot dictate interpretation. The same is true of misgendering in legal filings.

Other amici admit that misgendering is insulting but, peculiarly, argue that respect is irrelevant. A brief in *Harris Funeral Homes*, for example, made the argument that the authors did not have to use appropriate pronouns, since the case was clearly "not a social event, in which '[i]t's important to be polite and respectful,' but a lawsuit between two contending parties."[53] Roughly put, the logic finds that the context of litigation allows (or even compels) parties to display less respect than they would otherwise.

With this, I cannot agree. What is clear is that an adversarial system need not be an antagonistic one. Quite simply, the argument is discredited by the great weight of authority finding professionalism and courtesy to be paramount in litigation.[54]

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51. Brief Amicus Curiae of Public Advocate of the United States et al. in Support of Petitioner at 2 n.4, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, No. 16-273 (U.S. Jan. 10, 2017), 2017 U.S. S. Ct. Briefs LEXIS 114, at *7 n.4.

52. Precisely for this reason, the majority of courts that have adopted the honorifics, pronouns, and titles, which correspond with parties' gender identities, have done so based on respect rationales. *E.g.*, Kosilek v. Spencer, 740 F.3d 733, 737 n.3 (1st Cir. 2014); Farmer v. Haas, 990 F.2d 319, 320 (7th Cir. 1993) ("Farmer prefers the female pronoun and we shall respect her preference."); Supre v. Ricketts, 792 F.2d 958, 964 n.1 (10th Cir. 1986) (Seymour, J., dissenting) ("I choose the female pronouns 'she' and 'her' as a matter of courtesy to [the plaintiff].").

53. Brief Amicus Curiae of Public Advocate of the United States et al. in Support of Petitioner, *supra* note 33, at 12–13 (alteration in original) (footnote omitted).

54. *See, e.g.*, Warren E. Burger, The Necessity for Civility, LITIG., Winter 1975, at 8, 10 (explaining that "good manners, disciplined behavior and civility . . . are the lubricants that prevent lawsuits from turning into combat" and "civility is to the courtroom and adversary process what antisepsis is to a hospital and operating room"); Sandra Day O'Connor, Professionalism, 76 WASH. U. L.Q. 5, 8 (1998) ("When . . . lawyers themselves generate conflict, rather than focusing on the dispute between the parties they represent, it distorts our adversarial system. More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers."); Thomas M. Reavley, Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics, 17 PEPP. L. REV. 637, 643–44 (1990) (writing abusive and

D. Misgendering is an Acceptable Convention Because Trans Parties' Gender is "At Issue" in the Case

Another account states that trans parties' gender is a disputable point in the case. Accordingly, to prevent misgendering would hamper advocates' ability to advance their position on a "central issue" in the case; namely whether the Plaintiff is a male or female.[55]

The argument is too clever by half. The sexes of the parties in *Grimm*, *Harris*, and *Kenosha* were never issues requiring a judicial determination. Nor should they be. To be clear, the questions before the Court in those cases, were whether Title IX and Title VII cover discrimination against transgender persons, or, more directly, whether discrimination on the basis of gender identity constitutes sex discrimination. Determining the issue of the plaintiffs' sex does nothing to answer these questions. Instead, the answers lie in an ontological inquiry as to the nature of transphobic discrimination: Whether persons who discriminate against trans persons do so based on their targets' sex, take their targets' sex into account, or otherwise make some sex-based evaluation. Understanding the essence of the discriminating actors' motivations—and not the targets' sex or gender is therefore the central issue in the cases.

Just as importantly, the justification that transgender persons' sexes are determinable trial issues fails in cases beyond the limited scope of those evaluating the statutory coverage of the term "sex." Even in more general cases, courts need not adjudicate parties' sex to identify transgender discrimination. An analogous illustration will make this clear: Imagine a case of employment discrimination, in which the targeted employee identifies as Native American, but their supervisor perceives them as Black. Imagine further that the supervisor has no animosity towards Native persons but is deeply prejudiced against Black people. As a result of their bias, the supervisor regularly treats the employee less favorably and regularly invokes invidious stereotypes about Black persons. In such a case, must the

unprofessional behavior "makes life and the practice of law unpleasant and unhealthy," *id.* at 644 (footnote omitted)).

55. Brief of Amici Curiae Center for Constitutional Jurisprudence & National Organization for Marriage in Support of Petitioners at 2–3 n.2, Kenosha Unified Sch. Dist. v. Whitaker *ex rel.* Whitaker, 138 S. Ct. 1260 (2018) (No. 17-301), 2017 WL 4565076 (making the argument that the "central issue" in *Kenosha* was "[w]hether Ashton Whitaker 'is a boy' because she [sic] self-identifies as a boy, and therefore must be treated as a boy even with respect to access to intimate private facilities such as restrooms, locker rooms, showers, and dormitories").

court make a determination that the target is, in fact, Black (or, for that matter, make any determination of the target's race)? Absolutely not.[56] The supervisor's misperception does not alter the fact that harmful racial discrimination has taken place.

Similarly, in cases of transphobic discrimination no "gender determinations" need occur for a court to determine the discriminating party's motivations. Seen in this light, even from a wider view, the argument must fail.

E. There is (a) No Right to Be Addressed as One Wishes; and (b) If There Were, It Would Open a Slippery Slope

Next comes the argument that persons have no right "to be called what they choose to be called."[57] The thought is that, because such a right does not exist, lawyers can freely misgender transgender persons without consequence.

As an initial matter, this argument conflates the lack of an affirmative right to be free from harm with an invitation to inflict it. It does not follow, obviously, that the absence of a right to be free from blatant disrespect allows it: Societal rules of common courtesy say the opposite. More fundamentally, though, the argument rests on the nonexistence of such a right. Whether or not that is true—at least, in the limited context of trial—remains an open question, however.[58]

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56. *See* D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 153 n.312 (2013) (collecting cases allowing discrimination claims based on misperceived racial identity). Analogous cases, allowing claims based on misperceived sexual orientation or religion, similarly exist. *See, e.g.*, Ellingsworth v. Hartford Fire Ins. Co., 247 F. Supp. 3d 546, 546 (E.D. Pa. 2017) (upholding Title VII claim brought by a heterosexual woman perceived as a lesbian); Dallan F. Flake, *Religious Discrimination Based on Employer Misperception*, 2016 WIS. L. REV. 87, 117–24 (collecting cases allowing employment discrimination claims based on misperceived religion).

57. Brief Amicus Curiae of Public Advocate of the United States et al. in Support of Petitioner, *supra* note 33, at 13.

58. And, even accepting the absence of such a right as true, beyond being uncouth to flagrantly and unwarrantedly disrespecting other persons, other duties may compel courtesy to other parties. *See In re* Snyder, 472 U.S. 634, 647 (1985) ("All persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants."). What's more, the Rules of Professional Conduct, as well as the Code of Judicial Conduct actually impose affirmative obligations on lawyers and judges, respectively, to be courteous to others. *See* MODEL RULES OF PROF'L CONDUCT Preamble & Scope 9 (AM. BAR ASS'N 2018) (stating lawyers have the obligation of "maintaining a professional, courteous and civil attitude toward all persons involved in the legal system"); MODEL CODE OF JUDICIAL CONDUCT Canon 2

The 1964 case *Hamilton v. Alabama*[59] suggests the answer is at best unclear. *Hamilton* involved a state's attorney's insistence on addressing a Black witness by her first name, as was customary in the then-existing Southern racial etiquette system. When Hamilton refused to testify so long as she was addressed as "Mary" rather than "Miss Hamilton," she was held in contempt of court.[60] On appeal, the Alabama Supreme Court upheld Hamilton's contempt charge, reasoning that the form of address was appropriate.[61] Then, without much by way of explanation, the U.S Supreme Court reversed in light of *Johnson v. Virginia*, a case finding segregated courtroom seating unconstitutional.[62]

Hamilton's reticence invites various interpretations. Read broadly, the case could, in fact, stand for the proposition that parties do have a right to dictate how they are addressed in court. Which is to say, Mary Hamilton had the right to be addressed as she wished. If this holds, the proffered justification for misgendering must fail.

I will admit that reading might be a stretch. A narrower, more plausible reading finds that, at a minimum, *Hamilton* compels lawyers' equal treatment of parties as it relates to titles and honorifics, or at least prohibits disrespectful modes of address.[63] Importantly, if the wrong in the case was

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r. 2.8(B) (AM. BAR ASS'N 2020) ("A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control."); *see also* CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(3) (2019) (stating judges "should be patient, dignified, respectful, and courteous" and "should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process").

59. 376 U.S. 650 (1964).

60. *Ex parte* Hamilton, 156 So. 2d 926, 926 (Ala. 1963), *rev'd*, 376 U.S. 650 (1964).

61. *Id.* at 927 ("The record conclusively shows that petitioner's name is Mary Hamilton, not Miss Mary Hamilton. Many witnesses are addressed by various titles, but one's own name is an acceptable appellation at law.").

62. *Hamilton*, 376 U.S. at 650 (citing Johnson v. Virginia, 373 U.S. 61 (1963)).

63. *See* Bell v. Maryland, 378 U.S. 226, 247–49, 248 n.4 (1964) (Douglas, J., concurring) (characterizing Hamilton's mistreatment as "a relic of slavery" that infringed on Fourteenth Amendment equal citizenship); State v. Bright, 916 P.2d 922, 926 n.23 (Wash. 1996) (en banc) (reading *Hamilton* to stand for the principle that "[p]articipants in all court proceedings are entitled to be addressed with courtesy titles"); Derrick A. Bell, Jr., *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 CALIF. L. REV. 165, 191 (1973) (reading *Hamilton* to have "set a minimal standard of courtesy for black litigants"); Steven J. Eagle, *The Really New Property: A Skeptical Appraisal*, 43 IND. L. REV. 1229, 1274–75 & n.338 (2010) (interpreting *Hamilton* to stand for "the universal entitlement to be called by an honorific in judicial proceedings," *id.* at 1275); A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 527 (1990)

the refusal to address Black persons with courtesy titles while granting White persons that respect, then, for this independent reason as well, *Hamilton* instructs against misgendering: Refusing to address transgender persons by pronouns and titles in line with their gender, while doing just that for cisgender persons, is to treat trans persons unequally, in a manner akin to the way Hamilton was accorded less respect than White witnesses.

A corollary argument is that using appropriate language in reference to transgender persons opens a slippery slope.[64] The account states that once trans parties are addressed as they wish (by pronouns and titles in-line with their gender), there is no principled way to avoid having to address other litigants in the (less serious) ways they may wish to. For example, one brief pondered how courts would distinguish between litigants being allowed to choose their own pronouns and a request to be addressed as "His Majesty."[65]

Despite these warnings, the camel's nose needn't enter the tent.[66] Like many slippery slope arguments, this one seeks to say too much: Assuming the right to be addressed as one wishes exists, is it difficult to formulate a nonarbitrary dividing line? Not particularly. One possible rule might be

(suggesting the case stands for treating Black persons with the same dignity accorded White persons).

64. *E.g.*, Brief for Amicus Curiae Center for Arizona Policy in Support of the Petitioner, *supra* note 33, at 7 (stating the slippery slope will extend to "newly invented gender-neutral pronouns"); Brief Amicus Curiae of Public Advocate of the United States et al. in Support of Petitioner, *supra* note 51, at 35 n.52 (arguing the slippery slope will extend to being called royal titles).

65. Brief Amicus Curiae of Public Advocate of the United States et al. in Support of Petitioner, *supra* note 51, at 35 n.52 (citing the example of a student at University of Michigan Ann Arbor who, under the institution's inclusive language policy, changed his preferred pronoun to "His Majesty").

Interestingly, the argument ignores the underlying question of what anyone—trans or not—could possibly gain to be sufficiently motivated to lie about their pronouns or preferred terms of address. And, quite ironically, the only examples of persons exploiting or mocking policies allowing them to choose their personal pronouns or preferred modes of address, all involve persons who are not gender minorities. *See, e.g.*, Conor Thompson, *Op-Ed: An Open Letter to His Majesty*, MICH. DAILY (Oct. 13, 2016, 6:50 PM), https://www.michigandaily.com/section/viewpoints/op-ed-open-letter-grant-strobl [https://perma.cc/54VX-KDNL].

66. It is also important to recognize that these slippery slope arguments are trotted out and redeployed at every pit stop on the journey towards progress for minority groups. Recall the predictions that school desegregation would lead to racial mixing and miscegenation, and same-sex marriage would soon invite bestiality and polygamous marriage. For literature on the former, see Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 187, 192–201 (2006), and for literature on the latter, see Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 FLA. COASTAL L. REV. 181, 208–19 (2005).

that persons may choose how they wish to be addressed, unless the mode of address term undermines the trial or otherwise interferes with the administration of justice. Under such a rule, a transman would be addressed by his correct titles and pronouns, while a litigant who wants to be referred to by a crude name, slur, expletive, or an unpronounceable symbol would not.[67] Another, perhaps more straightforward, rule might be that persons can choose to be addressed by whatever *ordinary* terms of respect they wish.[68] Ordinarily, we refer to persons by the names they wish to be called, and pronouns in line with their gender.[69] We do not ordinarily refer to persons with royal titles if they are not in fact royalty, or with professional titles unless they have earned them. It seems to me, to be addressed by gendered titles and terms in line with gender identity easily falls on one side of that distinguishing line, and "His Majesty" on the other.

II. THE RULES OF PROFESSIONAL CONDUCT AS A SITE OF INTERVENTION

Judicial responses to modes of reference and address for transgender persons are mixed. In their own writing, many courts defer to individuals' chosen titles and pronouns.[70] To their credit, a few courts have gone even further, preventing opposing litigants from misgendering trans parties. In Private First-Class Chelsea Manning's 2015 trial, the U.S. Army Court of Criminal Appeals granted a motion requesting the court and government

67. *Cf.* Julia Shear Kushner, *The Right to Control One's Name*, 57 UCLA L. REV. 313, 313–15, 334 (2009) (collecting examples of name change denials for offensive or obscene references or incitement of violence).

68. See *supra* note 36 for an illustration of ordinary terms of respect.

69. Courts very commonly refer to persons by names they wish to be called, even though they may differ from their legal names. *E.g.*, *In re* Brackens, No. 18-11125, 2019 Bankr. LEXIS 691, at *1 n.1 (Bankr. W.D. La. Feb. 26, 2019) ("At trial, Ms. Gordon indicated that her preference was to be referred to by her married name, Cheynita Sneed. . . . This Court is happy to oblige and will refer to her as Ms. Sneed throughout this Memorandum of Decision." (citation omitted)); Ramirez-Vera v. State, No. 19A-CR-1368, 2020 Ind. App. LEXIS 102, at *1 n.1 (Ind. Ct. App. Mar. 17, 2020) ("At the beginning of her bench trial, Ramirez-Vera indicated that her preferred name is Ramirez. . . . Accordingly, we will refer to her as Ramirez throughout this opinion." (citation omitted)) .

70. *E.g.*, Lesperance v. Manning, No. 2:16-CV-0764 JAM AC P, 2019 U.S. Dist. LEXIS 150710, at *4 n.2 (E.D. Cal. July 30, 2019) ("Although the instant order uses masculine pronouns when referring to plaintiff, the court will use other pronouns in the future upon plaintiff's request."); Lewis v. Mullens, No. 2:16-CV-2607 AC P, 2018 U.S. Dist. LEXIS 42204, at *1–2 (E.D. Cal. Mar. 14, 2018) (granting trans plaintiff's "motion for documented gender identity acknowledgement" and stating "[g]oing forward, the court will use female pronouns when referring to plaintiff"); Doe v. Fedcap Rehab. Servs., No. 17-CV-8220 (JPO), 2018 U.S. Dist. LEXIS 71174 (S.D.N.Y. Apr. 27, 2018) (adopting they/their/theirs pronouns for a genderqueer plaintiff).

attorneys refer to Manning with female pronouns and precluding the use of her former name.[71] The order required the government address Manning with "either . . . neutral [terms] . . . or [by] employ[ing] a feminine pronoun."[72]

Even so, many courts have dismissed similar requests for proper address. Consider *Howard v. Georgia Department of Corrections*, denying a transgender plaintiff's "Motion for Recognition."[73] There, a federal magistrate judge not only failed to order the defendants to respect plaintiff's gender identity, but he also refused to do so himself. Deferring to the plaintiff's classification by the Georgia Department of Corrections, the court held it would "not use female pronouns . . . [or] order that defendants refer to plaintiff as 'Ms.' and use just female pronouns when referring to plaintiff."[74]

All too frequently, the *Howard* judge is not alone. For every court that respects transgender parties, several others do not.[75] This inconsistency complicates the possibilities for individual judicial interventions. It suggests that, realistically, a farreaching solution to misgendering in legal filings will not be court-initiated. Perhaps just as importantly, state bar associations are better positioned than individual courts, to address the discriminatory behavior of legal professionals; indeed, the regulation of attorney conduct is one of their central roles. With these two points in mind, this Part offers an alternative solution. Bar associations should, I propose, address the practice through the Rules of Professional Conduct. In particular, Rules 3.4, 4.4, and 8.4 are relevant. Discussion and application of each follows.

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71. Francesco G. Salpietro, *R-E-S-P-E-C-T: Transgender Pronoun Preference and the Application of the Model Code of Judicial Conduct*, 53 CT. REV. 162, 162–63 (2017).
72. Order at 2, United States v. Manning, 78 M.J. 501 (A. Ct. Crim. App. 2018) (No. ARMY 20130739).
73. Howard v. Ga. Dep't of Corr., No. 5:10-CV-207 (MTT), 2010 U.S. Dist. LEXIS 93173, at *1 (M.D. Ga. July 7, 2010).
74. *Id.* at *2 ("[T]he Court will certainly recognize and note that plaintiff classifies himself [sic] as 'a transgender person with gender identity disorder,' but it will not use female pronouns and it will not order that defendants refer to plaintiff as 'Ms.' and use just female pronouns when referring to plaintiff.").
75. *Compare*, *e.g.*, Keohane v. Jones, 328 F. Supp. 3d 1288, 1292 n.1 (N.D. Fla. 2018) ("Out of respect for Ms. Keohane, this Court uses female pronouns when referring to her—a courtesy not all of Defendant's agents have extended . . . ."), *and* Supre v. Ricketts, 792 F.2d 958, 964 n.1 (10th Cir. 1986) (using female pronouns for transgender plaintiff "as a matter of courtesy"), *with* United States v. Varner, 948 F.3d 250, 252 (5th Cir. 2020) (misgendering petitioner throughout, based on arguments discredited in Part I, *supra*), *and* Gibson v. Collier, 920 F.3d 212, 217 n.2 (5th Cir. 2019) (rationalizing the majority's misgendering on a mistaken conflation of gender and sex, and citing to a 1994 case misgendering a transgender party as precedential justification).

A. Model Rule 3.4: Fairness to Opposing Party and Counsel

Model Rule 3.4(e) states: "A lawyer shall not: . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant . . . ."[76] When a case does not involve transgender issues or similar questions, a party's gender identity cannot reasonably be described as relevant.[77] Accordingly, in those instances intentional misgendering should be viewed as violative of Rule 3.4(e).

As a case in point, take a 2017 civil suit filed in the wake of the Charlottesville 'Unite the Right' rally.[78] Christopher Cantwell, a rally participant who pleaded guilty to assault and battery for pepper-spraying counterprotestors, sued Emily Gorcenski, a witness in the criminal charges against him, for malicious prosecution, abuse of process, and false imprisonment.[79] Throughout Cantwell's complaint and subsequent filings, his attorney repeatedly referred to Gorcenski with male pronouns and honorifics, as well as by her birth name, despite her legal name and gender marker changes.[80] Further, in a motion responding to Gorcenski's request that the court recaption the case to reflect her current name, Cantwell's attorney included the following unwarranted, if not vastly inappropriate, statement:

> Despite his [sic] efforts to the contrary, Gorcenski is not in fact a female human being, having been born with and retaining the XY chromosome . . . . Further, Gorcenski's presenting himself [sic] as a female is untruthful, mendacious, and deceptive. He [sic] is free to suffer the consequences of his [sic] decision, but has no right to force others to condone his [sic] lie. He [sic] further has no right to ask a court of law to condone his [sic] lie, nor to ask that court to force others to condone it. The United States District Court

76. MODEL RULES OF PROF'L CONDUCT r. 3.4(e) (AM. BAR ASS'N 2018).
77. *E.g.*, United States v. McGrath, 80 Fed. Appx. 207, 207 n.1 (3d Cir. 2003) (describing, in a criminal case, the government's use of male pronouns for a transgender woman, and noting the issue of the Defendant's gender "identity . . . is not germane to our decision").
78. For a description of the leadup to and course of the rally, see Timothy E. D. Horley, *Rethinking the Heckler's Veto After Charlottesville*, 104 VA. L. REV. ONLINE 8, 8–12 (2018).
79. Complaint, Cantwell v. Gorcenski, No. 3:17-CV-00089 (W.D. Va. Dec. 28, 2017).
80. Discovery Letter from Sandra C. Freeman, Attorney for Ms. Gorcenski, to Honorable Norman K. Moon, Senior U.S. District Judge, *Cantwell*, No. 3:17-CV-00089 (W.D. Va. Feb. 27, 2018), ECF No. 15; Ian Shapira, *He Once Defended the Poor in Court. Now He Defends White Supremacists.*, WASH. POST (July 2, 2018, 7:34 PM), https://www.washingtonpost.com/local/he-once-defended-the-poor-in-court-now-he-defends -white-supremacists/2018/07/01/0c7bfa6a-6901-11e8-9e38-24e693b38637_story.html [https://perma.cc/6AYL-GUPA].

> exists to determine the truth, not to condone falsehoods nor encourage or force others to do so. A United States District Court Judge is not a "transmagistrate;" the magistrate judge is not a "transjudge" any more than counsel for Plaintiff is "transthin," "transyoung, or trans-not-balding." Convicted criminals are not "translawful." Cars with rolled back odometers are not "transmileage;" and perjury is not "transtruth,["] except to used car salesmen and perjurors [sic]. . . . This motion should not be transdenied, but rather granted.[81]

Reasonable minds can, of course, disagree. But given the nature of the claims and the fact that Gorcenski's gender played absolutely no role in them, this tangential diatribe as well as the other misgendering cannot be said to be relevant for Rule 3.4 purposes.[82] Rather, they must be considered inappropriate allusions prohibited by Rule 3.4(e).

B. Model Rule 4.4: Respect for the Rights of Third Persons

Misgendering in filings seems to violate the Model Rule 4.4 bar against lawyers' use of "means that have no substantial purpose other than to embarrass, delay, or burden."[83] As an initial point, research evidence and the firsthand reports of trans persons finds that experiencing misgendering causes measurable psychological and physiological harms. Misgendering, these sources find, is a critical stressor that is experienced as humiliating, stigmatizing, psychologically distressing, and dehumanizing.[84]

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81. Motion for Enlargement of Time at paras. 9–10, *Cantwell*, No. 3:17-CV-00089 (W.D. Va. Feb. 27, 2018), ECF No. 17.

82. In a later response, Gorcenski's counsel made this very point. *See* Amended (First) Counterclaims of Defendants at 30 & n.17, *Cantwell*, No. 3:17-CV-00089 (W.D. Va. Mar. 20, 2018) (stating Cantwell's attorney's statement "had no bearing whatsoever on the merits or procedure of the litigation," *id.* at 30, and that the statement "did not even serve the functional purpose of actually opposing Ms. Gorcenski's request to have [the] case recaptioned under her true name, as the reason not to do so was nowhere actually offered, and no objection to the requested relief was made by counsel," *id.* at 30 n.17).

    Beyond violating Rule 3.4, Woodward's representation also appears to violate Rule 8.4(g), discussed below, *see* text accompanying *infra* notes 90–101, and the Rule's Preamble, which notes lawyers have an obligation to maintain "a professional, courteous and civil attitude toward all persons involved in the legal system." MODEL RULES OF PROF'L CONDUCT Preamble & Scope 9 (AM. BAR ASS'N 2018).

83. MODEL RULES OF PROF'L CONDUCT r. 4.4(a) (AM. BAR ASS'N 2018).

84. *E.g.*, Brief of Amicus Curiae Transgender Legal Defense & Education Fund in Support of Respondents at *18–21, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 U.S. S. Ct. Briefs LEXIS 4216 (collecting firsthand narratives describing misgendering as an embarrassing and threatening

Simultaneously, reports find that persons actually deliberately misgender trans persons in an effort to embarrass and harass them.[85] This behavior also manifests at trial, where intentional and repeated misgendering is used to intimidate and harass.[86] Viewed in light of the above, it cannot be said that the use of inappropriate language in filings is meant to accomplish anything other than to disrespect, embarrass, and burden trans parties. Quite the contrary: Misgendering must be seen as a method deployed simply to badger litigants, with no underlying intent to advance a client's position.

Consider the example of *Rodgers v. State*, a still-pending appeal in the Supreme Court of Florida, in which government lawyers repeatedly misgendered the appellant, a transgender woman.[87] The State's move was curious since at no time did the State contradict the appellant's gender and, in fact, conceded her gender dysphoria diagnosis.[88] More strikingly, the state misgendered her in a responsive motion objecting on procedural grounds. As the appellant correctly replied: "Making legal arguments about the timeliness of Appellant's claims and about her prior waiver does not justify the State intentionally misgendering Appellant and, by extension, harassing her."[89] Together, these factors suggest the misidentifications serve

"hostile act"); McLemore, *Experiences With Misgendering*, *supra* note 8, at 52; McLemore, *A Minority Stress Perspective*, *supra* note 8, at 58.

85. *See, e.g.*, DAMIEN W. RIGGS, WORKING WITH TRANSGENDER YOUNG PEOPLE AND THEIR FAMILIES: A CRITICAL DEVELOPMENTAL APPROACH 109–11 (2019) (documenting instances of intentional misgendering to assert control of targets); Abbie E. Goldberg, Katherine Kuvalanka & Lore Dickey, *Transgender Graduate Students' Experiences in Higher Education: A Mixed-Methods Exploratory Study*, J. DIVERSITY HIGHER EDUC., July 2018, at 1, 9 (describing instances of "consciously deploy[ed]" language used to negate or challenge trans persons' gender identity); Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51, 63 (2013) (recording intentional misgendering as a form of emotional abuse among abusive relationships that include transgender partners); Kei Graves, *Typing My Way Out of the Cisheteronormative Closet at Community College*, *in* TRANS PEOPLE IN HIGHER EDUCATION 69 (Genny Beemyn ed., 2019) (documenting misgendering as means of deliberate humiliation).

86. *See* Goodmark, *supra* note 85, at 81–82 (documenting the "intentional[] and repeated[]" use of the wrong pronouns as "a tactic to break a witness down"); Abbe Smith, *The Complex Uses of Sexual Orientation in Criminal Court*, 11 AM. U. J. GENDER SOC. POL'Y & L. 101, 110 (2002) (telling of an instance in which defense counsel repeatedly addressed a transgender woman as "sir" during cross examination).

87. Appellant's Reply Brief at 1–3, Rodgers v. State, 288 So. 3d 1038 (Fla. 2019) (No. SC19-241), 2019 FL S. Ct. Briefs LEXIS 617.

88. *Id.* at 2.

89. *Id.*

no purpose in advancing the State's argument, but rather only serve to embarrass and burden the appellant.

C. Model Rule 8.4: Attorney Misconduct

The relevant sections of Model Rule 8.4 and the attendant comment read:

> It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice; . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . gender identity . . . in conduct related to the practice of law . . . .[90]
>
> Rule 8.4: Misconduct—Comment
>
> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful *verbal or physical conduct that manifests bias or prejudice towards others.* Harassment includes sexual harassment and *derogatory or demeaning verbal or physical conduct.* Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and antiharassment statutes and case law may guide application of paragraph (g).[91]

Model Rule 8.4 offers multiple avenues for addressing misgendering in filings. As a start, under subpoint (d), misgendering can constitute misconduct as being prejudicial to the administration of justice. It does this in at least three ways. First, it injects extraneous prejudice in decisionmaking, thereby threatening objectivity.[92] To see this, one need look no further than how it is used in court. Misgendering has most frequently been used as a tactic in hate crime cases involving transgender victims; highlighting targets' gender incongruence in order to elicit animus towards the victims, and ultimately, leniency towards defendants.[93] For

90. MODEL RULES OF PROF'L CONDUCT r. 8.4(d), (g) (AM. BAR ASS'N 2018).
91. *Id.* at r. 8.4 cmt.3 (emphasis added).
92. *See* Seth Hemmelgarn, *Misgendering in SF Trans Case Criticized*, BAY AREA REP. (Dec. 6, 2015), https://www.ebar.com/news/news//190177?ch=news&sc= news&sc2=&id=190177 [https://perma.cc/DT9Z-5D48] (linking the strategy of misgendering to eliciting bias against transgender parties).
93. *See, e.g.*, Jordan v. State, No. 01-14-00721-CR, 2015 WL 6768497, at *5–6 (Tex. App. Nov. 5, 2015) (arguing introducing a victim's gender identity would make a defendant's conviction less likely, since it would have rebutted "the prosecution's painting of the

example, in the 2019 trial of Edward Thomas, charged with felony aggravated assault for an attack on a Black transgender woman, Muhlaysia Booker, misgendering formed a critical part of Thomas's defense.[94] Initially, the defense argued that listing Muhlaysia's correct name and gender in Thomas's indictment was prejudicial, writing "Pierre Booker is legally a male by gender. To name him 'Muhlaysia' Booker could have the jury wrongfully conclude that Pierre is female."[95] Then, during medical testimony the defense asked a testifying doctor whether Muhlaysia had "male anatomy,"[96] and as the prosecutors read Booker's medical records to the jury, the defense interrupted by demanding: "Read the sex. What does the sex say?"[97] In another instance, the defense went as far as to tell the jury that the attack should be considered "mutual combat"[98] and as "a fight between two men, rather than a man assaulting a woman."[99] Clearly,

complainant as a 'damsel in distress,'" *id.* at *5); E. Cram, *"Angie Was Our Sister:" Witnessing the Trans-Formation of Disgust in the Citizenry of Photography*, 98 Q.J. SPEECH 411, 420–21 (2012) (detailing the use of misgendering by the defense in the murder of Angie Zapata).

The motivation of misgendering in hate crime cases appears to be the portrayal of trans victims as deceptive, and thus held morally accountable and less sympathetic. For examples and explanations of these invidious stereotypes see JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 76 (2011) (documenting a case in which the prosecution stated: "How can you trust this person? He tells you he is a women; he is clearly a man."); Talia Mae Bettcher, *Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion*, HYPATIA, Summer 2007, at 43, 43 (documenting the stereotype of trans people as "deceivers" and detailing its relationship to promoting transphobia and transphobic violence); Cynthia Lee & Peter Kar Yu Kwan, *The Trans Panic Defense: Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77, 113–19, 113 n.206 (2014) (documenting the stereotype and its consequences).

94. Stephen Young, *Man Who Beat Muhlaysia Booker in Viral Video Convicted of Assault*, DALL. OBSERVER (Oct. 22, 2019, 4:00 AM), https://www.dallasobserver.com/news/dallas-man-convicted-in-muhlaysia-booker-assault-11785268 [https://perma.cc/XV49-3WA7].

95. *Judge to Rule Whether Muhlaysia Booker Will Be Identified as Man or Woman During Trial*, FOX4 KDFW (Aug. 23, 2019), https://www.fox4news.com/news/judge-to-rule-whether-muhlaysia-booker-will-be-identified-as-man-or-woman-during-trial [https://perma.cc/L3LM-NATQ].

96. Dana Branham, *Defense Attorney Says Attack on Muhlaysia Booker Was 'Mutual Combat'*, DALL. MORNING NEWS (Oct. 18, 2019, 8:01 PM), https://www.dallasnews.com/news/courts/2019/10/18/defense-attorney-says-attack-on-muhlaysia-booker-was-mutual-combat [https://perma.cc/G7QR-879D].

97. Trudy Ring, *Defense Lawyers in Trans Assault Case Deadname, Misgender Victim*, ADVOC. (Oct. 18, 2019, 10:09 PM), https://www.advocate.com/crime/2019/10/18/defense-lawyers-trans-assault-case-deadname-misgender-victim [https://perma.cc/H68R-X7RK].

98. Branham, *supra* note 96.

99. Dana Branham, *Trial Begins This Week for Man Accused of Beating Muhlaysia Booker in Attack Caught on Viral Video*, DALL. MORNING NEWS (Oct. 13, 2019, 9:00 AM),

through misgendering, deadnaming, and otherwise portraying Booker as male, the defense sought to suggest that Thomas's assault was less egregious. Ultimately, the jury convicted Thomas of the lesser charge of misdemeanor assault.[100] By inflaming prejudice in jury or judicial decisionmaking, then, this form of misidentification can inappropriately influence case outcomes, which in turn compromises the administration of justice.

Second, misgendering in filings reflects poorly on the legal profession. Persons who witness these transphobic hostilities may question the impartiality of the legal system[101] or lose confidence in the legal profession,[102] neither of which bode well for the administration of justice. Worse, when these behaviors are unchecked, they give the appearance that the legal community itself countenances bias against gender minorities.

Third, misgendering undermines the administration of justice by challenging the legal system's authority. In one sense, name and gender marker changes and other similar judicial orders are legal conclusions. For this reason, when an advocate misgenders a party despite legal gender and name changes, advocates flagrantly disregard judicial determinations.[103] Failing to recognize a litigant's gender when the legal system itself does defies the authority of determining bodies and suggests that these legal processes are meaningless. Viewed in this light, misgendering in filings disrespects both the individual party and the legal system as an institution.

Next, Rule 8.4(g)'s prohibition on "harassment or discrimination" on the basis of gender identity is relevant. Plainly said, it is fairly obvious that intentional misgendering in legal documents constitutes harassment.

https://www.dallasnews.com/news/courts/2019/10/13/trial-begins-this-week-for-man-accused-of-beating-muhlaysia-booker-in-attack-caught-on-viral-video [https://perma.cc/CHN9-KUTX].

100. Young, *supra* note 94.

101. *See* Carla D. Pratt, *Should Klansmen be Lawyers?: Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857, 880 (2003) (arguing that "[d]iscriminatory conduct by a lawyer is prejudicial to the administration of justice because it causes the public to lose confidence in the system and it renders the system unfair"); Akshat Tewary, *Legal Ethics as a Means to Address the Problem of Elite Law Firm Non-Diversity*, 12 ASIAN L.J. 1, 31 (2005) (arguing that when lawyers engage in "practices that are of questionable fairness," they diminish the profession's credibility, and thus, prejudice the administration of justice).

102. *See* Attorney Grievance Comm'n of Md. v. Sanderson, 213 A.3d 122, 160 (Md. 2019) (interpreting Maryland's adopted 8.4(d) to prohibit attorney actions "that negatively impacts the public's perception of the legal profession" or "reflect[] negatively on the legal profession").

103. *Cf. In re* Jaeger, 834 N.W.2d 705, 710 (Minn. 2013) (finding that a lawyer's conduct that willfully ignored the "authority and directives" of the court undermines respect for the judicial system).

Return for a moment to the earlier employment discrimination illustration—this time with the supervisor discriminating against an employee who has recently converted to Rastafarianism. For the supervisor to repeatedly tell the employee that they "are not a real Rastafarian," and otherwise make light of their religious beliefs would clearly make a case for religious discrimination. Moreover, if litigation ensued, for the supervisor's attorney to refer to the plaintiff as "a fake Rastafarian," or "not Rastafarian" or "not really a Rastafarian" in reply briefs and filings would be worthy of condemnation, if not judicial reprimand. These expressions of the supervisor's views, even if sincerely held and genuinely believed, would constitute further religious harassment. The same is true of intentional misgendering in filings.

Finally, looking to Rule 8.4's comments confirms the rule's applicability. The practice of intentional misgendering is, unequivocally, designed and deployed to express prejudice against transgender persons. More tellingly, comment [3] notes that substantive antidiscrimination and antiharassment statutes and case law may be instructive as to 8.4(g)'s application. This is most damning. Statutes or regulations in California, New York, Washington D.C., Colorado, and Washington state find misgendering can constitute harassment.[104] By the U.S. Department of Education's Office of Civil Rights's own guidance, refusal to use a transgender student's pronouns may constitute "gender-based harassment" actionable under Title IX.[105] Case law[106] and EEOC decisions find the same.[107] If substantive antidiscrimination and antiharassment statutes

104. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1439.51(a)(5) (West 2019); COLO. CODE REGS. § 708-1:81.6(A)(4) (2014); D.C. Mun. Regs. tit. 4, § 808.2 (2006); WASH. ADMIN. CODE § 162-32-040 (2015); NYC COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN. CODE § 8-102, at 4–5 (2018), https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/CCHR%20Gender%20Guidance-December%202018.pdf [https://perma.cc/2TLR-E3MD] (interpreting N.Y.C., N.Y., ADMIN. CODE § 8-102 as prohibiting misgendering).

105. *See* Letter from Candice Jackson, Acting Assistant Sec'y for Civil Rights, Office for Civil Rights, Dep't of Educ., to Regional Directors, Office for Civil Rights, Dep't of Educ. (June 6, 2017), https://www.documentcloud.org/documents/3866816-OCR-Instructions-to-the-FieldRe-Transgender.html [https://perma.cc/Q2VT-XKZ7].

106. *E.g.*, Renee v. Neal, No. 3:18-CV-592-RLM-MGG, 2018 U.S. Dist. LEXIS 137025, at *1–2 (N.D. Ind. Aug. 13, 2018) (finding correctional officers' refusal to use female pronouns constituted "verbal harassment"); Holub v. Saber Healthcare Grp., No. 1:16-CV-02130, 2018 U.S. Dist. LEXIS 35458, at *2, *6 (N.D. Ohio Mar. 2, 2018) (upholding a sexual harassment claim against a motion to dismiss in which a trans woman was intentionally and repeatedly referred to as "'he,' 'him' and 'mister'").

107. *See, e.g.*, sources cited *supra* note 7.

instruct, 8.4(g) squarely applies to attorney misgendering in court documents.

III. ANTICIPATING AND REFUTING FIRST AMENDMENT COUNTERARGUMENTS

As with all previous attempts to curtail damaging speech towards minorities and women, the approach advocated here will likely face First Amendment pushback. Harms to the victims notwithstanding, in the past, free speech absolutists have taken aim at restrictions on hate speech against racial and ethnic minorities, as well as laws restricting sexual and antireligious harassment in the workplace. By preemptively responding to two possible arguments, this final Part shows that the present proposal's narrow scope, concerning only lawyers within the course of legal representation, insulates it from similar criticisms. In particular, it addresses one argument frequently used to undermine remedies for harmful speech—that they are unconstitutional restrictions on speech, and one argument more recently introduced in conversations around rules requiring proper address of trans persons—that they unconstitutionally compel speech.

A. The Proposal is an Unconstitutional Restriction on Speech

As a general matter, the First Amendment prohibits restrictions on speech. I will not detail here the minutiae of the doctrine, but suffice it to say, with a few narrow exceptions, actions suppressing private individuals' ability to say or express whatever they want will be struck down as unconstitutional.[108]

Lawyer speech is different, however. For one thing, it has always been subject to more restrictions than that of private citizens. Think, for example, of how the Rules of Professional Conduct have long prohibited lawyer communication with jurors, opposing parties, and members of the judiciary, as well as some communication with the press.[109] Lawyers' speech about

108. See Luke Morgan, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175, 183–86 (2018) for a summary of First Amendment protection of free speech.

109. MODEL RULES OF PROF'L CONDUCT r. 3.5(b) (AM. BAR ASS'N 2018); *see also* Gentile v. State Bar of Nev., 501 U.S. 1030 (1991) (upholding the constitutionality of limited restrictions on attorney communication with the press).

judges, and advertisements have also been heavily restricted.[110] Further, rules of evidence and civil procedure also place limitations on lawyers' speech.[111]

Context also matters. Whereas lawyers' speech as private citizens is squarely within the protection of the U.S. Constitution, speech within the legal process is necessarily circumscribed.[112] Courts cite the need to maintain a neutral environment, the fact that the legal process is not a public forum, and the necessity of judicial control over proceedings to justify these restrictions.[113] Most recently, this has been demonstrated by judges' restrictions on lawyers' symbolic speech during trial. Courts have forbidden attorneys from wearing pro-LGBT buttons and #BlackLivesMatter lapel pins despite the messages they were meant to express.[114] And yet, under existing free speech doctrine, these symbolic expressions would be permissible if worn as private citizens.

Taken together, these two factors suggest a First Amendment distinction for attorney speech. The proposal advanced here capitalizes on both of these qualitative differences. First, I offer no opinion on how to address misgendering by parties who are not lawyers. Thus, a pro se defendant who misgenders another litigant in a complaint or other filing will not face sanction under the rules of professional misconduct. Second, I express no opinion on how bar associations should address misgendering beyond the context of legal documents. Lawyers aggrieved by their newfound inability to verbally harass transgender persons within their

110. *E.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (finding Florida Bar rules prohibiting direct mail solicitation constitutional under the First Amendment); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (finding the Ohio Bar's enforcement of a prohibition against in-person solicitations within thirty days of an accident constitutional).

111. *See* Michael Kagan, *The Public Defender's Pin: Untangling Free Speech Regulation in the Courtroom*, 112 NW. U. L. REV. 1245, 1254–55 (2018).

112. Eugene Volokh, *Will Lawyers Be Punishable for Using the "Wrong" Pronouns to Refer to Transgender People in "Social" or "Bar Association" Activities?*, VOLOKH CONSPIRACY (May 21, 2018, 4:04 PM), https://reason.com/2018/05/21/will-lawyers-be-punishable-for-using-the [https://perma.cc/NN2L-7E9K] (stating if a rule "only aimed at restricting lawyer speech . . . in the courtroom . . . it would certainly be constitutional as part of the court system's power to control speech in the courtroom"); *cf.* United States v. Jones, 978 F. Supp. 1459, 1460 (N.D. Ala. 1997) (finding the AUSA's behavior unprofessional, but finding that the court could not address the conduct because it "did not occur in the presence of the court, or, indeed, within the confines of the courthouse").

113. Kagan, *supra* note 111, at 1246–47, 1250–51.

114. *Id.* at 1250–55.

filings may, under my proposal, do so outside the scope of their representation.

B. The Proposal Unconstitutionally Compels Speech

A second potential criticism is one particularly targeted towards the movement for gender-inclusive language: The argument is that requiring appropriate language is an unconstitutional speech compulsion.[115] As it relates to the rule I propose here, however, this challenge must also fail. After all, a compelled speech challenge cannot hold when absolutely no speech has been compelled. Which is to say, preventing attorneys from misgendering parties is not the same as affirmatively requiring they address parties with language in line with their gender.[116]

This final point is worth highlighting further. Lawyers who wish to avoid the appropriate language have a range of alternatives that still avoid misgendering transgender persons. For starters, those who take the view that gender appropriate language expresses support for transgender persons might consider using appropriate language with a caveat.[117] This approach is not

115. *See* Josh Blackman, *The Government Can't Make You Use 'Zhir' or 'Ze' in Place of 'She' and 'He'*, WASH. POST. (June 16, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/06/16/the-government-cant-make-you-use-zhir-or-ze-in-place-of-she-and-he [https://perma.cc/J7KA-QJV7]; Peter Hasson, *Legal Experts: Transgender Pronoun Mandates Are Unconstitutional*, DAILY CALLER (June 30, 2016, 3:09 PM), https://dailycaller.com/2016/06/30/legal-experts-transgender-pronoun-mandates-are-unconstitutional [https://perma.cc/4EGQ-WWXJ]. *But see* Tyler Sherman, Note, *All Employers Must Wash Their Speech Before Returning to Work: The First Amendment & Compelled Use of Employees' Preferred Gender Pronouns*, 26 WM. & MARY BILL RTS. J. 219, 219–20 (2017) (concluding "pronoun laws"—those "requir[ing] private employers to use the preferred [sic] gender pronouns of their employees," do not unconstitutionally compel speech).

116. *Cf.* Meriwether v. Trs. of Shawnee State Univ., No. 1:18-CV-753, 2019 U.S. Dist. LEXIS 151494, at *1, *53 (S.D. Ohio Sept. 5, 2019) (reasoning that a university policy preventing a professor from misgendering a student did not violate the First Amendment since it did not force "him to espouse or express a view that plaintiff disagreed with or found objectionable").

117. *E.g.*, Brief of Amicus Curiae Professor W. Burlette Carter in Support of Petitioner at *12 n.3, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. Aug. 22, 2019), 2019 U.S. S. Ct. Briefs LEXIS 3867; Brief of Amicus Curiae Foundation for Moral Law in Support of Petitioner at 2 n.2, Calgaro v. St. Louis County, No. 19-127 (U.S. Aug. 16, 2019) ("Out of respect for the Court and in accordance with the Petition, *Amicus* will refer to the child as E.J.K. [her preferred name.] However, despite using the feminine initials or pronouns, *Amicus* does not concede that E.J.K. is the child's correct name or that the child is now of the female sex."). Courts have done the same. *E.g.*, Pinson v. U.S. Dep't. of Just., 199 F. Supp. 3d 203, 207 n.1 (D.D.C. 2016) (addressing plaintiff with female pronouns but "caution[ing] that its use of feminine pronouns is not

particularly novel; for decades brief-writers and courts have used this convention to balance stylistic choice, courtesy, and lucidity.[118] In this way, lawyers would be able to clarify and specify what their language is, and is not, meant to express.

Less desirably, lawyers may choose to address the trans parties only by name (in lieu of titles or pronouns), or by the gender-neutral role in the litigation (Plaintiff, Defendant, Respondent, Appellant, etc.). Though, to be sure, some might find this approach problematic, it seems preferable to misgendering.[119] Moreover, this approach is most closely aligned with Supreme Court precedent. Twice, now, when discussing transgender persons the Court has avoided misgendering through the use of such gender-neutral language.[120] Taking this cue, the Department of Justice's *Harris Funeral Homes* brief assiduously used Ms. Stephens's name rather

intended to confer any substantive or legal characterization concerning [Plaintiff's] gender identity"); Wilson v. David, No. 9:08-CV-618, 2010 U.S. Dist. LEXIS 13825, at *2 n.1 (N.D.N.Y. 2010) ("The Court will refer to Plaintiff using female pronouns, but makes no judgment or opinion considering Plaintiff's [gender] identity.").

118. *E.g.*, Brief Amici Curiae of Council for Secular Humanism & International Academy of Humanism in Support of Respondents at *6 n.1, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110), 1996 U.S. S. Ct. Briefs LEXIS 792 (indicating the brief would use both gender pronouns as "a stylistic choice that carries no further significance"); Brief of Amicus Curiae the Coalition for the Restoration of Parental Rights at *2 n.1, Harris v. Harris, 96 P.3d 141 (Cal. 2004) (No. S101836), 2002 CA S. Ct. Briefs LEXIS 182 (clarifying the brief would use male pronouns to refer to parents and children, "but obviously, all such references apply to both mothers and fathers, daughters and sons").

119. *See* SUSAN STRYKER, TRANSGENDER HISTORY 22 (2008) (pointing out "[s]ome transgender people—often those who have worked very hard to attain a gender status other than the one assigned to them at birth—take offense when gender neutral pronouns, rather than the appropriate gendered ones, are applied to them because they perceive this usage as a way that others fail to acknowledge their attained gender"); *see also* Rachel L. Harris & Lisa Tarchak, *I'm With 'They'*, N.Y. TIMES (July 12, 2019), https://www.nytimes.com/2019/07/12/opinion/gender-neutral-pronouns.html [https://perma.cc/PZ49-F6R6] (capturing the opinion that using gender neutral pronouns for binary trans persons is "linguistic erasure"). *But see* Robin Dembroff & Daniel Wodak, *The Problem With Pronouns*, PHILOSOPHER (June 23, 2017), https://politicalphilosopher.net/2017/06/23/featured-philosophers-robin-dembroff-daniel-wodak [https://perma.cc/LAH4-YAZ8] (making the argument that gender neutral address does not "semantically convey misinformation about gender identities" (emphasis omitted)); Robin Dembroff & Daniel Wodak, *He/She/They/Ze*, 5 ERGO 371, 382–88 (2018) (presenting the argument that affirming gender identity through gendered pronouns, and denying it through misgendering are qualitatively distinct).

120. *See* Burt v. Titlow, 571 U.S. 12 (2013) (using the gender neutral "respondent"); Farmer v. Brennan, 511 U.S. 825 (1994) (using the gender neutral "petitioner"). *But see Burt*, 571 U.S. at 24 (Sotomayor, J., concurring) (using female pronouns); *id.* at 26 (Ginsburg, J., concurring) (same); Transcript of Oral Argument, *Farmer*, 511 U.S. 825 (No. 92-7247) (all using female pronouns for transgender inmate, with the exception of Scalia and Thomas—who did not speak).

than pronouns.[121] In another example, an amicus brief in *Kenosha* revised the case caption from "Whitaker, by his Mother and Next Friend, Melissa Whitaker" to the gender neutral "Whitaker *ex rel* Whitaker."[122] To sum up, misgendering in filings can easily be avoided.

CONCLUSION

Pronouns, honorifics, and other such gendered modes of address, are quickly becoming the latest flashpoint in the movement towards social equality for transgender Americans. Even while transgender persons and those who support them have welcomed increased awareness of gender appropriate language, others have harshly criticized the movement for gender-inclusive language and refused to use language in line with the gender of persons who are trans. These latter contentions have spilled over into legal practice in which they have taken the form of misgendering language in legal filings. Yet, as this Article has shown, under scrutiny the justifications typically offered for doing so are ultimately unsustainable. We are left, then, with the conclusion that these designations are done simply to insult, disrespect, and antagonize. If this is so, then the practice cannot be allowed to continue.

At the same time, never has it been more obvious that solutions will not be court-initiated. Indeed, as recent opinions have demonstrated, courts themselves have increasingly been the perpetrators of this harmful language.[123] Still, something must be done: To fail to address lawyers' misgendering is to ignore blatantly unprofessional behavior, and worse, gives the appearance of countenancing and encouraging transphobia within the legal system. The Rules of Professional Conduct provide a practical and, equally important, constitutionally permissible solution. By recasting misgendering as attorney misconduct, state bar associations can begin the necessary work of addressing the wanton disrespect of gender minorities by members of the profession.

121. Mark Sherman & Jessica Gresko, *Supreme Court Notebook: Gender Pronouns Part of LGBT Fight*, AP (Aug. 20, 2019), https://apnews.com/cd658b2da9da44989ab585db559e4058 [https://perma.cc/MR3D-EJBV].

122. *See* Brief of Amici Curiae Center for Constitutional Jurisprudence & National Organization for Marriage in Support of Petitioners, *supra* note 55, at 2–3 n.2 (explaining "*Amici* have chosen to utilize a time-honored [L]atin phrase, *ex rel.* (meaning, on behalf of), that is gender neutral").

123. *See* Elie Mystal, *This Trump Judge Tormented a Trans Woman—Because He Could*, NATION (Jan. 31, 2020), https://www.thenation.com/article/society/trump-judge-duncan-trans [https://perma.cc/J6GS-XB3S] (documenting Fifth Circuit Judge Stuart Kyle Duncan's repeated misgendering of a transgender woman in a January 2020 case, *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020)).

APPENDIX

Table 1: Language in G.G. Grimm v. Gloucester County School Board Amicus Briefs Filed in Support of the School Board

	Amicus Author(s)	*Language Notes*
1	Brief amicus curiae of Wisconsin Institute for Law & Liberty.	Uses gender appropriate language throughout brief.
2	Brief amici curiae of Gail Heriot and Peter N. Kirsanow, members of the U.S. Commission on Civil Rights, in their capacities as private citizens.	Uses gender appropriate language throughout brief.
3	Brief amicus curiae of Alliance Defending Freedom.	Misgenders throughout brief.
4	Brief amici curiae of Dr. Paul R. McHugh, M.D., Dr. Paul Hruz, M.D., Ph.D., and Dr. Lawrence S. Mayer, Ph.D.	Misgenders throughout brief.
5	Brief amici curiae of Public Advocate of the United States et al.	Misgenders throughout brief.
6	Brief amici curiae of Dr. Judith Reisman and the Child Protection Institute.	Misgenders in case caption.
7	Brief amici curiae of National Organization for Marriage and Center for Constitutional Jurisprudence.	Misgenders in case caption.
8	Brief amici curiae of North Carolina Values Coalition et al.	Uses party name in place of pronouns.
9	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund.	Uses party name in place of pronouns.
10	Brief amicus curiae of Foundation for Moral Law.	Uses party name in place of pronouns.
11	Brief amici curiae of Public Safety Experts.	Uses "Respondent" in place of pronouns.
12	Brief amici curiae of General Conference of the Seventh-Day Adventists et al.	Uses "Respondent" in place of pronouns.
13	Brief amici curiae of West Virginia and 20 Other States et al.	Uses "Respondent" in place of pronouns.
14	Brief amici curiae of Women's Liberation Front and Family Policy Alliance.	Uses "Respondent" in place of pronouns.
15	Brief amici curiae of Christian Educators Association International et al.	Uses "Respondent" in place of pronouns.

16	Brief amicus curiae of William J. Bennett.	No discussion.
17	Brief amici curiae of Pacific Legal Foundation et al.	No discussion.
18	Brief amici curiae of Major Religious Organizations.	No discussion.
19	Brief amici curiae of Professors Dean Ronald A. Cass, Christopher C. Demuth, Sr., and Christopher J. Walker.	No discussion.
20	Brief amici curiae of Members of Congress.	No discussion.
21	Brief amici curiae of Cato Institute et al.	No discussion.
22	Brief amicus curiae of Concerned Women for America.	No discussion.
23	Brief amici curiae of Religious Colleges, Schools, and Educators.	No discussion.
24	Brief amici curiae of The National School Boards Association et al.	No discussion.

Table 2: Language in Kenosha Unified School District v. Whitaker Amicus Briefs Filed in Support of the School District

	Amicus Author(s)	*Language Notes*
1	Brief amici curiae of Michigan Association of Christian Schools et al.	Misgenders throughout brief.
2	Brief amicus curiae of Alliance Defending Freedom.	Misgenders throughout brief.
3	Brief amicus curiae of Foundation for Moral Law.	Misgenders throughout brief.
4	Brief amici curiae of Public Advocate of the United States et al.	Misgenders throughout brief.
5	Brief amici curiae of Center for Constitutional Jurisprudence et al.	Misgenders throughout brief.
6	Brief amici curiae of Family Research Council et al.	Uses "Respondent" in place of pronouns.
7	Brief amicus curiae of William J. Bennett.	Uses "Respondent" in place of pronouns.
8	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund.	Uses party name in place of pronouns.
9	Brief amicus curiae of Concerned Women for America.	No discussion.

Table 3: Language in R.G. & G.R. Harris Funeral Homes v. EEOC Amicus Briefs Filed in Support of Both Parties With References to Ms. Stephens

Amicus Author(s)		*Language Notes*
Amici for Employers		
1	Brief amicus curiae of Ryan T. Anderson.	Uses gender appropriate language throughout brief.
2	Brief amicus curiae of Professor W. Burlette Carter.	Uses gender appropriate language throughout brief.
3	Brief amicus curiae of Women's Liberation Front.	Misgenders throughout brief.
4	Brief amici curiae of Defend My Privacy et al.	Misgenders throughout brief.
5	Brief amicus curiae of Free Speech Advocates.	Misgenders throughout brief.
6	Brief amici curiae of Scholars of Philosophy, Theology, Law, Politics, History, Literature, and the Sciences.	Misgenders throughout brief.
7	Brief amici curiae of Members of Congress.	Misgenders throughout brief.
8	Brief amicus curiae of Military Spouses United.	Misgenders throughout brief.
9	Brief amicus curiae of The H.T. Hackney Co.	Uses party name in place of pronouns.
10	Brief amicus curiae of David A. Robinson.	Uses party name in place of pronouns.
11	Brief amicus curiae of Dr. Paul R. McHugh, M.D., Professor of Psychiatry.	Uses party name in place of pronouns.
12	Brief amici curiae of Institute for Faith and Family and Christian Family Coalition.	Uses party name in place of pronouns.
13	Brief amicus curiae of American Public Philosophy Institute.	Uses party name in place of pronouns.
14	Brief amicus curiae of Center for Religious Expression.	Uses party name in place of pronouns.
15	Brief amici curiae of Council of Christian Colleges & Universities et al.	Uses party name in place of pronouns.
16	Brief amici curiae of Scholars of Family and Sexuality.	Uses party name in place of pronouns.

17	Brief amici curiae of Walt Heyer et al.	Uses party name in place of pronouns.
18	Brief amici curiae of Women Business Owners and CEOs.	Uses party name in place of pronouns.
19	Brief amicus curiae of William J. Bennett.	Uses party name in place of pronouns.
20	Brief amicus curiae of Liberty Counsel.	Uses party name in place of pronouns.
21	Brief amici curiae of National Medical and Policy Groups That Study Sex and Gender Identity.	Uses "Respondent" in place of pronouns.
	Amici for Ms. Stephens	
1	Brief amici curiae of Transgender Legal Defense & Education Fund and 33 Organizations Serving Transgender Individuals.	Uses gender appropriate language throughout brief.
2	Brief amici curiae of Employment Discrimination Law Scholars.	Uses gender appropriate language throughout brief.
3	Brief amici curiae of Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ+) Members of the Legal Profession.	Uses gender appropriate language throughout brief.
4	Brief amicus curiae of Altria Group, Inc.	Uses gender appropriate language throughout brief.
5	Brief amici curiae of William N. Eskridge Jr. and Andrew M. Koppelman.	Uses gender appropriate language throughout brief.
6	Brief amici curiae of Professors Samuel R. Bagenstos, Michael C. Dorf, Martin S. Lederman, Leah M. Litman, and Margo Schlanger.	Uses gender appropriate language throughout brief.
7	Brief amici curiae of Anti-sexual Assault, Domestic Violence, and Gender-based Violence Organizations.	Uses gender appropriate language throughout brief.
8	Brief amici curiae of Scholars Who Study the Transgender Population.	Uses gender appropriate language throughout brief.
9	Brief amici curiae of Philosophy Professors.	Uses gender appropriate language throughout brief.
10	Brief amici curiae of National Education Association et al.	Uses gender appropriate language throughout brief.
11	Brief amici curiae of InterACT: Advocates for Intersex Youth et al.	Uses gender appropriate language throughout brief.
12	Brief amici curiae of Law & History Professors.	Uses gender appropriate language throughout brief.

13	Brief amici curiae of National LGBT Bar Association et al.	Uses gender appropriate language throughout brief.
14	Brief amici curiae of Kenneth B. Mehlman et al.	Uses gender appropriate language throughout brief.
15	Brief amicus curiae of Lambda Legal Defense and Education Fund, Inc.	Uses gender appropriate language throughout brief.
16	Brief amici curiae of Transgender Law Center, Center for Constitutional Rights, and 44 Other Non-Profit and Grassroots Organizations.	Uses gender appropriate language throughout brief.
17	Brief amicus curiae of National Women's Law Center.	Uses gender appropriate language throughout brief.
18	Brief amici curiae of Impact Fund et al.	Uses gender appropriate language throughout brief.