TEACHING GENDER IDENTITY LAW

David B. Cruz, Carl Charles, Alexander Chen,
James Gilliam, Sonia Katyal, Ilona Turner

Lavender Law 2021

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Gender Identity and the Law

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For J.C., and trans youth everywhere, with the hope that this book may in some measure help make your journey easier

—DBC

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Introduction

Over the past decades, a framework has begun to emerge in U.S. law regarding gender identity and expression, shaping the rights of millions of people who are transgender or "trans," used here to include gender non-conforming, nonbinary, and other related categories. Having evolved from a patchwork quilt of statutory laws, administrative regulations and policies, and judicial opinions, the emergent framework contains many tensions and inconsistencies yet to be resolved.

The authors of this casebook bring distinct perspectives from within the LGBTQ+ community. David Cruz is Newton Professor of Constitutional Law at the University of Southern California Gould School of Law, a cisgender, out gay Latino, who has written extensively on U.S. constitutional law and sex, gender, and sexual orientation law. He first taught a course on gender identity and the law in 2010. Jillian Weiss, a transgender woman, has a practice primarily representing transgender clients in employment discrimination matters. She is also a retired Professor of Law and Society from Ramapo College of New Jersey and former executive director of the Transgender Legal Defense and Education Fund, and she has widely published in the area of transgender rights.

This casebook is designed to provide students a comprehensive understanding of the decades-long revolution in law and society regarding the concepts of gender identity and expression that affect trans individuals in many related contexts. A background chapter explains the modern conceptions of gender identity and expression, and their relation to traditional notions of sex and gender, that have driven extensive legal developments resulting in hundreds of decisions in areas of law commonly considered unrelated. The book invites students to examine these concepts in a range of contexts nearly as broad as the lives we all live, including government identification, parenting and youth care, schools, employment, disability, healthcare, housing, public accommodations, immigration, and incarceration. It encourages students to analyze how these varied areas are or should be understood as interrelated and integrated, and what they mean for traditional legal and social understandings of sex and gender.

This book enables examination of its topics from the standpoint of trans persons, foregrounding their lived experience and the discriminatory effects of transphobia, transmisogyny, and transmasculine erasure. This stands in distinction to approaches that theorize transgender people's experiences of law as fundamentally outgrowths of gender or sexual orientation biases. This focus enables students to

theorize the legal wrongs against trans persons as wrongs qua wrongs against their lived identities, understanding them as trespasses against their right to live in their chosen gender, rather than merely as sequelae of incorrect stereotypes of their gender assigned at birth. At the same time, the advances in the social statuses and legal rights of trans people are inseparable from "gender" issues and issues of sex, gender, sex roles, and sex stereotyping.

Students should carry away from a course taught from this casebook an understanding of how gendered our law is, how entrenched gender identity biases are, and ways in which the law has been used to lessen the oppressions experienced by trans people. This book's role is not only to facilitate teaching the specifics of this area of law, but to show new lawyers how effective the law can be in combatting social ills as well as ways in which it is less effective or ill-suited to the task of social change. It shines an analytic spotlight on a population subject to numerous social harms in which law has sometimes been complicit and whom increasingly law is developing to protect. It is our hope this will inspire a new generation of lawyers to pursue justice for trans people.

In editing materials for this book, the authors have omitted footnotes without indication; preserved original footnote numbering for those sources where footnotes were retained; used lowercase letters for footnotes we have authored; omitted citations and sometimes parentheticals without indication; and altered citations' formats (e.g., reporters, short form vs. long form) and omitted pinpoint citations generally without indication. Although not entirely consistently in this first edition, the authors tried to indicate with "[*sic*]" when opinions first use terminology that is today widely regarded as derogatory or outdated; we have also albeit incompletely tried to list the movement organizations that have litigated so many of the cases presented. The undercompensated and sometimes unsung efforts of dedicated movement lawyers have been key to the evolution in the law examined in this text.

This book has been a labor of love—a great labor—over many years, and we are profoundly grateful that it has come to fruition. We are thankful that Erwin Chemerinsky put us in touch with Carol McGeehan at Carolina Academic Press, which has been excited about and critical to this book—and we thank Carol, Keith Sipe, Scott Sipe, Ryland Bowman, Jennifer Hill, and everyone at CAP who touched this project. Jillian Weiss would like to thank David Cruz, who has spent so many years in pursuit of justice for trans people, for which she is personally grateful. Having talked together about co-authoring such a casebook for over a decade, it is David's mastery of the subject matter, dedication, and tireless enthusiasm in the face of many distractions that made this very timely book happen. David Cruz would like to thank Jillian Weiss, whose legal scholarship on transgender issues, advocacy, and life lived out loud and proud have inspired him for decades. He would not have attempted this project without her. He gives special thanks to law professors Dean Spade and Janet Halley for sharing their transgender law course materials with him when he was preparing to teach his first class in this area, as well as to Alex Bastian, Mark Ohl, and Tina Sohaili, the intrepid USC Gould School of Law students who

showed up at 8:00 a.m. for this new course, whose weekly insights about the material helped influence his thinking about the field, and whose discussions of RuPaul's Drag Race helped ensure the course never lost touch with the culture that has been changing in ways necessary to allow gender identity and expression law to develop in the more open and inclusive ways as so much of it has. A legion of student research assistants have helped with trans law research, including (with profound apologies to anyone inadvertently omitted) Alex Bastian, Emily Cronin, Edward Demirjian, Nicholas Duncan, George Ellis, Robina Gallagher, Kate Im, John Korevec, Sabrina Kumre, Tiffany Li, Abby Lu, Mack Matthews, Chris McElwain, Melissa Mende, Paul Moura, Jacob Ordos, Gus Paras, Brett Pugliese, Eric Remijan, Christina Roberto, Gabriela Rodriguez, Matthew Schuman, Travis Schumer, Melissa Shinto, Jessica Bromall Sparkman, Kerry Sparks, Queenie Sun, Christina Tapia, Jill Vander Borght, Helen You, and especially Ryan Gorman, whose work for this book was instrumental in helping the authors bring it to completion. The brilliant and talented USC Gould School of Law librarians particularly including Judy Davis, Diana Jaque, Paul Moorman, Brian Raphael, and Karen Skinner have helped with research over many years. Kathleen Perrin, founder and president of Equality Case Files, has selflessly brought her expertise to bear to provide David research on trans legal issues, often on very short time frames. The USC Gould School of Law and its Deans Scott Bice (who hired David), Matt Spitzer (under whom he earned tenure following selfless mentoring by Mary Dudziak and Jody Armour), Ed McCaffery, Bob Rasmussen, and Andrew Guzman (under whom David became the Newton Professor of Constitutional Law, for which he is also grateful to the late Mr. and Dr. Newton) provided economic and other support for his scholarship on LGBTQ+ issues starting at a time when those were much less recognized as worthwhile areas of scholarly inquiry. David also thanks his family, including especially his parents Sue (who passed during the completion of this book) and Nick, for their support and sacrifices. Finally syntactically but first and foremost substantively, David thanks his husband and partner of decades Steve Greene, for encouraging him to go to law school and to pursue his commitment to justice for LGBTQ+ people, for putting up with the long hours David put in on this book everywhere including with his laptop on his lap in the car every week for well over a year, and for unflagging love and support.

LAW-757 Sex, Gender, and the Law (Transgender Law)
Spring 2021
3 Units, MW 1:30-2:45
Prof. David B. Cruz

Course Description
This class will explore questions of law's response to questions of sex discrimination and gender identity and expression, with an emphasis upon legal issues facing transgender persons; circumstances of intersex persons will also be considered. Employment discrimination (especially Title VII of the Civil Rights Act of 1964), family law, birth certificates and other identity documents, incarceration, the Trump administration's ban on military service by transgender persons, and restroom access in schools and at work will provide some of the factual setting in which these issues will be engaged; some of these topics will include material comparing the law in other countries.

Gender Identity & the Law
Spring 2021

Mr. Carl Charles
Pronouns: he/him
Preferred Communication: carl.charles@du.edu

Office Hours (all in MT): Fridays from 3-5PM, unless otherwise noted on Canvas. Please email me during the week with questions you would like to discuss during office hours. If that time does not work for you during a given week, please email me about setting up another time. As I am a full-time, practicing attorney, I may have to change office hours due to work obligations, but I will make every effort to be available each week outside of class meetings.

Course Description:
This course will explore the ways in which the law intersects with gender identity, examining this evolving area of law in the context of a changing judicial and political landscape. Emphasizing the legal tools and decision-making processes involved in doing pathbreaking civil rights work, students will gain an insight into the strategic and ethical tradeoffs involved in using the legal and political system to enact societal change. The course will provide an overview of the historical development of transgender rights through the lens of intersecting identities of race and disability, of the constitutional and statutory protections based on gender identity; access to sex-segregated spaces and activities; access to health care and reproductive technologies; nonbinary and intersex identities; and unique considerations in military, family, and prison litigation.

Class Meetings & Location:
This will be a largely synchronous online course, meeting Tues. and Thurs. from 4:15-5:30 MT.
https://udenver.zoom.us/[redacted]

Learning Outcomes:
To successfully complete this course, students will:

- Learn the substantive law covered during the semester— the foundations of the law of gender identity and discrimination through consideration of the sources and developments in the field—including the arguments that can be made under the constitution and statutes, for transgender equality, as well as possible defenses to such claims.
- Gain familiarity with how social movements use law strategically to create social and legal change, think strategically about how to do so in new contexts, and understand their limits.
- Recognize the diverse forms of power that affect and are expressed in the structure, content, and implementation of laws and legal systems.
- Understand how to connect legal issues to complicated political and social issues.
- Develop critical thinking skills by assessing various types of readings and comparing them with one another in class discussion and by creating a final project.

Required Texts:

- David B. Cruz & Jillian T. Weiss, GENDER IDENTITY AND THE LAW (Carolina Academic Press 2020).
- Any additional assigned readings and other materials noted in the syllabus.

Student Evaluation and Grade Determination:

- **Participation in Synchronous Zoom Meetings: 25%**
  You will be expected to make at least one significant contribution to class discussion during one of the two meetings each week. I will keep track of this participation and typically will not include times where I call on someone to provide background information or a summary of one of the week's readings. You have one week of grace (non-participation) to use at any time, but you must communicate your wish to do so to me via email in advance of that week's Tuesday meeting. Because of class size and functionality, I will not be using the zoom chat feature as a mechanism for this participation.

  Participation is judged based on both quantity and quality. When I say quantity, I do not mean that speaking more is always better. Instead, your goal should be thoughtful participation: stepping back if you are used to talking a lot and stepping up if you do not usually speak. High quality participation builds on and relates to the comments of other students as well as integrating the materials.

- **Pre-class Questions/Comments: 15%**
  Submit to the course's Canvas website one short question or comment on your assigned readings by 11:59 PM the day before class. You do not need to write much – two to three sentences are fine. Pre-class questions or comments are graded on completion and content, to ensure you have read/watched/listened and reflected on the assigned materials. You may miss up to two responses without penalty.

- **Three Written Assessments (10%, 20%, and 30%)**
  Students will demonstrate their understanding of the subject matter and practical legal skills by completing three distinct but connected written assessments throughout the semester. Each assessment should reflect legal analysis; synthesis; recognition of the connectedness among law, politics, and society; and demonstration of an ability to explain complex legal problems and concepts to both a legal and a lay audience.

  - First Assessment (10%) Due **March 7**
    - Draft Memo to Senior Attorney
  - Second Assessment (20%) Due **April 5**
    - Final Memo to Senior Attorney
  - Third Assessment (30%) Due **May 17**
    - TBA

  A detailed set of instructions and a rubric will be provided via separate documents.

Attendance/Camera Policy:
You are expected to attend each class meeting with your video on, per SCOL policy. Food and drink are permitted during class but please do your best to minimize other distractions. The ABA requires you attend 80% of our class meetings to receive academic credit. Due to the accreditation implications, I will take attendance. Please let me know as far in advance of a class meeting if you are unable to attend or if you want to request that your video be turned off during all or a portion of class. If you have technology issues that affect video participation, please also notify me in advance/as soon as possible.

Academic Honesty
All students must practice academic honesty. Law is a self-disciplining profession, one in which the members bear the responsibility for policing their own behavior as well as the behavior of their peers and colleagues. The faculty of the University of Denver Sturm College of Law expects that the students will always conduct themselves in a professional manner, and in accordance with the University of Denver Honor Code. Students are expected to review the Honor Code as well as the Denver Law **Student Handbook**.

Accommodations:
The University of Denver is committed to equitable access and inclusion of those with disabilities. If you have a disability (*physical, medical, mental, emotional, learning)* protected under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act and need to request accommodations, please visit the Disability Services Program website at www.du.edu/disability/dsp. DSP is available via 303.871.2372, or in person on the 4th floor of Ruffato Hall, 1999 E. Evans Ave. If preferred, you can reach out to Dean Boynton (jboynton@law.du.edu) first.

Students with disabilities who need to record classroom lectures or discussions must contact the Disability Services Program to register, request, and be approved for an accommodation. All students are advised that students may tape classroom activities for this purpose. Such recordings are to be used solely for individual or group study with other students enrolled in the class this semester. They may not be reproduced, shared in any way (including electronically or posting in any web environment) with those not in the class in this semester.

Mental Health and Wellness
As part of the University's Culture of Care & Support, it provides campus resources to create access for students to maintain their safety, health, and well-being. The University understands that students may experience a range of issues that can cause barriers to learning, such as strained relationships, increased anxiety, alcohol/drug concerns, depression, difficulty concentrating and/or lack of motivation. These stressful moments can impact academic performance or reduce ability to engage. The University offers services to assist students with addressing these or ANY other concerns.

If you or someone you know are suffering from any challenges, you should reach out for support. You can seek confidential mental health services available on campus in the Health & Counseling Center (HCC) and My Student Support System (My SSP). Another helpful campus office is Student Outreach & Support (SOS), where staff work with you to connect to all the appropriate

campus resources (there are many!), develop a plan of action, and guide you in navigating challenging situations. If you are concerned about yourself and/or one of your peers, you can send a SOS referral. More information about HCC, MY SSP, and SOS can be found at:

- Health & Counseling Center
- My SSP 24/7 confidential services for students
- Student Outreach & Support (SOS) and SOS Referrals

You may also want to reach out to Dean Boynton at jboynton@law.du.edu

Equal Opportunity Policies

The University of Denver maintains several policies as it relates to discrimination, harassment, and equal opportunity. You can review the policies in depth here: https://www.du.edu/equalopportunity/policies_procedures/index.html. If you encounter any challenges as it relates to EEO policies for your work in this class, please contact the EEO office. You can also share with me if you would like, but I may be required to report to the EEO office as well. ***Note***: you are not required to engage with the EEO office if they reach out to you.

Names and Pronouns

If you use a different name than may appear on my class list, please inform me via email. The class list does not provide your pronouns to me, so for our first class, please list your pronouns in your zoom name field so that I can take note. It is not required, but highly encouraged, that students continue to include their pronouns in the zoom name field (a professional practice of mine). If a classmate (or the instructor) mispronounces your name, please let them know so they can correct it. Students are expected to respectfully refer to each other by correctly pronounced names and pronouns during class discussions.

Caregiving

I understand that during the pandemic, you may have additional family obligations that require you to provide care for those around you. Newborns are welcome in class (and bodyfeeding is entirely appropriate, if applicable). For older family members, children, and babies, please discuss with me in advance.

Class Recording

Please note that DU's Zoom and Canvas automatically records our class sessions, ***including all public and private chats***. While I promise I will never review private chats, I cannot guarantee that extends to others with access to the recordings. If you are unable to attend a particular class meeting and would like access to that recording, please contact Sarah Sweetman in the Registrar's office at ssweetman@law.du.edu and she will convey your request to me.

An Important Note:

This last year has been challenging in new and terrible ways for many people, like me, you, and people you love and care about. The stress of being at home, living our lives in front of our screens in more demanding ways, and guggling impossible care-giving responsibilities takes a toll. Please know that you can and should reach out to the various avenues for support at SCOL, including me, if you are struggling and need support. My goal with this course is that you learn and grow in your understanding and skills, not that you be stretched to the point of breaking.

SYLLABUS (subject to change):

Thursday, January 14

- Chapter 1 Cruz & Weiss pp. 1-18
- 2015 U.S. Trans Survey Executive Summary
- GLAD Media Reference Guide pp. 6-14
- Chase Strangio, To My Fellow White Other

Tuesday January 19

- Chapter 2 Conceptualizing Sex/Gender
  - Cruz & Weiss pp.19-29
  - Jessica Clarke: They, Them & Theirs, Including Nonbinary Gender Identities in Law and Policy
    - Minute Marker 00-17:55
  - Jessica Clarke: They, Them, & Theirs Harvard Law Review (2019 Westlaw)
    - Introduction and Section I

Thursday, January 21

- Chapter 2: Conceptualizing Sex/Gender
  - Human Rights Watch and InterACT: Advocates for Intersex Youth: I Want to Be as Nature Made Me: Medically Unnecessary Surgeries on Intersex Children in the US.
    - Summary pp.4-15
  - M.C. v. Aaronson Complaint (Cruz & Weiss. pp.38-54)
  - M.C. v. Aaronson 4th Circuit Appeal Order (Cruz & Weiss pp. 54-60)

Tuesday January 26:

- Chapter 3 Anti-Cross-Dressing Laws (Cruz & Weiss pp. 65-83)
  - PBS: Why Was Cross Dressing Illegal
  - Columbus, City of v. Zanders
  - Cincinnati, City of v. Adams
  - Chicago, City of v. Wilson
  - Doe v. McConn

Thursday, January 28

- Youth in Out of Home Care
  - Doe v. Bell (Cruz & Weiss pp. 100-108)
  - Mariah L v. Administration for Children's Services (Cruz & Weiss p. 118-123)
  - D.F. v. Carrion (Cruz &Weiss 124-133)

- Justice For Jane Campaign (2014)
  - Democracy Now: After Abuse Under State Supervision, Transgender Connecticut Teen Held in Solitary Without Charge
    - Minute marker 49:30-54:09
    - Minute marker 55:13-58:30
  - Teen's Violent History Left State No Option
  - Harvey Fierstein: What is This Child Doing in Prison?
  - New Haven Register: Transgender Teen, Jane Doe, moved to home for delinquent boys
  - Chase Strangio: Why 16-Year-Old Transgender Teen Jane Doe Might Have Run

Tuesday February 2

- Transgender People in Prison
  - Introduction (Cruz & Weiss p. 669-670)
    - KQED: Transgender Women Share Stories from Prison
  - Failure to Protect
    - Chase Strangio: Dee's Triumph: One of the Most Important Trans Victories You Never Heard Of
    - Farmer v. Brennan (Cruz & Weiss p.671-685)
    - Note on U.S. Department of Justice, Federal Bureau of Prisons, Transgender Offender Manual (Cruz & Weiss p. 702-705)
  - Failure to Treat
    - Brown v. Zavaras (Cruz & Weiss p. 706-709)
    - Fields v. Smith (Cruz & Weiss p. 710-716)

Thursday, February 4

    - Now This: Transgender Woman in Missouri Prison Receives Hormone Treatment
    - Hicklin v. Presythe (Cruz & Weiss p. 774-788)
    - Note on Edmo v. Idaho Dept of Correction (Cruz & Weiss p.788-791)
  - Failure to House
    - PREA Final Rule 2012: p. 37109-37110, 37135, 37152-37153
    - Jackie Tates v. Lou Blanas (Cruz & Weiss p. 803-816)
    - KQED: Could Changing How Transgender Inmates are Housed Make it Safer for Them
    - California Bill 132: "The Transgender Respect, Agency and Dignity Act"
  - Spade: The Only Way to End Racialized Gender Violence in Prisons is to End Prisons (Cruz & Weiss p. 698-700)

Tuesday, February 9

Chapter 11: Introduction (Cruz & Weiss p. 583)

- Note on Davidson v. Aetna Life and Casualty Insurance and Mario v. P.C. Food Markets
- Note on Rush v. Parham
- Verna Pinneke v. Victor Preisser, Commissioner of Iowa Department of Social Services et.al
- John Smith v. Jessie K. Rasmussen, in her Official Capacity as Director of the Iowa Department of Human Services

The Affordable Care Act Introduction (Cruz & Weiss p. 594)

- Section 1557 Final Rule 2016 Read Section I, pp. 31387-31390
- Prof. Clarke: They, Them & Theirs, Read Section III, Subsection E: Healthcare
- Franciscan Alliance, Inc., et al. v. Sylvia Burwell, Secretary of HHS (Cruz & Weiss 594-605)

Thursday, February 11

Guest Speaker: An Interview with Dylan Nicole De Kervor of the Civil Rights Division of the US DOJ

Post Affordable Care Act/Section 1557

- Rumble v. Fairview Health Services (March 2015)
  - Read Sections I, II and III subsections A, B Count 1
- Prescott v. Rady's Children's Hospital (Sept 2017)
  - **Content Note:** mention of death by suicide of trans child. We will discuss summary of case facts, reasoning and holding in class, contact me in advance with concerns.
- Medicaid Programs
  - Flack v. Wisc. Dep't of Health Services (August 2018)
    - Order on Motion for Preliminary Injunction
- Aetna to Expand Coverage for Gender Affirming Surgeries

Tuesday February 16

Health Care Continued

- State Bills Regulating Healthcare for Trans Youth
  - ACLU: 2019/20 Legislation Affecting LGBT Rights Across the Country
  - South Dakota HB 1057
  - Democracy Now: South Dakota May Criminalize Lifesaving Healthcare for Trans Youth in Latest Attack on LGBTQ Rights

- Quinncy Parke: I Volunteer at Tribute
- Wax-Thibodeaux & Schmidt, South Dakota House Passes Bill Restricting Medical Treatments for Transgender Youth
- Fitzsimmons: South Dakota's trans health bill is effectively dead, opponents say (watch 4 min video imbedded in article)

Employment

- Chapter 5 Intro
- Note on Holloway v. Arthur Andersen and Sommers v. Budget Marketing
- Ulane v. Eastern Airlines, Inc. (District Court)
- Ulane v. Eastern Airlines, Inc. (Circuit Court)
- Diane Schroer and the Library of Congress
- Schroer v. Billington (Cruz & Weiss p.199-212)

Thursday February 18

- McGowan: Working with Clients to Develop Compatible Visions of What It Means to "Win" A Case: Reflections on Schroer v. Billington (Cruz & Weiss p. 213-226)
- "Because of Sex" The Daily Podcast, Nov 7, 2019
  - Minute Marker 0:00-7:54
- R.G. & G.R. Harris Funeral Homes, Inc., v. EEOC Oral Argument, Oct 8, 2019
  - Audio (Listen from 0:00 to 24:20)
  - Transcript (use as supplement while listening to audio)
- Alexander Chen: The Supreme Court Doesn't Understand Transgender People

Tuesday February 23

- Employment (Cont'd)
  - Bostock v. Clayton County
    - Read Majority Opinion (Cruz & Weiss p. 242-258)
    - **Skim** Dissents (Cruz & Weiss p. 258-279)
      - Read Notes (Cruz & Weiss 279-283)
- Workplace Restroom Access
  - Introduction
  - Cruzan v. Special School District #1
  - Note on Kastl v. Maricopa County Community College District
  - Etsitty v. Utah Transit Authority

Thursday February 25

- Federal Legislative Efforts
  - Jerome Hunt: A History of the Employment Non-Discrimination Act

- Monica Roberts: Why The Transgender Community Hates HRC
- The Equality Act 2019/2020

➢ Employment (Military)
- Introduction (Cruz & Weiss p. 315-324)
- Watch PBS Newshour: What Serving in the Military Means for This Transgender Sailor
- Karnoski v. Trump
  - Order Granting Preliminary Injunction in Part
  - General Mattis Feb 22, 2018 Memorandum
- Massey & Nair: Inclusion in the Atrocious

Tuesday, March 2

➢ Identity Documents
  ➢ Birth Certificates (Cruz & Weiss pp. 1097-1099)
    - *Arroyo Gonzalez v. Rossello Nevares* (pp. 1129-1138)
    - Movement Advancement Project: X Gender Marker on Birth Certificates
  ➢ Driver's Licenses
    - Leslie Feinberg, Transgender Warrior (Cruz & Weiss pp. 1139-1141)
    - *Love v. Johnson* (Cruz & Weiss pp. 1147-1154)

Thursday, March 4

    - Lambda Legal: Saba v. Cuomo Complaint
  ➢ Passports
    - Note Zzym v. Kerry & Zzyym v. Pompeo Trial Court (pp.1155-1159)
    - Oral Argument: Zzyym v. Pompeo 10th Circuit Jan 20, 2020
    - *Zzymm v. Pompeo* (1159-1173)

Tuesday March 9

➢ Public Accommodations (Cruz & Weiss p. 383-387)
  ➢ Department of Fair Employment and Housing v. Marion's Place (Cruz & Weiss pp. 403-415)
  ➢ German Lopez: The House just passed a sweeping LGBTQ rights bill
    - Full Committee Hearing on H.R. 5, the "Equality Act"
      - Carter Brown, Minute Marker 53:30-59:08
  ➢ 2015 USTS Full Report: Chapter 16 Public Accommodations and Airport Security (pp. 212-223)

Thursday March 11

- Housing (p. 415-417)
  - Smith v. Avanti (Cruz & Weiss p. 418-425)
  - 2016 HUD Equal Access Final Rule: Read Summary Only
  - HUD Updates Equal Access Rule, Returns Decisions to Local Shelter Providers
  - Carl Charles: Trans People are Terrified About the Trump Administration's New Housing Rule
  - 2015 USTS Full Report: Chapter 13: Housing, Homelessness and Shelter Access (pp. 175-183)

Tuesday March 16

- Immigration by and Asylum for Transgender People (Cruz & Weiss p. 487-489)
  - Miranda v. INS (Cruz & Weiss p. 489-492)
  - Avedano-Hernandez v. Loretta Lynch (Cruz & Weiss p. 508-516)
  - In re Jose Mauricio (Cruz & Weiss p. 522-529)
  - Democracy Now: Undocumented Trans Activist Jennicet Gutierrez Challenges Obama on Deportations At White House

Thursday March 18

- Medicalization and Disability (Cruz & Weiss 941-942)
  - Using Disability Laws to Reach Anti-Trans Discrimination (Cruz & Weiss 955-956)
  - Beyond A Medical Model: Advocating for New Conception of Gender Identity in the Law (Cruz & Weiss pp. 956-958)
  - Pursuing Protection for Transgender People Through Disability Laws (Cruz & Weiss pp. 959-960)
  - Eli Clare: Body Pride, Body Shame: Lessons from the Disability Rights Movement
  - Jane Doe v. The Boeing Company (Cruz & Weiss p. 965-973)

Tuesday March 23

- Asynchronous Class Meeting (no live class meeting)
  - Watch *Disclosure* on Netflix
    - Write 250-word reflection
    - Complete Audience Survey

Tuesday March 30

- Medicalization and Disability Continued
  - Note on Sommers v. Iowa Civil Rights Commission (Cruz & Weiss 963-965)
  - DSM-V Changes (Cruz & Weiss 1017-1022)
  - A Bare Desire to Harm: Transgender People and the Equal Protection Clause (Cruz & Weiss pp. 1022-1032)
  - Blatt v. Cabela's Retail, Inc. (Cruz & Weiss p. 1033-1038)

Thursday April 1

- Students' Rights Under Title IX and Other Laws
  - Chapter Intro (Cruz & Weiss pp. 821-823)
  - *Doe v. Yunits I* (Cruz & Weiss pp. 823-834)
  - Evancho v. Pine-Richland School District (Cruz & Weiss pp. 860-871)

Tuesday April 6

- The Gavin Grimm Litigation Intro (p. 876)
  - Video: Gavin Grimm's Testimony at November 11, 2014 Gloucester County School Board Meeting
- *G.G. ex rel. Grimm v. Gloucester County School Board* (4th Circuit 2016) (Cruz & Weiss pp. 876-892)
- *Davis Concurrence in G.G.* (4th Circuit 2017) (Cruz and Weiss pp. 892-894)
- Notes on *Parents for Privacy v. Bar* (Cruz & Weiss pp. 936-940)

Thursday April 8

- Parenting
  - Christian v. Randall (Cruz & Weiss 435-439)
  - Note on the Varying Relevance of Marital Status to Trans Parenthood Determinations (Cruz & Weiss 441-443)
  - In re the Marriage of Magnuson (Cruz & Weiss 456-461)
  - Daly v. Daly (Cruz & Weiss 461-72)
    - Reno News and Review: Stripped Rights: How Nevada helped destroy a family
  - Palmore v. Sidoti (Cruz & Weiss 472-476)
  - In the Matter of M *(Children)* (Cruz & Weiss 482-485)

Tuesday April 13

- Marriage (Cruz & Weiss pp. 1175-1177)
  - M.T. v. J.T. (Cruz & Weiss 1189-1195)
  - Note on Littleton v. Prange (Cruz & Weiss p. 1200-1202)

- Goodwin v. United Kingdom (Cruz & Weiss 1202-1214)
- In re Marriage License for Nash (Cruz & Weiss 1232-1239)
- Cruz, Getting Sex "Right" (Cruz & Weiss 1243-1246)

Thursday April 15

- Sports
  - *Richards v. U.S. Tennis Ass'n* (93 Misc.2d 713)
  - *Semenya v. IAAF* (pp. 2, 9-16, 16-19, 71-79 p. 151-160)
  - Katrina Karkazis*: Stop Talking about Testosterone—there's no such thing as a "true sex"*

Tuesday April 20

  - *Hecox v. Little*
    - Order on Plaintiffs' Motion for Preliminary Injunction
      - pp 1-13, 55-87
  - The New York Times*: Who Should Compete in Women's Sports?*
  - 2015 International Olympic Committee Consensus Meeting on Sex Reassignment and Hyperandrogenism

Thursday April 22

- Reserved for Review or Additions of Recent and Relevant Developments

GENDER IDENTITY, SEXUAL ORIENTATION, AND THE LAW

Mr. Alexander Chen
Fall 2020
Tu 1:00-3:00 pm
2 credits

Readings:

There is no casebook for this class. The materials for each class are posted on Canvas.

I may add further readings not listed in the syllabus. Any additional readings for the following week will be announced at the end of the prior class and posted to Canvas on the same day.

Grading:

Class participation: 25% of your final grade is based on participation in class. Please appear by video (you can use a virtual background if you prefer). Always be prepared to be called on. If something prevents you from attending or preparing for a particular class, please let me know in advance by email (achen@law.harvard.edu).

Written assessment: 75% of your final grade is based on four reaction papers written throughout the term and a final reflection paper.

Reaction papers: You must write a reaction paper for the following classes, based on the first letter of your surname:

A-F: Classes 2, 5, 8, 11
G-P: Classes 3, 6, 9, 12
Q-Z: Classes 4, 7, 10, 13

Each reaction paper should be no more than 500 words, and must be submitted on Canvas in the "Assignments" tab the Monday before class by 5:00 pm.

For each reaction paper:

1. Choose at least one of the readings for that class and discuss what you found interesting about the reading(s). Your reaction paper should generally focus on legal analysis, but can also include a personal component.
2. Pose one discussion question for the class (discussion questions do not count against the 500 word limit).

The discussion questions will be collated, anonymized, and posted on Canvas in the "Discussions" tab the Monday before class by 6:00 pm. Students should review the discussion questions prior to each class.

Final reflection paper: You must write a final reflection paper. The final reflection paper should be no more than 1000 words, and must be posted on Canvas in the "Assignments" tab on Monday, November 30, 2020 by 5:00 pm (the day before our final class). The paper should address one or more of the following prompts:

- What were you hoping to get out of this course when you originally signed up for it? What did you end up taking away from it? Is there anything that surprised you, or that you did not expect to learn?
- Has this course affected your views on how the law affects changes in society? Do you think that the law is upstream from culture, downstream from culture, or both?
- What have you learned about how to effectively advocate for marginalized groups within the law? Do you think that there are lessons from LGBTQ+ advocacy that are generalizable to advocating for other groups, or are they mostly just specific to LGBTQ+ people?
- Has this course affected your own thinking about the role that you will play—or want to play—in our legal system?

Office Hours:

Tuesdays 3:00-5:00 pm on Zoom (https://harvard.zoom.us/j/95816061864?pwd=NE5QTjZLUFVyYmwrQ3hCRFlRK3BCZz09).

Please contact my assistant Andrew Matthiessen (amatthiessen@law.harvard.edu) for a 30 minute appointment during those hours. You can also "walk-in" during those hours (you will be placed in a Zoom waiting room), but students who make an appointment will be prioritized.

SYLLABUS

Class 1: Employment

Ulane v. Eastern Airlines, Inc.
Price Waterhouse v. Hopkins
Bostock v. Clayton Cty. (read majority opinion, skim dissents)
Schroer v. Billington
McGowan, *Working With Clients to Develop Compatible Visions of What It Means to "Win" a Case: Reflections on* Schroer v. Billington

Class 2: The Road to Marriage

Bowers v. Hardwick
Romer v. Evans
Lawrence v. Texas
Windsor v. United States
Obergefell v. Hodges
Latta v. Otter (Judge Berzon's concurrence)
Spade & Willse, *Marriage Will Never Set Us Free*

Class 3: Sex-Segregated Facilities

Grimm v. Gloucester Cty. Sch. Bd.

- Majority opinion and dissent
- NAACP amicus brief
- Video: Gavin Grimm's testimony at November 11, 2014 Gloucester County School Board Meeting (also available at https://www.youtube.com/watch?v=My0GYq_Wydw)

Jespersen v. Harrah's Operating Co.
Gessen, *The Supreme Court Considers L.G.B.T. Rights, But Can't Stop Talking about Bathrooms*

Class 4: Military Inclusion

Witt v. Dep't of Air Force
Karnoski v. Trump
Doe v. Trump (Judge Williams' concurrence)
Mattis Feb. 22, 2018 Memorandum

Holden, *This Transgender Man Is Trying To Enlist In The Military On Jan. 1. Trump Is Trying To Stop Him*
Stur, *Donald Trump's "Trans Ban" Reverses More Than 70 Years of Military Integration*
Massey & Nair, *Inclusion in the Atrocious*

Class 5: The Carceral State

Farmer v. Brennan
Edmo v. Corizon, Inc.

- Opinion
- Judge O'Scannlain's opinion respecting and Judge Bumatay's dissent from denial of rehearing en banc

R.G. v. Koller

Class 6: Health Care

Flack v. Wisc. Dep't of Health Servs.
Rumble v. Fairview Health Servs.
Prescott v. Rady's Childrens Hosp.
Blatt v. Cabela's Retail, Inc.
South Dakota HB 1057
Schmidt, South Dakota House Passes Bill Restricting Medical Treatments for Transgender Youth

Class 7: Religious Exemptions

Masterpiece Cakeshop v. Colo. Civil Rights Com'n
Fulton v. City of Phila.
Minton v. Dignity Health
Meriwether v. Trustees of Shawnee State Univ.

Class 8: Identity Documents

K.L. v. Alaska DMV
F.V. v. Barron
Arroyo v. Rossello
Zzyym v. Pompeo
California Gender Recognition Act (skim)
2015 U.S. Trans Survey, Chapter 6: Identity Documents

Class 9: Family Law 1

Daly v. Daly
Littleton v. Prange
In re Marriage of Simmons
Smith v. Smith
Williams v. Frymire
Sacklow v. Betts
McBride, *Stripped Rights: How Nevada Helped to Destroy a Family*
Minter, *Transgender Family Law*

Class 10: Family Law 2

K.M. v. E.G.
Johnson v. Calvert
In re Roberto d.B.
Morrissey v. U.S.
Reynolds v. United States
Dawn M. v. Michael M.
2006 Beyond Same-Sex Marriage Statement
Somerville Domestic Partnerships Ordinance
Barry, *A Massachusetts City Decides to Recognize Polyamorous Relationships*
Almendrala, *Transgender People Often Have to Choose Between Their Fertility And Their Transition*

Class 11: Sports

Richards v. U.S. Tennis Ass'n
Semenya v. IAAF
Hecox v. Little
2015 International Olympic Committee Consensus Meeting on Sex Reassignment and Hyperandrogenism
Eccleshare, *Meet Renee Richards: Sport's Accidental Transgender Pioneer*
Kessel, *The Unequal Battle: Privilege, Genes, Gender and Power*
Magubane, *Spectacles and Scholarship: Caster Semenya, Intersex Studies, and the Problem of Race in Feminist Theory*
Barnes, *How Two Transgender Athletes Are Fighting To Compete in the Sports They Love*

Class 12: Reflections

Lorde, *The Master's Tools Will Never Dismantle the Master's House*
Minter, *Do Transsexuals Dream of Gay Rights?*
Roberts, *Why The Transgender Community Hates HRC*

Sexual Identity & the Law
Spring 2021
Monday, 8:10-10:10

Professor James Gilliam
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213-555-5555

SEXUAL IDENTITY & THE LAW
COURSE SYLLABUS

Course Overview:

This two-unit seminar course is designed to give students a practical understanding of the role the law has played in the history of discrimination against gay, lesbian, bisexual, transgender, and intersex individuals, as well as an examination of the advancing development of laws affecting these same communities.

The course will consider gender identity, gender expression, and sexual orientation, with a focus on intersectionalities with race and socioeconomic status, within a historical and evolving context of the law. This semester we will particularly explore ongoing legal battles over the rights of transgender and gender-nonconforming people. Finally, to bring all the course concepts together, this semester we will pay attention to the intersectionalities of race and poverty by examining many issues through the perspective of transgender women of color.

Moreover, this course will explore the achievements of the LGBTQIA rights movement, as well as the challenges facing the movement today. While political, legal, and social rights for oppressed groups are a hallmark of modern American society, with each step forward, new issues emerge. With this framework in mind, this course will look at the law as it both constricts societal development at times, and acts as a catalyst for radical social change at others.

The course may fulfill the Upper Division Writing Requirement.

Course Objectives:

By the end of this course, you should be able to:

1. Demonstrate knowledge and understanding of the core substantive constitutional, civil, and criminal laws regarding sexual orientation and gender identity/expression, particularly as such knowledge relates to public disclosure of one's sexual identity, relationship recognition, protection against violence, and students/schools.
2. Apply knowledge of the laws regarding sexual orientation and gender identity/expression to sets of facts to make organized and persuasive arguments in favor of a result from both a plaintiff and a defendant's perspective.
3. Develop legal advocacy lawyering skills necessary to present issues relating to sexual orientation and gender identity/expression before a judge, jury, administrative agency, or other decision-making body.
4. Predict how a court or other decision-making authority would apply the law to facts.

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Grading:

There is no final examination in this course. The grade for the class will be based primarily on a Final Paper (as well as a Draft of the Final Paper and a short presentation about the chosen topic and thesis); one Reaction Essay; and overall class attendance and participation in class discussions.

Punctual class attendance and participation are required. Twenty-five person (25%) of your final grade will be based on in-class participation, attendance, and timely assignment completion. Class attendance is mandatory, and attendance will be taken at each class session. If you miss more than three class meetings, you may receive a failing grade for the course.

Participation in class discussions, along with good faith attempts to answer questions I may pose during class, are valuable components of legal education, and I strongly encourage you to volunteer your thoughts and perspectives.

To the extent possible, I hope to conduct this class as a discussion-style seminar, though I will use lecture and random questioning when appropriate. Participation in class discussions, along with attempts to answer questions I may pose during class, are valuable components of legal education, and I strongly encourage you to volunteer your thoughts and perspectives. I may call randomly on anyone in any class (I do keep track of whom I have called on, to be sure everyone participates eventually). I will strive to conduct the class discussion in as relaxed a manner as possible. The purpose is not to "test" you or record your performance in any specific sense, nor to make you feel nervous or "on stage," but simply to stimulate your own thinking and that of your fellow classmates, and to generally make the class more interesting. I am not concerned with whether you have the "correct" answer to any given question (often there is no such thing), although if you are off-track in understanding the doctrine, I will try to steer you back on track. I mainly want to know that you have done the readings and are making a good-faith effort to participate and respond. If you feel you do not do very well in response to specific questions, I encourage you to pose questions of your own and volunteer your own thoughts.

Neatness, grammar, and formatting count for all written assignments in this class. I do not care what citation style you use; but pick one and consistently stick to it. You will lose points on every written assignment in this class for typographical, spelling, grammatical, and other mechanical errors, and for unexplained variations in citation formatting.

For all assignments, please submit them via Anonymous File Transfer system on Brightspace to the locations specified for each assignment. All the assignments and the due dates for each are provided in the schedule below; you now know all the deadlines. Assignments are due at the beginning of the class session. The penalty for late work is a 10% reduction, per 24-hour period (or part thereof), of the total points available on each assignment.

The Grade for the class will be based on the following assignments, and weighted as indicated:

Attendance and Participation	25%
Reaction Essay	10%
Topic/Thesis Presentation	5%
Draft of Final Paper[1]	10%
Final Paper[2]	50%

Course Elements:

The course material will be presented through two primary sources—reading assignments and class discussions. We will also have a few Guest Speaker presentations, followed by Q&A sessions with the Guest Speakers.

Reading Assignments

Because preparation for and participation in class discussions is critical for an effective classroom experience, all reading assignments must be completed timely. You should read the specific reading assignments listed for each class session prior to that class.

Class Discussions of Reading Assignments

We will use the class sessions to discuss the reading assignments. The purpose of these discussions is to gain a deeper understanding of the readings, to provoke your thinking about the concepts covered in the readings, and to evaluate questions about the readings. Again, active participation in class discussions is encouraged. I expect you to have read the assigned reading assignments for each class session and to be able to discuss those readings in class. Quality of class discussion will be valued over quantity.

Guest Speaker Presentations

During a few class sessions, students will have the opportunity to meet and hear from Guest Speakers. I will provide information about each Guest Speaker in advance of the Guest Speaker's visit to the class. I expect you to be familiar with the Guest Speakers when they visit, and for you to give the Guest Speakers the respect of your attention during their visits. Moreover, you are encouraged to prepare questions for the Guest Speakers.

Student Participation:

In this course, students of all viewpoints and philosophies, and all genders, races, religions, and sexual orientations are welcome. I do not assume, and no one else should assume, anything about anyone's sexual orientation or gender identity or their attitudes about such issues simply because they are in this class or because they visit this class, including any Guest Speakers we may have. The perspectives of students who come to the class with an open mind, interested in

[1] The Draft of your Final Paper should reflect the best work you can achieve without assistance from me and must be at least one-third of your overall paper length.

[2] To fulfill the Upper Division Writing Requirement, the Student Handbook indicates that the Law School requires that the paper be no less than 7500 words exclusive of footnotes, in 12-point type with one-inch margins, and in Times New Roman font.

learning about an unfamiliar area of law and society, are every bit as valuable as the perspectives of those students who may be gay or lesbian (they also, of course, make a great contribution to the course). The purpose of this course, like all law courses, is not to convert anyone to any philosophy or political or social viewpoint, but to learn about legal issues (including their historical background and current expression in "black-letter law") and to develop skills in analyzing the law as it is and, most importantly, *should be*.

Because of the sensitive and often controversial nature of this course's subject matter and the personal implications it often has for people and their lives, it is important to clarify a few additional ground rules. Everyone should feel free, *if they wish*, to bring into the class discussion their own personal perspectives on the issues raised, including the perspectives gained from having a particular sexual orientation or identity, whether that be heterosexual ("straight"), gay, lesbian, bisexual, transgender, or perhaps having a friend or family member who is gay, lesbian, etc. This is no different from a female student relating her gender identity, or a student of color relating their racial identity, to any issue. Such personal perspectives often provide especially useful depth and "real world" context to a legal discussion.

However, no one should feel in any way pressured to bring a personal perspective into the class discussion or to discuss their personal sexual orientation or identity. If you feel comfortable approaching the class on a purely abstract and intellectual level, that is entirely legitimate and understandable. I will respect that, and I insist that everyone else in the class respect that as well. A student may earn the full potential participation points for the course by attending class and participating in the class discussions, regardless of whether that discussion includes information regarding their personal sexual orientation or identity.

I will occasionally bring to bear my own personal perspectives on the issues raised in the course, though I will usually lead the class discussion at a more abstract level (sometimes deliberately arguing a position contrary to my own, just to stir things up). As I have learned, there is every bit as much diversity in the philosophical, political, and religious viewpoints within the LGBT community as outside it. I do not consider the basic fact about a gay person's identity to be any more private than a heterosexual person's heterosexuality, which in our society is usually acknowledged in a completely public and nonchalant way. There is a difference, however, between being open about one's orientation or identity and discussing personal details of one's life. Where to draw the boundary line between personality or identity about which you choose to be public, is a question every individual must resolve for themselves. I simply ask that all of us be respectful and courteous to each other and let each individual draw that line wherever he or she feels most comfortable.

Part of what makes law tremendous fun to teach and (I hope) to learn is that it is filled with debates about some of the most difficult and hotly contested issues in our society. I will often express my own views and opinions. Sometimes I will take a stance in opposition to my own actual views, just to make sure we explore all sides of an issue. I encourage you to freely express and defend your own views. Disagreeing with me will NOT adversely affect you in any way. Indeed, I would find it a very boring class in the unlikely event most people did agree with me. I did not begin teaching law school classes to convert anyone to my views, and I have no

interest in doing so. I do, however, enjoy a good debate. Thus, you should feel free to express and defend your own views, regardless of whether they happen to disagree with either mine or those of your fellow classmates. The key ground rule is that I expect every student to show basic courtesy and respect both to every other student and to me, and I hold myself to the same standard. It is difficult to define what would violate this standard, but, for example, speech that goes beyond courteous intellectual debate and makes personal comments directed at another individual's known or assumed personal characteristics (e.g., race, gender, religion, sexual orientation) would not be acceptable. This should not, however, inhibit open discussion of controversial issues at an abstract level. Free and respectful debate is always healthy, even if one's views may be likely to arouse strong disagreement in others. Just do not make it personal (or take it personally if others disagree with you). It is probably best to frame and respond to comments on controversial issues in terms of your own experiences, what you believe, and the abstract merits of the issues, not in terms of commenting upon others or their beliefs.

Final Paper:

A large portion of the grade for this course is based on a Final Paper, including a Draft of the paper, which will meet the Law School's writing requirement. Please note that I will adhere strictly to the guidelines the Law School has published for such assignments.

Students may choose to write about any sexual orientation-related issue and may approach the Final Paper from several different perspectives. More information about the Final Paper will be distributed and discussed at the first class session.

I would encourage you, if you are so inclined, to consider this paper as a potential law review article. My published law review article on LGBT youth in foster care, which we will read this semester, started as a seminar paper for this same class while I was in law school here. I would be happy to help you, continuing beyond the end of the semester, should you decide to publish the paper you prepare for this course. Although I have no preference to which citation style you use, if you wish to aim for publication in a law review, I strongly recommend that you use Bluebook format from the outset, because that is what most law reviews require. The aspiration to publish is not, however, a course requirement.

Topic/Thesis Presentation:

During the seventh class session, each student will make a short presentation to the class explaining the student's topic selection and preliminary thesis.

This presentation comprises 5% of the grade for this class.

Reaction Essay:

During the semester, each student is required to submit a short two-page Reaction Essay regarding any of the topics we discuss, any of the materials that we read, or regarding any other gender identity, gender expression, or sexual-orientation related topic. For example, you may choose to write in depth about issues that are discussed in class, discussion questions that appear at the end of the readings, or to respond to something that someone else says in class. This essay

may provide the perfect opportunity to share thoughts with me about a topic that you were not comfortable discussing with the class. The Reaction Essays is due by March 26.

Course Materials:

GENDER IDENTITY AND THE LAW, David B. Cruz and Jillian T. Weiss (1st Ed., 2021) ("Cruz")

Selected Supplemental Course Materials ("Supp."). These will be excerpts from books titled "Transgender Rights," "The Right Side of History," and "The Right to Be Out."

Office Hours:

I will generally be available by email and telephone to assist you and to answer questions upon your request. You may schedule appointments by contacting me at the email address listed above. I find that this is more fruitful than me choosing a random set of hours to advertise as weekly "office hours."

Recording of Classes:

You are expected to attend class. Please be advised that if you miss a class session, you should consult with another student to review their notes from the class, though someone else's notes certainly cannot substitute for the in-class experience that occurs from shared discussion of the materials. Because of the sensitive nature of the topics to be discussed, and out of a desire to encourage full and frank in-class discussions, I must approve all requests to receive a recording of the class, as provided under Loyola Law School's Class Recording Policy.

Reasonable Accommodations:

Students in need of reasonable accommodations may review the application guidelines and appeals process at https://my.lls.edu/studentaffairs/disabilityaccommodations. For additional information, you may contact Student Accessibility Services (SAS) in the Office of Student Affairs at accessibility@lls.edu or 213-736-8151.

Reporting Requirements of Sexual or Interpersonal Misconduct:

As responsible employees, faculty are required to report any case of suspected sexual or interpersonal misconduct and cannot protect student confidentiality. For information about confidential counseling on campus and for general information about consensual relationships, sexual harassment, and sexual assault, please review the following information on the Office of Student Affairs webpage: Student-on-Student Sexual Misconduct & Interpersonal Conduct Policy & Protocol; LLS & Community Sexual Assault & Interpersonal Misconduct Resource Contact List; & Project Callisto.

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Class No. & Date	Class Coverage	Assignment/Due
1: 1/11/21	*Introductions*: Introduction to the Course; Professor and Student Introductions	No reading assignment
2: 1/25/21	*Exploring Gender, Gender Identity, Gender Expression, Sexuality, and Sexual Orientation* *Outing*	Reading Assignment Cruz, 3-18; 19-64 Supp., 1. Gay Rights Is A First Amendment Issue 2. The Genderbread Person 3. The Outing Controversy
3: 2/1/21	*Medicalization and Disability* *Anti "Cross-Dressing" Laws*	Reading Assignment Cruz, 941-963; 65-97
4: 2/8/21	*Employee Rights*	Reading Assignment Cruz, 135-84
5: 2/15/21	*Employee Rights*	Reading Assignment Cruz, 135-184
6: 2/22/21	*Employee Rights*	Reading Assignment Cruz, 184-242
7: 3/1/21	*Employee Rights*	Reading Assignment Cruz, 242-313

8: 3/8/21	*Youth in Out-of-Home Care*	Reading Assignment Cruz, 99-133
9: 3/15/21	*Student Rights*	Reading Assignment Cruz, 821-848;876-912
10: 3/22/21	*Religious Exemptions*	Reading Assignment Cruz, 531-581
11: 3/29/21	*Incarcerated & Institutionalized Persons' Safety and Health Care*	Reading Assignment Cruz, 669-698; 705-752
12: 4/5/21	*Incarcerated & Institutionalized Persons' Safety and Health Care*	Reading Assignment Cruz, 791-819
13:4/12/21 LAST CLASS	*Name Changes & Identity Documents*	Reading Assignment Cruz, 1047-1080
14:4/19/21 LAST CLASS	*Name Changes & Identity Documents*	Reading Assignment Cruz, 1097-1115; 1138-1154

Suggested Rules for Non-Transsexuals Writing about Transsexuals, Transsexuality, Transsexualism, or Trans ____. http://sandystone.com/hale.rules.html

Still under construction. Dig we must. Sorry about the formatting and colors.

Written by Jacob Hale, with thanks to Talia Bettcher, Dexter D. Fogt, Judith Halberstam, and Naomi Scheman. Note that the list refers to transsexuality rather than to transgender per se. However, many items also apply to non-transgendered researchers writing about transgender, as well as to trans-folk writing across trans-trans differences.

* 1. Approach your topic with a sense of humility: you are not the experts about transsexuals, transsexuality, transsexualism, or trans ____. Transsexuals are.

* 2. Interrogate your own subject position: the ways in which you have power that we don't (including powers of access, juridical power, institutional power, material power, power of intelligible subjectivity), the ways in which this affects what you see and what you say, what your interests and stakes are in forming your initial interest, and what your interests and stakes are in what you see and say as you continue your work. (Here's what Bernie Hausman, p.vii, says about how her initial interest was formed: She had been reading about transvestism and ran across library material on transsexualism. "Now *that* was fascinating." Why? "The possibilities for understanding the construction of 'gender' through an analysis of transsexualism seemed enormous and there wasn't a lot of critical material out there." Remember that using those with less power within institutionalized, material and discursive structures as your meal ticket (retention, tenure, promotion) is objectionable to those so used.)

* 3. Beware of replicating the following discursive movement (which Sandy Stone articulates in *"The Empire Strikes Back,"* and reminds us is familiar from other colonial discourses): Initial fascination with the exotic; denial of subjectivity, lack of access to dominant discourse; followed by a species of rehabilitation.

* 4. Don't erase our voices by ignoring what we say and write, through gross misrepresentation (as Hausman does to Sandy Stone and to Kate Bornstein), by denying us our academic credentials if we have them (as Hausman does to Sandy Stone), or by insisting that we must have academic credentials if we are to be taken seriously.

* 5. Be aware that our words are very often part of conversations we're having within our communities, and that we may be participating in overlapping conversations within multiple communities, *e.g.*, our trans communities, our scholarly communities (both interdisciplinary ones and those that are disciplinarily bounded), feminist communities, queer communities, communities of color. Be aware of these conversations, our places within them, and our places within community and power structures. Otherwise, you won't understand our words.

* 6. Don't totalize us, don't represent us or our discourses as monolithic or univocal; look carefully at each use of 'the,' and at plurals.

* 7. Don't uncritically quote non-transsexual "experts," *e.g.*, Harry Benjamin, Robert Stoller, Leslie Lothstein, Janice Raymond, Virginia Prince, Marjorie Garber. Apply the same critical acumen to their writings as you would to anyone else.

* 8. Start with the following as, minimally, a working hypothesis that you would be loathe to abandon: "Transsexual lives are lived, hence livable" (as Naomi Scheman put it in *"Queering the Center by Centering the Queer"*).

* 9. When you're talking about male-to-female transsexual discourses, phenomena, experiences, lives, subjectivities, embodiments, etc., make that explicit and keep making it explicit throughout; stating it once or twice is not sufficient to undermine paradigmaticity. Don't toss in occasional references to female-to-male

transsexual discourses, phenomena, experiences, lives, subjectivities, embodiments, etc., without asking what purposes those references serve you and whether or not those purposes are legitimate.

* 10. Be aware that if you judge us with reference to your political agenda (or agendas) taken as the measure or standard, especially without even asking if your agenda(s) might conflict with ours and might not automatically take precedence over ours, that it's equally legitimate (or illegitimate, as the case may be) for us to use our political agenda(s) as measures by which to judge you and your work.

* 11. Focus on: What does looking at transsexuals, transsexuality, transsexualism, or transsexual _____ tell you about *yourself*, *not* what does it tell you about trans.

* 12. Ask yourself if you can travel in our trans worlds. If not, you probably don't get what we're talking about. Remember that we live most of our lives in non-transsexual worlds, so we probably do get what you're talking about.

* 13. Don't imagine that you can write about the trope of transsexuality, the figure of the transsexual, transsexual discourse/s, or transsexual subject positions without writing about transsexual subjectivities, lives, experiences, embodiments. Ask yourself: what relations hold between these categorial constructions, thus what implications hold between what you write about one and what you don't write about another.

* 14. Don't imagine that there is only one trope of transsexuality, only one figure of "the" transsexual, or only one transsexual discourse at any one temporal and cultural location.

* 15. If we attend to your work closely enough to engage in angry, detailed criticism, don't take this as a rejection, crankiness, disordered ranting and raving, or the effects of testosterone poisoning. It's a *gift*. (And it's praise: there must be something we value about you to bother to engage you, especially since such engagement is often painful, as well as time-consuming, for us.)

References:

Naomi Scheman, *"Queering the Center by Centering the Queer"*; *in* DIANA T. MEYERS, ED., FEMINISTS RETHINK THE SELF. Boulder: Westview Press, forthcoming.

Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, *in* CAMERA OBSCURA 26; *also in* STRAUB AND EPSTEIN (EDS): BODY GUARDS; Routledge 1991.

BERNICE L. HAUSMAN, CHANGING SEX: TRANSSEXUALISM, TECHNOLOGY, AND THE IDEA OF GENDER. Durham: Duke University Press, 1995.

Last updated 5 January 1997 in the Second Age. Last updated 16 January 2006 in the Third Age. Last updated 18 November 2009 in the Third Age. Thanks to Ulrica Engdahl and Katherine Harrison for organizing the conference "Transgender Studies and Theories: Building Up the Field in a Nordic Context," and pointing out more copy errors in this document.

Prof. Ilona Turner
U.C. Berkeley – LS 159

Group Assignment: Transgender Birth Certificate Legal Challenge

Background: You and your classmates are interns at Transgender Legal Advocates ("TLA"), a nonprofit legal organization. The organization has decided that it is a high priority to challenge the law in Arizona that currently requires a "sex change operation" or chromosomal count before a person can change the gender marker on a birth certificate.

Statute: Under A.R.S. 36-337(A)(3), the gender marker on a birth certificate will only be changed if the person submits the written statement of a physician confirming either that the person "has undergone a sex change operation or has a chromosomal count that establishes the sex of the person as different than in the registered birth certificate."

Facts: We have found a potential client to be the plaintiff in this case: Elijah Jones, a transgender man. He lives in California but was born in Arizona. His birth certificate lists his gender as female. He wants to change the gender marker on his birth certificate from "female" to "male" but he has not had genital surgery.

Assignment: During the semester, you will work in small groups to develop arguments that you could use in support of the case to change your client's birth certificate. Those arguments will primarily be constitutional ones, making the case that denying Elijah the right to change his gender marker is unconstitutional.

By the end of the semester, each group will draft a demand letter that TLA will send to the Arizona Bureau of Vital Records requesting that they change the gender marker on our client's birth certificate to "male," and threatening to sue the state in court if they do not make that change.

This assignment is part of your participation grade.

Examples to show you the style and format of a demand letter:

- ACLU - Constance McMillen case: https://www.aclu.org/sites/default/files/field_document/Fulton_Prom_Demand_Letter.pdf
- Transgender Law Center – Ash Whitaker case: https://transgenderlawcenter.org/archives/12776

Timeline:

Week of February 1 – In your small groups, during section, (A) brainstorm potential arguments that you could use to challenge this statute, and (B) brainstorm questions for the first meeting with our client. Each group should submit a list of at least five questions.

Thursday, February 4 – In lecture, Prof. Turner will draw from those questions to interview our client, Elijah Jones, in class.

Week of February 22: In your small groups, draft 1-2 paragraphs that will go into the demand letter, briefly setting forth the argument that a law that discriminates against transgender people violates the Equal Protection Clause of the Fourteenth Amendment. You should cite to the Fourteenth Amendment, the M.A.B. case, and Romer v. Evans. You don't need to cite to any other cases. You should not make an argument here that discrimination against transgender people is a form of sex discrimination; that will be covered another time.

Week of March 15: In your small groups, draft 1-2 paragraphs that will go into the demand letter, adding the argument that this law constitutes sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Cite the court decisions that we have read in class that you think are most relevant to support that argument.

Week of April 19:

(1) In your small groups, draft 1-2 paragraphs setting forth an argument that denying Elijah the opportunity to change the gender marker on his birth certificate unless he undergoes genital surgery violates Elijah's due process rights under the Fourteenth Amendment. Cite any court decisions or other sources that we have read in class that you think are most relevant to support that argument.

(2) Then combine ALL the paragraphs you have drafted so far into a final, complete demand letter.

CAPTIVE GENDERS

Trans Embodiment and the Prison Industrial Complex

EDITED BY ERIC A. STANLEY AND NAT SMITH

Captive Genders: Trans Embodiment and the Prison Industrial Complex
Edited by Eric A. Stanley and Nat Smith

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San Francisco, CA 1979
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Interior by Michelle Fleming with Kate Khatib

BUILDING AN ABOLITIONIST TRANS AND QUEER MOVEMENT WITH EVERYTHING WE'VE GOT

Morgan Bassichis, Alexander Lee, Dean Spade

As we write this, queer and trans people across the United States and in many parts of the world have just celebrated the fortieth anniversary of the Stonewall Rebellion. On that fateful night back in June 1969, sexual and gender outsiders rose up against ongoing brutal police violence in an inspiring act of defiance. These early freedom fighters knew all too well that the NYPD—"New York's finest"—were the frontline threat to queer and trans survival. Stonewall was the culmination of years of domination, resentment, and upheaval in many marginalized communities coming to a new consciousness of the depth of violence committed by the government against poor people, people of color, women, and queer people both within US borders and around the world. The Stonewall Rebellion, the mass demonstrations against the war in Vietnam, and the campaign to

free imprisoned Black-liberation activist Assata Shakur were all powerful examples of a groundswell of energy demanding an end to the "business as usual" of US terror during this time.

Could these groundbreaking and often unsung activists have imagined that only forty years later the "official" gay rights agenda would be largely pro-police, pro-prisons, and pro-war—exactly the forces they worked so hard to resist? Just a few decades later, the most visible and well-funded arms of the "LGBT movement" look much more like a corporate strategizing session than a grassroots social justice movement. There are countless examples of this dramatic shift in priorities. What emerged as a fight against racist, anti-poor, and anti-queer police violence now works hand in hand with local and federal law enforcement agencies—district attorneys are asked to speak at trans rallies, cops march in Gay Pride parades. The agendas of prosecutors—those who lock up our family, friends, and lovers—and many queer and trans organizations are becoming increasingly similar, with sentence- and police-enhancing legislation at the top of the priority list. Hate crimes legislation is tacked on to multi-billion dollar "defense" bills to support US military domination in Palestine, Iraq, Afghanistan, and elsewhere. Despite the rhetoric of an "LGBT community," transgender and gender-non-conforming people are repeatedly abandoned and marginalized in the agendas and priorities of our "lead" organizations—most recently in the 2007 gutting of the Employment Non-Discrimination Act of gender identity protections. And as the rate of people (particularly poor queer and trans people of color) without steady jobs, housing, or healthcare continues to rise, and health and social services continue to be cut, those dubbed the leaders of the "LGBT movement" insist that marriage rights are the way to redress the inequalities in our communities.

For more and more queer and trans people, regardless of marital status, there is no inheritance, no health benefits from employers, no legal immigration status, and no state protection of our relationship to our children. Four decades after queer and trans people took to the streets throwing heels, bottles, bricks, and anything else we had to ward off police, the official word is that, except for being able to get married and fight in the military,[2] we are pretty much free, safe, and equal. And those of us who are not must wait our turn until the "priority" battles are won by the largely white, male, upper-class lawyers and lobbyists who know better than us.[3]

Fortunately, radical queer and trans organizing for deep transformation has also grown alongside this "trickle-down"[4] brand of "equality"

politics mentioned above. Although there is no neat line between official gay "equality" politics on the one hand, and radical "justice" politics on the other, it is important to draw out some of the key distinctions in how different parts of our movements today are responding to the main problems that queer and trans people face. This is less about creating false dichotomies between "good" and "bad" approaches, and more about clarifying the actual impact that various strategies have, and recognizing that alternative approaches to the "official" solutions are alive, are politically viable, and are being pursued by activists and organizations around the United States and beyond. In the first column, we identify some of these main challenges; in the second, we summarize what solutions are being offered by the well-resourced[5] segments of our movement; and in the third, we outline some approaches being used by more radical and progressive queer and trans organizing to expand possibilities for broad-based, social-justice solutions to these same problems.

The Current Landscape

BIG PROBLEMS	"OFFICIAL" SOLUTIONS	TRANSFORMATIVE APPROACHES
Queer and trans people, poor people, people of color, and immigrants have minimal access to quality healthcare	Legalize same-sex marriage to allow people with health benefits from their jobs to share with same-sex partners	Strengthen Medicaid and Medicare; win universal healthcare; fight for transgender health benefits; end deadly medical neglect of people in state custody
Queer and trans people experience regular and often fatal violence from partners, family members, community members, employers, law enforcement, and institutional officials	Pass hate crimes legislation to increase prison sentences and strengthen local and federal law enforcement; collect statistics on rates of violence; collaborate with local and federal law enforcement to prosecute hate violence and domestic violence	Build community relationships and infrastructure to support the healing and transformation of people who have been impacted by interpersonal and intergenerational violence; join with movements addressing root causes of queer and trans premature death, including police violence, imprisonment, poverty, immigration policies, and lack of healthcare and housing

BIG PROBLEMS	"OFFICIAL" SOLUTIONS	TRANSFORMATIVE APPROACHES
Queer and trans members of the military experience violence and discrimination	Eliminate bans on participation of gays and lesbians in US military	Join with war resisters, radical veterans, and young people to oppose military intervention, occupation, and war abroad and at home, and demand the reduction/elimination of "defense" budgets
Queer and trans people are targeted by an unfair and punitive immigration system	Legalize same-sex marriage to allow same-sex international couples to apply for legal residency for the non–US citizen spouse	End the use of immigration policy to criminalize people of color, exploit workers, and maintain the deadly wealth gap between the United States and the Global South; support current detainees and end ICE raids, deportations, and police collaboration
Queer and trans families are vulnerable to legal intervention and separation from the state, institutions, and/or non-queer people	Legalize same sex marriage to provide a route to "legalize" families with two parents of the same sex; pass laws banning adoption discrimination on the basis of sexual orientation	Join with struggles of queer/trans and non-queer/trans families of color, imprisoned parents and youth, native families, poor families, military families, and people with disabilities to win community and family self-determination and the right to keep kids, parents, and other family members in their families and communities
Institutions fail to recognize family connections outside of heterosexual marriage in contexts like hospital visitation and inheritance	Legalize same-sex marriage to formally recognize same-sex partners in the eyes of the law	Change policies like hospital visitation to recognize a variety of family structures, not just opposite-sex and same-sex couples; abolish inheritance and demand radical redistribution of wealth and an end to poverty

BIG PROBLEMS	"OFFICIAL" SOLUTIONS	TRANSFORMATIVE APPROACHES
Queer and trans people are disproportionately policed, arrested, and imprisoned, and face high rates of violence in state custody from officials as well as other imprisoned or detained people	Advocate for "cultural competency" training for law enforcement and the construction of queer and trans-specific and "gender-responsive" facilities; create written policies that say that queer and trans people are equal to other people in state custody; stay largely silent on the high rates of imprisonment in queer and trans communities, communities of color, and poor communities	Build ongoing, accountable relationships with and advocate for queer and trans people who are locked up to support their daily well-being, healing, leadership, and survival; build community networks of care to support people coming out of prison and jail; collaborate with other movements to address root causes of queer and trans imprisonment; work to abolish prisons, establish community support for people with disabilities and eliminate medical and psychatric institutionalization, and provide permanent housing rather than shelter beds for all people without homes

I. How Did We Get Here?

The streams of conservative as well as more progressive and radical queer and trans politics developed over time and in the context of a rapidly changing political, economic, and social landscape. Although we can't offer a full history of how these different streams developed and how the more conservative one gained national dominance, we think it is important to trace the historical context in which these shifts occurred. *To chart a different course for our movements, we need to understand the road we've traveled.* In particular, we believe that there are two major features of the second half of the twentieth century that shaped the context in which the queer and trans movement developed: (1) the active resistance and challenge by radical movement to state violence, and subsequent systematic backlash,[7] and (2) the massive turmoil and transformation of the global economy.[8] Activists and scholars use a range of terms to describe this era in which power, wealth, and oppression were transformed to respond to these two significant "crises"—including neoliberalism, the "New World Order," empire, globalization, free market democracy, or late capitalism.

Each term describes a different aspect or "take" on the current historical moment that we are living in.

It is important to be clear that *none of the strategies of the "New World Order" are new.* They might work faster, use new technologies, and recruit the help of new groups, but they are not new. Oppressive dynamics in the United States are as old as the colonization of this land and the founding of a country based on slavery and genocide. However, they have taken intensified, tricky forms in the past few decades—particularly because our governments keep telling us those institutions and practices have been "abolished." There were no "good old days" in the United States—just times in which our movements and our communities were stronger or weaker, and times when we used different cracks in the system as opportunities for resistance. All in all, we might characterize the past many decades as a time in which policies and ideas were promoted by powerful nations and institutions (such as the World Trade Organization and the International Monetary Fund) to destroy the minimal safety nets set up for vulnerable people, dismantle the gains made by social movements, and redistribute wealth, resources, and life changes upward—away from the poor and toward the elite.[9]

Below are some of the key tactics that the United States and others have used in this most recent chapter of our history:

- **Pull Yourself Up by Your Bootstraps, Again**

The US government and its ally nations and institutions in the Global North helped pass laws and policies that made it harder for workers to organize into unions; destroyed welfare programs and created the image of people on welfare as immoral and fraudulent; and created international economic policies and trade agreements that reduced safety nets, worker rights, and environmental protections, particularly for nations in the Global South. Together, these efforts have dismantled laws and social programs meant to protect people from poverty, violence, sickness, and other harms of capitalism.

> **EXAMPLE:** In the early 1990s, the North American Free Trade Agreement (NAFTA) was implemented by the United States under Democratic President Clinton to make it easier for corporations to do business across borders between the United States, Mexico, and Canada. Unfortunately, by allowing corporations to outsource their labor much more cheaply, the agreement also led to the loss

of hundreds of thousands of US jobs and wage depression even in "job receiving" countries.[10] Additionally, human rights advocates have documented widespread violations of workers rights since NAFTA, including "favoritism toward employer-controlled unions; firings for workers' organizing efforts; denial of collective bargaining rights; forced pregnancy testing; mistreatment of migrant workers; life-threatening health and safety conditions"; and other violations of the right to freedom of association, freedom from discrimination, and the right to a minimum wage.[11] Loss of jobs in the United States reduced the bargaining power of workers, now more desperate for wages then ever, and both wages and benefits declined, with many workers now forced to work as "temps" or part-time with no benefits or job security.

EXAMPLE: In 1996, President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act, which effectively dismantled what existed of a welfare state—creating a range of restrictive and targeting measures that required work, limited aid, and increased penalties for welfare recipients. The federal government abdicated its responsibility to provide minimal safety nets for poor and working-class people, using the rhetoric of "personal responsibility" and "work" to justify the exploitation and pain caused by capitalism and racism. Sexist, racist images of poor people as immoral, fraudulent drug addicts fueled these policy changes. Since then, different cities have adopted local measures to gut economic safety nets for poor, homeless, and working-class people. In San Francisco, Mayor Newsom's notorious 2002 "Care Not Cash" program slashed welfare benefits for homeless people, insisting that benefits given to the homeless were being spent on "drugs and alcohol."[12]

- **Scapegoating**

The decrease in manufacturing jobs and the gutting of social safety nets for the poor and working class created a growing class of people who were marginally employed and housed, and forced into criminalized economies such as sex work and the drug trade. This class of people was blamed for the poverty and inequity they faced—labeled drug dealers, welfare queens, criminals, and hoodlums—and were used to justify harmful policies that expanded violence and harm. At the same time, criminal penalties for behaviors associated with poverty, like drug use, sleeping outside,

graffiti, and sex work have increased in many parts the United States, and resources for policing these kinds of "crimes" has also increased.

> **EXAMPLE:** In the 1990s, states across the United States began to sign into law so-called "Three Strikes" measures that mandated standard, long (often life) sentences for people convicted of three felonies, many including non-violent offenses. California's law has resulted in sentences of twenty-five years or more for people convicted of things like shoplifting. The popularity of Three Strikes laws have been fueled by a growing cultural obsession with criminality and punishment that relies on images of violent and dangerous "career criminals" while functioning to imprison enormous numbers of low-income people and people of color whose behaviors are the direct results of economic insecurity.

> **EXAMPLE:** Under President Clinton's 1996 welfare reforms, anyone convicted of a drug-related crime is automatically banned for life from receiving cash assistance and food stamps. Some states have since opted out of this ban, but for people living in fifteen states, this draconian measure presents nearly insurmountable barriers to becoming self-sufficient. Unable to receive cash assistance and subject to job discrimination because of their criminal histories, many people with drug-related convictions go back into the drug trade as the only way to earn enough to pay the rent and put food on the table. The lifetime welfare ban has been shown to particularly harm women and their children.[13]

- **Fear-Mongering**

The government and corporate media used racist, xenophobic, and misogynist fear-mongering to distract us from increasing economic disparity and a growing underclass in the United States and abroad. The War on Drugs in the 1980s and the Bush Administration's War on Terror, both of which are ongoing, created internal and external enemies ("criminals" and "terrorists") to blame for and distract from the ravages of racism, capitalism, patriarchy, and imperialism. In exchange, these enemies (and anyone who looked like them) could be targeted with violence and murder. During this time, the use of prisons, policing, detention, and surveillance skyrocketed as the government declared formal war against all those who it marks as "criminals" or "terrorists."

EXAMPLE: In the 1980s, the US government declared a "War on Drugs" and drastically increased mandatory sentences for violating drug prohibition laws. It also created new prohibitions for accessing public housing, public benefits, and higher education for people convicted of drug crimes. The result was the imprisonment of over one million people a year, the permanent marginalization and disenfranchisement for people convicted, and a new set of military and foreign policy intervention justifications for the United States to take brutal action in Latin America.

EXAMPLE: Following the September 11, 2001 attacks on the World Trade Center in New York, politicians manipulated the American public's fear and uncertainty to push through a range of new laws and policies justified by a declared "War on Terror." New legislation like the PATRIOT Act, the Immigrant Registration Act, and the Real ID Act, as well as new administrative policies and practices, increased the surveillance state, reduced even the most basic rights and living standards of immigrants, and turned local police, schoolteachers, hospital workers, and others into immigtation enforcement officers.

• The Myth That Violence and Discrimination Are Just About "Bad" Individuals

Discrimination laws and hate crimes laws encourage us to understand oppression as something that happens when individuals use bias to deny someone a job because of race or sex or some other characteristic, or beat up or kill someone because of such a characteristic. This way of thinking, sometimes called the "perpetrator perspective,"[14] makes people think about racism, sexism, homophobia, transphobia, and ableism in terms of individual behaviors and bad intentions rather than wide-scale structural oppression that often operates without some obvious individual actor aimed at denying an individual person an opportunity. The violence of imprisoning millions of poor people and people of color, for example, can't be adequately explained by finding one nasty racist individual, but instead requires looking at a whole web of institutions, policies, and practices that make it "normal" and "necessary" to warehouse, displace, discard, and annihilate poor people and people of color. Thinking about violence and oppression as the work of "a few bad apples" undermines our ability to analyze our conditions *systemically* and *intergenerationally*, and to therefore organize for systemic change.

This narrow way of thinking about oppression is repeated in law, policy, the media, and nonprofits.

EXAMPLE: Megan's Laws are statutes that require people convicted of sexual offenses to register and that require this information be available to the public. These laws have been passed in jurisdictions around the country in the last two decades, prompted by and generating public outrage about child sexual abuse (CSA). Studies estimate that 1 in 3 people raised as girls and 1 in 6 people raised as boys were sexually abused as children, as a result of intergenerational trauma, community- and state-sanctioned abusive norms, and alienation. Rather than resourcing comprehensive programs to support the healing of survivors and transformation of people who have been sexually abusive, or interrupt the family and community norms that contribute to the widespread abuse of children, Megan's Laws have ensured that people convicted of a range of sexual offenses face violence, the inability to find work or a place to live, and severely reduced chances of recovery and healing. Despite the limited or nonexistent deterrent effect of such laws, they remain the dominant "official" approach to the systemic problems of CSA.[15]

EXAMPLE: As we write this, the Matthew Shepard Local Law Enforcement Enhancement Act has recently passed in the US Senate, and if signed into law would give $10 million to state and local law enforcement agencies, expand federal law enforcement power focused on hate crimes, and add the death penalty as a possible punishment for those convicted. This bill is heralded as a victory for transgender people because it will make gender identity an included category in Federal Hate Crimes law. Like Megan's Law, this law and the advocacy surrounding it (including advocacy by large LGBT nonprofit organizations) focus attention on individuals who kill people because of their identities. These laws frame the problem of violence in our communities as one of individual "hateful" people, when in reality, trans people face short life-spans because of the enormous systemic violence in welfare systems, shelters, prisons, jails, foster care, juvenile punishment systems, and immigration, and the inability to access basic survival resources. These laws do nothing to prevent our deaths, they just use our deaths to expand a system that endangers our lives and places a chokehold on our communities.[16]

• Undermining Transformative Organizing

The second half of the twentieth century saw a major upsurge in radical and revolutionary organizing in oppressed communities in the United States and around the world. This powerful organizing posed a significant threat to the legitimacy of US power and capitalist empire more broadly, and therefore needed to be contained. These movements were undermined by two main strategies: First, the radical movements of the 1960s and '70s were criminalized, with the US government using tactics of imprisonment, torture, sabotage, and assassination to target and destroy groups like the Black Panthers, American Indian Movement, and Young Lords, among others. Second, the growth of the nonprofit sector has seen social movements professionalizing, chasing philanthropic dollars, separating into "issue areas," and moving toward social services and legal reform projects rather than radical projects aimed at the underlying causes of poverty and injustice.[17] These developments left significant sections of the radical left traumatized and decimated, wiping out a generation of revolutionaries and shifting the terms of resistance from revolution and transformation to inclusion and reform, prioritizing state- and foundation-sanctioned legal reforms and social services over mass organizing and direct action.

EXAMPLE: The FBI's Counter-Intelligence Program (COINTELPRO) is a notorious example of the US government's use of infiltration, surveillance, and violence to overtly target dissent and resistance. COINTELPRO was exposed when internal government documents were revealed that detailed the outrageous work undertaken by the federal government to dismantle resistance groups in the 1960s and '70s. Although the program was dissolved under that name, the tactics continued and can be seen today in current controversies about wiretapping and torture as well as in the USA PATRIOT Act. Overt action to eliminate resistance and dissent here is as old as the European colonization of North America.[18]

EXAMPLE: In the wake of decades of radical organizing by people in women's prisons and activists on the outside decrying systemic medical neglect, sexual violence, and the destruction of family bonds, California legislators in 2006 proposed a so-called "gender responsive corrections" bill that would allow people in women's prisons to live with their children and receive increased social services. To make this plan

work, the bill called for millions of dollars in new prison construction. The message of "improving the lives of women prisoners" and creating more "humane" prisons—rhetoric that is consistently used by those in power to distract us from the fundamentally violent conditions of a capitalist police state—appealed to liberal, well-intentioned feminist researchers, advocates, and legislators. Anti-prison organizations such as Oakland-based Justice Now and others working in solidarity with the resounding sentiment of people in women's prisons, pointed out that this strategy was actually just a back door to creating 4,500 new prison beds for women in California, yet again expanding opportunities to criminalize poor women and transgender people in one of the nation's most imprisoning states.[19]

- **The Hero Mindset**

The United States loves its heroes and its narratives—Horatio Alger, rags-to-riches, "pull yourself up by your bootstraps," streets "paved with gold," the rugged frontiersman, the benevolent philanthropist, and Obama as savior, among others. These narratives hide the uneven concentration of wealth, resources, and opportunity among different groups of people—the ways in which not *everybody* can just do anything if they put their minds to it and work hard enough. In the second half of the twentieth century, this individualistic and celebrity-obsessed culture had a deep impact on social movements and how we write narratives. Stories of mass struggle became stories of individuals overcoming great odds. The rise of the nonprofit as a key vehicle for social change bolstered this trend, giving incentives to charismatic leaders (often executive directors, often people with privilege) to frame struggles in ways that prioritize symbolic victories (big court cases, sensationalistic media coverage) and ignore the daily work of building a base and a movement for the long haul. This trend also compromises the accountability of leaders and organizations to their constituencies, and devalues activism in the trenches.

EXAMPLE: Rosa Parks is one of the most well-known symbols of resistance during the African American Civil Rights movement in the 1950s and 1960s. She is remembered primarily for "sparking" the Montgomery Bus Boycott and as the "mother of the civil rights movement."[20] In popular mythology, Ms. Parks was an ordinary woman who simply decided one day that she would not give up her seat to a white person in a "lonely act of defiance."[21] In reality, Ms. Parks was

an experienced civil rights activist who received political education and civil disobedience training at the well-known leftist Highlander Folk School, which still exists today. Ms. Parks's refusal to give up her seat was far from a "lonely act," but was rather just one in a series of civil disobediences by civil rights leaders to target segregation in public services. The Civil Rights Movement of the period was a product of the labor and brilliance of countless New-World African enslaved people, African American people, and their allies working since before the founding of the United States, not simply attributable to any one person. The portrayal of mass struggles as individual acts hides a deeper understanding of oppression and the need for broad resistance.

EXAMPLE: Oprah's well-publicized giveaways[22]—as well as a range of television shows that feature "big wins" such as makeovers, new houses, and new cars—have helped to create the image of social change in our society as individual acts of "charity" rather than concerted efforts by mass groups of people to change relationships of power. These portrayals affirm the false idea that we live in a meritocracy in which any one individual's perseverance and hard work are the only keys needed to wealth and success. Such portrayals hide realities like the racial wealth divide and other conditions that produce and maintain inequality on a group level, ensuring that most people will not rise above or fall below their place in the economy, regardless of their individual actions. In reality, real social change that alters the relationships of power throughout history have actually come about when large groups of people have worked together toward a common goal.

Together, the tactics that we describe above function as a strategy of *counter-revolution*—an attempt to squash the collective health and political will of oppressed people, and to buy off people with privilege in order to support the status quo. This is a profoundly traumatic process that deepened centuries of pain, loss, and harm experienced by people of color, immigrants, queer and trans people, women, and others marked as "disposable." For many of us, this included losing our lives and our loved ones to the devastating government-sanctioned HIV/AIDS pandemic and ongoing attacks from family, neighbors, and government officials.

Perhaps one of the most painful features of this period has been the separating of oppressed communities and movements from one another. Even though our communities are all overlapping and our struggles for

liberation are fundamentally linked, the "divide and conquer" strategy of the "New World Order" has taught us to think of our identities and struggles as separate and competing. In particular, it was useful to maintaining harmful systems and conditions to create a false divide between purportedly separate ("white") gay issues and ("straight") people of color, immigrant, and working-class issues to prevent deep partnerships across multiple lines of difference for social transformation. In this context, the most visible and well-funded arms of LGBT organizing got caught up in fighting for small-scale reforms and battles to be recognized as "equal" and "visible" under the law and in the media without building the sustained power and self-determination of oppressed communities. Instead of trying to change the system, the official LGBT agenda fought to just be welcomed into it, in exchange for helping to keep other oppressed people at the bottom.

But thankfully that's not the end of the story. As we describe below, this period also nurtured powerful strands of radical queer and trans politics organizing at the intersections of oppressions and struggles and in the legacy of the revolutionary freedom fighters of an earlier generation.

II. Reclaiming a Radical Legacy

Despite the powerful and destructive impacts that the renewed forces of neoliberal globalization and the "New World Order" have had on our communities and our social movements, there are and always have been radical politics and movements to challenge the exploitation that the United States is founded upon. These politics have been developed in communities of color and in poor and working-class, immigrant, queer, disability, and feminist communities in both "colonized" and "colonizing" nations, from the Black Panther Party in Oakland to the Zapatistas in Chiapas to the Audre Lorde Project in New York. As the story of Stonewall teaches us, our movements didn't start out in the courtroom; they started out in the streets! Informing both the strategies of our movements as well as our everyday decisions about how we live our lives and form our relationships, these radical politics offer queer communities and movements a way out of the murderous politics that are masked as invitations to "inclusion" and "equality" within fundamentally exclusive, unequal systems. Sometimes these spaces for transformation are easier to spot than others—but you can find them everywhere, from church halls to lecture halls, from the lessons of our grandmothers to the lessons we learn surviving in the world, from the post-revolutionary Cuba to post-Katrina New Orleans.

These radical lineages have nurtured and guided transformative branches of queer and trans organizing working at the intersections of identities and struggles for collective liberation. These branches have redefined what count as queer and trans issues, losses, victories, and strategies—putting struggles against policing, imprisonment, borders, globalization, violence, and economic exploitation at the center of struggles for gender and sexual self-determination. Exploding the false division between struggles for (implicitly white and middle-class) sexual and gender justice and (implicitly straight) racial and economic justice, there is a groundswell of radical queer and trans organizing that's changing all the rules—you just have to know where to find it. In the chart below, we draw out a few specific strands of these diverse radical lineages that have paved the way for this work. In the first column, we highlight a value that has emerged from these radical lineages. In the second column, we lift up specific organizations striving to embody these values today.[23]

Deepening the Path of Those Who Came Before

RADICAL LINEAGE	CONTEMPORARY DESCENDANT
Liberation is a collective process! The conventional nonprofit hierarchical structure is actually a very recent phenomenon, and one that is modeled off corporations. Radical organizations, particularly feminist and women of color-led organizations, have often prioritized working collectively—where group awareness, consensus, and wholeness is valued over majority rule and individual leadership. Collectivism at its best takes up the concerns of the few as the concerns of the whole. For example, when one member of a group or community cannot attend an event or meeting because the building is not wheelchair accessible, it becomes a moment for all to examine and challenge ableism in our culture—instead of just dismissing it as a "problem" that affects only people who use wheelchairs.	The **Sylvia Rivera Law Project** (SRLP), among many other organizations, has shown just how powerful working collectively can be—with their staff and volunteers, majority people of color, majority trans and gender-nonconforming governing collective, SRLP is showing the world that how we do our work is a vital part of the work, and that doing things collectively helps us to create the world we want to see as we're building it.

RADICAL LINEAGE	CONTEMPORARY DESCENDANT
"Trickle up" change! We know that when those in power say they will "come back" for those at the bottom of the social and economic hierarchy, it will never happen. Marginalization is increased when a part of a marginalized group makes it over the line into the mainstream, leaving others behind and reaffirming the status quo. We've all seen painful examples of this in LGBT politics time after time—from the abandonment of transgender folks in the Employment Non-Discrimination Act (ENDA) to the idea that gay marriage is the first step toward universal healthcare. Instead, we know that freedom and justice for the most oppressed people means freedom and justice for everyone, and that we have to start at the bottom. The changes required to improve the daily material and spiritual lives of low-income queer and transgender people of color would by default include large-scale transformation of our entire economic, education, healthcare, and legal systems. When you put those with the fewest resources and those facing multiple systems of oppression at the center of analysis and organizing, everybody benefits.	**Queers for Economic Justice** in New York City and the **Transgender, Gender Variant, and Intersex Justice Project** in San Francisco are two great examples of "trickle up" change—by focusing on queers on welfare, in the shelter system, and in prison systems, these groups demand social and economic justice for those with the fewest resources and the smallest investment in maintaining the system as it is.
Be careful of all those welcome mats! Learning from history and other social-justice movements is a key principle. Other movements and other moments have been drained of their original power and purpose and appropriated for purposes opposing their principles, either by governments working to dilute and derail transformation or by corporations looking to turn civil unrest into a fashion statement (or both). Looking back critically at where other movements have done right and gone	**Critical Resistance** is a great example of this commitment. In the group's focus on prison abolition (instead of reform), its members examine their strategies and potential proposals through the question "Will we regret this in ten years?" This question is about taking a long-term view and assessing a potential opportunity (such as any given proposal to "improve" or "reform" prisons or sentencing laws) against their commitment to abolishing—not expanding or even maintaining—the prison industrial

RADICAL LINEAGE	CONTEMPORARY DESCENDANT
wrong helps us stay creative and accountable to our communities and our politics.	complex. The message here is that even though it might feel nice to get an invitation to the party, we would be wise to ask about the occasion.
For us, by us! The leadership, wisdom, and labor of those most affected by an issue should be centralized from the start. This allows those with the most to gain from social justice to direct what that justice will look like and gives allies the chance to directly support their leadership.	**FIERCE!** in New York City is a great example of this principle: By building the power of queer and trans youth of color to run campaigns, organize one another, and challenge gentrification and police violence, FIERCE! has become a powerful force that young people of color see themselves in. At FIERCE!, it is the young people directly facing the intersections of ageism, racism, xenophobia, homophobia, and transphobia who identify what the problems, priorities, and strategies should be rather than people whose expertise on these issues derives from advanced degrees or other criteria. The role of people not directly affected by the issues is to support the youth in manifesting their visions, not to control the political possibilities that they are inventing.
Let's practice what we preach! Also known as "praxis," this ideal strives for the alignment of what we do, why we're doing it, and how we do it—not just in our formal work, but also in our daily lives. This goes beyond the campaign goals or strategies of our organizations, and includes how they are organized, how we treat one another, and how we treat ourselves. If we believe that people of color have the most to gain from the end of racism, then we should support and encourage people of color's leadership in fights to end white supremacy, and for a fair economy and an end to the wealth gap. People in our organizations should get paid equally regardless	An inspiring example of praxis can be found in the work of **Southerners on New Ground** (SONG), based in Atlanta, Ga. SONG strives to integrate healing, spirit, and creativity in their work organizing across race, class, gender, and sexuality to embody new (and old!) forms of community, reflective of our commitments to liberation. SONG and other groups show that oppression is traumatic, and trauma needs to be addressed, acknowledged, and held both by individuals and groups of people. If trauma is ignored or swept under the rug, it just comes back as resentment, chaos, and divisiveness. We are all whole, complex human beings that

RADICAL LINEAGE	CONTEMPORARY DESCENDANT
of advanced degrees, and our working conditions and benefits should be generous. If we support a world in which we have time and resources to take care of ourselves, as well as our friends, families, and neighbors, we might not want to work sixty hours a week.	have survived a great deal of violence to get where we are today. Our work must support our full humanity and reflect the world we want to live in.
Real safety means collective transformation! Oppressed communities have always had ways to deal with violence and harm without relying on police, prisons, immigration, or kicking someone out—knowing that relying on those forces would put them in greater danger. Oppressed people have often known that these forces were the main sources of violence that they faced—the central agent of rape, abuse, murder, and exploitation. The criminal punishment system has tried to convince us that we do not know how to solve our own problems and that locking people up and putting more cops on our streets are the only ways we can stay safe or heal from trauma. Unfortunately we often lack other options. Many organizations and groups of people have been working to interrupt the intergenerational practices of intimate violence, sexual violence, hate violence, and police violence without relying on the institutions that target, warehouse, kill, and shame us.	Groups like **Creative Interventions** and **generationFIVE** in Oakland, Calif., **Communities Against Rape and Abuse** in Seattle, Wash., and the Audre Lorde Project's **Safe OUTside the System** (SOS) Collective, have been creating exciting ways to support the healing and transformation of people who have survived and caused harm, as well as the conditions that pass violence down from one generation to another. Because violence touches every queer and trans person directly or indirectly, creating ways to respond to violence that are transformative and healing (instead of oppressive, shaming, or traumatizing) is a tremendous opportunity to reclaim our radical legacy. We can no longer allow for our deaths to be the justification for so many other people's deaths through policing, imprisonment, and detention. Locking people up, having more cops in the streets, or throwing more people out will never heal the wounds of abuse or trauma.

Resisting the Traps, Ending Trans Imprisonment

Even in the context of growing imprisonment rates and deteriorating safety nets, the past decade has brought with it an upsurge in organizing and activism to challenge the imprisonment and policing of transgender and gender-non-conforming communities.[32] Through high-profile lawsuits, human rights and media documentation, conferences and trainings,

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grassroots organizing, and coalitional efforts, more individuals and organizations are aware of the dynamics of trans imprisonment than ever. This work has both fallen prey to the tricky traps of the "New World Order" that we described above and also generated courageous new ways of doing the work of transformation and resistance that are in line with the radical values that we also trace. What was once either completely erased or significantly marginalized on the agendas of both the LGBT and anti-prison/prisoner rights movements is now gaining more and more visibility and activity. We think of this as a tremendous opportunity to choose which legacies and practices we want for this work moving forward. This is not about playing the blame game and pointing fingers at which work is radical and which is oppressive, but rather about building on all of our collective successes, losses, and contradictions to do work that will transform society (and all of us) as we know it.

Below are a few helpful lessons that have been guided by the values above and generated at the powerful intersections of prison abolition and gender justice:[33]

1. We refuse to create "deserving" vs. "undeserving" victims.[34] Although we understand that transgender and gender-non-conforming people in prisons, jails, and detention centers experience egregious and often specific forms of violence—including sexual assault, rape, medical neglect and discrimination, and humiliation based on transphobic norms—we recognize that all people impacted by the prison industrial complex are facing severe violence. Instead of saying that transgender people are the "most" oppressed in prisons, we can talk about the different forms of violence that people impacted by the prison industrial complex face, and how those forms of violence help maintain the status quo common sense that the "real bad people"—the "rapists," "murderers," "child molesters," in some cases now the "bigots"—deserve to be locked up. Seeking to understand the specific arrangements that cause certain communities to face particular types of violence at the hands of police and in detention can allow us to develop solidarity around shared *and* different experiences with these forces and build effective resistance that gets to the roots of these problems. Building arguments about trans people as "innocent victims" while other prisoners are cast as dangerous and deserving of detention only undermines the power of a shared resistance strategy that sees imprisonment as a violent, dangerous tactic for everybody it touches.

We know that the push for hate crimes laws as the solution to anti-queer and -trans violence will never actually address the fundamental reasons why we are vulnerable to violence in the first place or why homophobia and transphobia are encouraged in our cultures. Individualizing solutions like hate crimes laws create a false binary of "perpetrator" and "victim" or "bad" and "good" people without addressing the underlying systemic problem, and often strengthen that problem. In place of this common sense, we understand that racism, state violence, and capitalism are the root causes of violence in our culture, not individual "bigots" or even prison guards. *We must end the cycle of oppressed people being pitted against one another.*

2. We support strategies that weaken oppressive institutions, not strengthen them.

We can respond to the crises that our communities are facing right now while refusing long-term compromises that will strengthen the very institutions that are hurting us. As more and more awareness is being raised about the terrible violence that transgender and gender-non-conforming people face in prisons, jails, and detention centers, some prisoner rights and queer and trans researchers and advocates are suggesting that building trans-specific prisons or jails is the only way that imprisoned transgender and gender-non-conforming people will be safe in the short-term. Particularly in light of the dangerous popularity of "gender responsiveness" among legislators and advocates alike, we reject all notions that we must expand the prison industrial complex to respond to immediate conditions of violence. Funneling more money into prison building of any kind strengthens the prison industrial complex's death hold on our communities. We know that if they build it, they will fill it, and getting trans people out of prison is the only real way to address the safety issues that trans prisoners face. *We want strategies that will reduce and ultimately eliminate the number of people and dollars going into prisons, while attending to the immediate healing and redress of individual imprisoned people.*

3. We must transform exploitative dynamics in our work.

A lot of oppressed people are hyper-sexualized in dominant culture as a way to create them as a threat, a fetish, or a caricature—transgender women, black men, Asian and Pacific Islander women, to name a few. Despite often good intentions to raise awareness about the treatment of transgender and gender-non-conforming people in prisons, we recognize

that much of the "public education" work around these issues often relies on sexualization, voyeurism, sensationalism, and fetishization to get its point across. In general there is a focus on graphic descriptions of people's bodies (specifically their genitals), sexual violence, and the humiliation they have faced. Imprisoned people (who are usually represented as black) and transgender people (who are usually represented as transgender women of color in this context) have long been the target of voyeuristic representation—from porn movies that glorify rape in prison to fetishizing "human rights" research distributed to majority white, middle-class audiences. As transgender people who often have our bodies on display for non-transgender people who feel empowered to question, display, and discuss us, we know that this is a dangerous trend that seriously undercuts the integrity of our work and the types of relationships that can be formed. Unless we address these exploitative power dynamics in our work, even our most "well-intentioned" strategies and movements will reproduce the prison industrial complex's norms of transphobic, misogynist, and racist sexualized violence. *Research, media, cultural work, and activism on this issue needs to be accountable to and directed by low-income transgender people and transgender people of color and our organizations.*

4. We see ending trans imprisonment as part of the larger struggle for transformation.

The violence that transgender people—significantly low-income transgender people of color—face in prisons, jails, and detention centers and the cycles of poverty and criminalization that leads so many of us to imprisonment is a key place to work for broad-based social and political transformation. There is no way that transgender people can ever be "safe" in prisons as long as prisons exist and, as scholar Fred Moten has written, as long as we live in a society that could even *have* prisons. Building a trans and queer abolitionist movement means building power among people facing multiple systems of oppression in order to imagine a world beyond mass devastation, violence, and inequity that occurs within and between communities. We must resist the trap of being compartmentalized into "issues" and "priorities" and sacrificing a broader political vision and movement to react to the crisis of the here and now. This is the logic that allows many white and middle-class gay and lesbian folks to think that marriage is *the* most important and pressing LGBT issue, without being invested in the real goal of ending racism and capitalism. *Struggling*

against trans imprisonment is one of many key places to radicalize queer and trans politics, expand anti-prison politics, and join in a larger movement for racial, economic, gender, and social justice to end all forms of militarization, criminalization, and warfare.

III. So You Think We're Impossible?

This stuff is heavy, we realize. Our communities and our movements are up against tremendous odds and have inherited a great deal of trauma that we are still struggling to deal with. A common and reasonable response to these conditions is getting overwhelmed, feeling defeated, losing hope. In this kind of emotional and political climate, when activists call for deep change like prison abolition (or, gasp, an LGBT agenda *centered around* prison abolition), our demands get called "impossible" or "idealistic" or even "divisive." As trans people, we've been hearing this for ages. After all, according to our legal system, the media, science, and many of our families and religions, we shouldn't exist! Our ways of living and expressing ourselves break such fundamental rules that systems crash at our feet, close their doors to us, and attempt to wipe us out. And yet we exist, continuing to build and sustain new ways of looking at gender, bodies, family, desire, resistance, and happiness that nourish us and challenge expectations.

In an age when thousands of people are murdered annually in the name of "democracy," millions of people are locked up to "protect public safety," and LGBT organizations march hand in hand with cops in Pride parades, being impossible may just be the best thing we've got going for ourselves: *Impossibility may very well be our only possibility.*

What would it mean to *embrace*, rather than *shy away from,* the impossibility of our ways of living as well as our political visions? What would it mean to desire a future that we can't even imagine but that we are told couldn't ever exist? We see the abolition of policing, prisons, jails, and detention not strictly as a narrow answer to "imprisonment" and the abuses that occur within prisons, but also as a challenge to the rule of poverty, violence, racism, alienation, and disconnection that we face every day. Abolition is not just about closing the doors to violent institutions, but also about building up and recovering institutions and practices and relationships that nurture wholeness, self-determination, and transformation. Abolition is not some distant future but something we create in every moment when we say no to the traps of empire and yes to the nourishing possibilities dreamed of and practiced by our ancestors and friends. Every time we insist on accessible and affirming healthcare, safe and quality

education, meaningful and secure employment, loving and healing relationships, and being our full and whole selves, we are doing abolition. Abolition is about breaking down things that oppress and building up things that nourish. Abolition is the practice of transformation in the here and now and the ever after.

Maybe wrestling with such a significant demand is the wake-up call that an increasingly sleepy LGBT movement needs. The true potential of queer and trans politics cannot be found in attempting to reinforce our tenuous right to exist by undermining someone else's. If it is not clear already, we are all in this together. To claim our legacy of beautiful impossibility is to begin practicing ways of being with one another and making movement that sustain all life on this planet, without exception. It is to begin speaking what we have not yet had the words to wish for.

NOTES

1. We would like to thank the friends, comrades, and organizations whose work, love, and thinking have paved the path to this paper and our collective movements for liberation, including: Anna Agathangelou, Audre Lorde Project, Community United Against Violence (CUAV), Communities Against Rape and Abuse (CARA), Critical Resistance, Eric Stanley, FIERCE!, INCITE! Women of Color Against Violence, Justice Now, Lala Yantes, Mari Spira, Miss Major, Mordecai Cohen Ettinger, Nat Smith, Southerners on New Ground (SONG), Sylvia Rivera Law Project (SRLP), Transforming Justice Coalition, Transgender, Gender Variant, Intersex Justice Project (TGIJP), and Vanessa Huang.
2. In the wake of the 2011 repeal of Don't Ask Don't Tell, queer and trans people who oppose the horrible violence committed by the US military all over the world have been disappointed not only by pro-military rhetoric of the campaign to allow gays and lesbians to serve, but also by the new debates that have emerged since then about ROTC on college campuses. Many universities that have excluded the military from campuses are now considering bringing it back to campus, and some activists are arguing that the military should be kept off campus because trans people are still excluded from service. The terms of this debate painfully embraces US militarism, and forgets that long-term campaigns to exclude the US military from college campuses and to disrupt military recruitment campaigns and strategies are based in not only the horrible violence of the military toward service members but also the motivating colonial and imperial purposes of US militarism.
3. This has been painfully illustrated by a range of LGBT foundation and individual funders who, in the months leading up to the struggle over California's

same-sex marriage ban, Proposition 8, declared that marriage equality needed to be the central funding priority and discontinued vital funding for anti-violence, HIV/AIDS, and arts organizations, among others.

4. This is a reference to the "trickle-down" economic policies associated with the Reagan Administration, which promoted tax cuts for the rich under the guise of creating jobs for middle-class and working-class people. The left has rightfully argued that justice, wealth, and safety do not "trickle down," but need to be redistributed first to the people at the bottom of the economic and political ladder. Trickle down policies primarily operate as another opportunity to distribute wealth and security upward.
5. By this we mean the advocacy work and agenda-setting done by wealthy (budgets over $1 million) LGBT-rights organizations such as the Human Rights Campaign and the National Lesbian and Gay Task Force.
6. See the Sylvia Rivera Law Project's *It's War in Here: A Report on the Treatment of Transgender and Gender Non-Conforming People in New York State Prisons* (available online at www.srlp.org) and *Gendered Punishment: Strategies to Protect Transgender, Gender Variant and Intersex People in America's Prisons* (available from TGI Justice Project, info@tgijp.org) for a deeper examination of the cycles of poverty, criminalization, imprisonment, and law-enforcement violence in transgender and gender-non-conforming communities.
7. This was a period of heightened activity by radical and revolutionary national and international movements resisting white supremacy, patriarchy, colonization, and capitalism—embodied by organizations such as the American Indian Movement, the Black Liberation Army, the Young Lords, the Black Panther Party for Self-Defense, the Brown Berets, Earth First!, the Gay Liberation Front, and the Weather Underground in the United States, and anti-colonial organizations in Guinea-Bissau, Jamaica, Vietnam, Puerto Rico, Zimbabwe, and elsewhere. Mass movements throughout the world succeeded in winning major victories against imperialism and white supremacy, and exposing the genocide that lay barely underneath American narratives of democracy, exceptionalism, and liberty.
8. See Ruth Wilson Gilmore, "Globalisation and US Prison Growth: From Military Keynesianism to Post-Keynesian Militarism," *Race and Class,* Vol. 40, No. 2–3, 1998/99.
9. For a compelling analysis of neoliberalism and its impacts on social movements, see Lisa Duggan's *The Twilight of Equality: Neoliberalism, Cultural Politics, and the Attack on Democracy,* published by Beacon Press in 2004.
10. Public Citizen, NAFTA and Workers' Rights and Jobs, 2008, at http://www.citizen.org/trade/nafta/jobs.

11. Human Rights Watch, "NAFTA Labor Accord Ineffective," April 15, 2001, at http://hrw.org/english/docs/2001/04/16/global179.htm. Corporations specifically named in complaints by workers include General Electric, Honeywell, Sony, General Motors, McDonald's, Sprint, and the Washington State apple industry.
12. Sapphire, "A Homeless Man's Alternative to 'Care Not Cash,'" *Poor Magazine*, July 1, 2003, at http://www.poormagazine.org/index.cfm?L1=news&category=50&stor=1241.
13. The Sentencing Project, "Life Sentences: Denying Welfare Benefit to Women Convicted of Drug Offenses," at http://www.sentencingprogrject.org/Admin/Documents/publications/women_smy_lifesentences.pdf.
14. Alan David Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine," 62 MINN. L. REV. 1049, 1052 (1978).
15. Visit generationFIVE at http://www.generationfive.org and Stop It Now! at http://www.stopitnow.org online for more research documenting and tools for ending child sexual abuse.
16. For a critique of hate crimes legislation, see Carolina Cordero Dyer, "The Passage of Hate Crimes Legislation–No Cause to Celebrate," INCITE! Women of Color Against Violence, March 2001 at http://www.incite-national.org/news/_march01/editorial.html. Also see INCITE!-Denver and Denver on Fire's response to the verdict in the 2009 Angie Zapata case at http://www.leftturn.org/?q=node/1310.
17. For an in-depth analysis of the growth and impacts of "nonprofit industrial complex," see INCITE! Women of Color Against Violence's groundbreaking anthology *The Revolution Will Not Be Funded: Beyond the Non-Profit Industrial Complex,* published by South End Press in 2007.
18. For a deeper examination of the FBI's attack on radical movements, see Ward Churchill and Jim Vander Wall's *The COINTELPRO Papers: Documents from the FBI's Secret War Against Domestic Dissent*, published by South End Press in 1990. Also see the Freedom Archive's 2006 documentary *Legacy of Torture: The War Against the Black Liberation Movement* about the important case of the San Francisco 8. Information available online at http://www.freedomarchives.org/BPP/torture.html.
19. See Justice Now co-founder Cassandra Shaylor's essay "Neither Kind Nor Gentle: The Perils of 'Gender Responsive Justice'" in *The Violence of Incarceration*, edited by Phil Scraton and Jude McCulloch, published by Routledge in 2008.
20. Academy of Achievement: A Museum of Living History, "Rosa Parks," October, 25, 2005 at http://www.achievement.org/autodoc/page/par0pro-1.

21. Academy of Achievement: A Museum of Living History, "Rosa Parks," October, 31, 2005 at http://www.achievement.org/autodoc/page/par0bio-1.
22. CNNMoney.com, "Oprah Car Winners Hit with Hefty Tax," September, 22, 2004 at http://money.cnn.com/2004/09/22/news/newsmakers/oprah_car_tax/index.htm.
23. We recognize that we mention only relatively well-funded organizations and mostly organizations in the San Francisco Bay Area and New York City, two strongholds of radical organizing and also places where a significant amount of resources are concentrated. There are hundreds of other organizations around the country and the world that we do not mention and do not know about. *What organizations or spaces do you see embodying radical values?*
24. The Sylvia Rivera Law Project at http://www.srlp.org.
25. Queers for Economic Justice at http://www.q4ej.org.
26. Transgender, Gender Variant, and Intersex Justice Project at http://www.tgijp.org.
27. Critical Resistance at http://www.criticalresistance.org.
28. FIERCE! at http://www.fiercenyc.org.
29. Southerners on New Ground at http://www.southernersonnewground.org .
30. See Creative Interventions at http://www.creative-interventions.org, generationFIVE at http://www.generationfive.org, Communities Against Rape and Abuse at http://www.cara-seattle.org, and Audre Lorde Project's Safe OUTside the System Collective at http://www.alp.org.
31. For examples of LGBTQ-specific organizations creating community-based responses to violence, see the Audre Lorde Project's Safe Outside the System Collective in Brooklyn (www.alp.org), the Northwest Network of BTLG Survivors of Abuse in Seattle, and Community United Against Violence (CUAV) in San Francisco (www.cuav.org).
32. Particularly significant was the Transforming Justice gathering in San Francisco in October 2007, which brought together over two hundred LGBTQ and allied formerly imprisoned people, activists, and attorneys to develop a shared analysis about the cycles of trans poverty, criminalization, and imprisonment and a shared strategy moving forward. Transforming Justice, which has now transitioned to a national coalition, was a culmination of tireless and often invisible work on the part of imprisoned and formerly imprisoned people and their allies over the past many years. For more, see www.transformingjustice.org.
33. See the Transforming Justice Coalition's statement "How We Do Our Work" for a more detailed account of day-to-day organizing ethics, which can be requested from the TGI Justice Project at http://www.tgijp.org.
34. Both of the lessons here were significantly and powerfully articulated and popularized by Critical Resistance and Justice Now, both primarily based in Oakland, CA.

consequence of prosecutorial discretion. Such decisions affect the base offense level assessed defendants, of course; but, this alone does not cause a constitutional violation. *See Batchelder*, 442 U.S. at 125, 99 S.Ct. 2198 (citations omitted) ("The prosecutor may be influenced [in his charging decision] by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the . . . Due Process Clause.").

[15] Nor do the differing base offense levels allow, as Ross claims, prosecutorial selection of the ultimate sentence. Pursuant to *United States v. Booker*, 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), which rendered the Guidelines advisory, the district court determines that sentence. *E.g.*, *Beckles*, 137 S. Ct. at 894. "The court relie[s] on the [Guidelines] merely for advice in exercising its discretion to choose a sentence within [the] statutory limits." *Id.* at 895.

The court's downward variance in this instance demonstrates the distinction between the advisory Guidelines sentencing range and the sentence imposed. The Guidelines sentencing range Ross complains was arbitrarily assigned him (because he was charged with receipt in count one) did not bind the court, which exercised its discretion to vary from the Guidelines and impose a significantly lower sentence. This advisory character is precisely why the Guidelines "are not amenable to a vagueness challenge". *See id.* at 894.

III.

For the foregoing reasons, the judgment is AFFIRMED.

UNITED STATES of America, Plaintiff - Appellee

v.

Norman VARNER, Defendant - Appellant

No. 19-40016
Summary Calendar

United States Court of Appeals, Fifth Circuit.

FILED January 15, 2020

Background: Federal prisoner filed letter request to change the name on judgment of confinement, alleging that prisoner had come out as a transgender woman. The United States District Court for the Eastern District of Texas, Marcia A. Crone, J., construed the motion as a motion to correct the judgment of committal, and denied the motion. Prisoner appealed and filed motion to be addressed using female pronouns.

Holdings: The Court of Appeals, Duncan, Circuit Judge, held that:

(1) district court was not authorized to consider prisoner's request under the federal criminal procedure rule allowing correction of sentences;

(2) district court was not authorized to consider prisoner's request under the federal criminal procedure rule allowing correction of clerical errors in judgments; and

(3) a federal court cannot require litigants, judges, court personnel, or anyone else to refer to litigants with gender dysphoria with pronouns matching their subjective gender identity.

Judgment vacated; motion denied.

Dennis, Circuit Judge, filed a dissenting opinion.

1. Criminal Law [redacted]

[redacted]

2. Federal Courts [redacted]

[redacted]

3. Federal Courts [redacted]

[redacted]

4. Sentencing and Punishment [redacted]

[redacted]

5. Criminal Law [redacted]

[redacted]

6. Criminal Law [redacted]

[redacted]

7. Criminal Law [redacted]

[redacted]

8. Criminal Law [redacted]

[redacted]

9. Criminal Law [redacted]

[redacted]

10. Federal Civil Procedure [redacted]

[redacted]

[redacted]

11. Judges [redacted]

12. Judges [redacted]

Appeal from the United States District Court for the Eastern District of Texas, Marcia A. Crone, U.S. District Judge

Bradley Elliot Visosky, Amanda Louise Griffith, Marisa J. Miller, Assistant U.S. Attorneys, U.S. Attorney's Office, Eastern District of Texas, Plano, TX, for Plaintiff - Appellee.

Norman Varner, Pro Se.

Before SMITH, DENNIS, and DUNCAN, Circuit Judges.

STUART KYLE DUNCAN, Circuit Judge:

Norman Varner, federal prisoner # 18479-078, appeals the denial of his motion to change the name on his judgment of confinement to "Kathrine Nicole Jett." The district court denied the motion as meritless. We conclude that the district court lacked jurisdiction to entertain the motion and so vacate the court's judgment. In conjunction with his appeal, Varner also moves that he be addressed with female pronouns. We will deny that motion.

I.

In 2012, Varner pled guilty to one count of attempted receipt of child pornography and was sentenced to 180 months in prison, to be followed by 15 years supervised release. Varner's federal sentence was influenced by his previous convictions at the state level for possession of child pornography and failure to register as a sex offender. In 2018, Varner wrote a letter to the district court requesting that the name on his judgment of committal ("Norman Keith Varner") be changed to reflect his "new legal name of Kathrine Nicole Jett." Varner's letter explained that he "ca[me] out as a transgender woman" in 2015, began "hormone replacement therapy" shortly after, and planned to have "gender reassignment surgery in the near future" in order to "finally become fully female." Attached to Varner's letter was a certified copy of a 2018 order from a Kentucky state court changing Varner's name.

The government opposed Varner's request, arguing principally that Varner alleged no defect in the original judgment and that a "new preferred name" was not a basis for amending a judgment. *See* Fed. R. Crim. P. 36 (upon notice, court may "correct a clerical error in a judgment, order, or other part of the record"). The government also pointed out that, under Bureau of Prisons ("BOP") regulations, Varner would be able to use his preferred name as a secondary name or alias. *See* BOP Policy No. 5800.15, § 402(d). Finally, the government argued that Varner's name change was, in any event, improperly obtained under Kentucky law: Varner

swore in his petition that he was then a resident of "Covington, Kentucky," when, in fact, he was at the time incarcerated at a federal facility in Waymart, Pennsylvania.

The district court construed Varner's letter as a motion to correct his judgment of committal and denied it on the merits. The court reasoned that a "new, preferred name is not a legally viable basis to amend the previously entered Judgment," and, moreover, that inmates have no constitutional right to have prison records reflect a new name. Order at 2 (citing *United States v. Baker*, 415 F.3d 1273, 1274 (11th Cir. 2005); *United States v. White*, 490 F. App'x 979, 982 (10th Cir. 2012); *United States v. Jordan*, 162 F.3d 93 (5th Cir. 1998)). Additionally, the court concluded that Varner "does not appear to have legally changed his name" under Kentucky law because his prison records reflected that he was not a resident of Kentucky when he petitioned for a name change. Order at 2–3 (citing Ky. Rev. Stat. § 401.010). Finally, the court noted that the relief Varner sought is "achievable without amending the Judgment." *Id.* at 3. As the court explained, BOP regulations allow Varner to use "Kathrine Nicole Jett" as a secondary name and also authorize BOP staff "to use either gender-neutral or an inmate's requested gender-specific pronoun or salutation when interacting with transgender inmates." *Id.* (citing BOP Policy No. 5800.15, § 402(d); BOP Policy No. 5200.04, § 11).

[1] Varner appealed the district court's denial of his motion to amend the judgment, which we review *de novo*. *See United States v. Douglas*, 696 F. App'x 666, 668 (5th Cir. 2017) (per curiam) (citing *United States v. Ramirez-Gonzalez*, 840 F.3d 240, 246 (5th Cir. 2016)); *see also United States v. Davis*, 841 F.3d 1253, 1261 (11th Cir. 2016). Along with his appeal, Varner has filed various motions in our court, including a "motion to use female pronouns when addressing Appellant" and motions to "submit [his] photograph into evidence" or to "appear ... either by phone, videoconference, or in person."

II.

A.

[2, 3] While the district court's reasons are well-taken, we conclude that Varner's request to change the name on his judgment of commitment was "an unauthorized motion which the district court was without jurisdiction to entertain." *United States v. Early*, 27 F.3d 140, 142 (5th Cir. 1994). Our jurisdiction is predicated upon the valid jurisdiction of the district court, and so we must examine the basis for the district court's jurisdiction. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000); *Mosley v. Cozby*, 813 F.2d 659 (5th Cir. 1987). "Absent jurisdiction conferred by statute, district courts lack power to consider claims." *Veldhoen v. United States Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994). "If the district court lacked jurisdiction, '[o]ur jurisdiction extends not to the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' " *Key*, 205 F.3d at 774 (quoting *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 882 (5th Cir. 1998)). We conclude that Varner's motion was unauthorized by any statute and that the district court therefore lacked jurisdiction to entertain it.

[4–6] Varner's letter request does not fall into any of the recognized categories of postconviction motions. Although a district court has authority to correct a sentence under Federal Rule of Criminal Procedure 35 and to correct clerical mistakes in judgments and orders under Federal Rule of Criminal Procedure 36, Varner's request does not fall under either rule. The request

did not implicate Rule 35 because it was neither made "[w]ithin 14 days after sentencing," nor was it made by the government. *See* Fed. R. Crim. P. 35(a) (allowing court to correct "arithmetical, technical, or other clear error" in sentence "[w]ithin 14 days after sentencing"); *id.* 35(b)(1), (2) (allowing sentence reduction on certain grounds "[u]pon the government's motion"). Nor did the request implicate Rule 36 because it did not seek correction of a "clerical error in [the] judgment." Fed. R. Crim. P. 36. A clerical error occurs "when the court intended one thing but by merely clerical mistake or oversight did another." *United States v. Buendia-Rangel*, 553 F.3d 378, 379 (5th Cir. 2008); *see also Ramirez-Gonzalez*, 840 F.3d at 247 (Rule 36 is a "limited tool[ ] meant only to correct mindless and mechanistic mistakes") (internal quotation marks and citations omitted). A name change obtained six years after entry of judgment is not a clerical error within the meaning of Rule 36.

[7–9] Nor was Varner's request authorized under 18 U.S.C. § 3582(c)(2) because it was not based upon an amendment to the Sentencing Guidelines. *See* § 3582(c)(2) (permitting court to modify term of imprisonment "based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. [§] 994(*o*)"). Additionally, the district court could not construe the request as a motion arising under 18 U.S.C. § 3742, which applies only to direct appeals. *See Early*, 27 F.3d at 142 (explaining that relief under § 3742 is "available ... only upon direct appeal of a sentence or conviction"). Finally, the request did not arise under 28 U.S.C. § 2255 because Varner did not challenge the validity of his conviction or sentence. *See United States v. Segler*, 37 F.3d 1131, 1137 (5th Cir. 1994) (explaining "Congress ... meant to limit the types of claims cognizable under § 2255 to claims relating to unlawful custody"). In sum, Varner's request to change the name on his judgment was an unauthorized motion that the district court lacked jurisdiction to entertain.

B.

We next consider Varner's motion for the "use [of] female pronouns when addressing [Varner]." We understand Varner's motion as seeking, at a minimum, to require the district court and the government to refer to Varner with female instead of male pronouns.[1] Varner cites no legal authority supporting this request. Instead, Varner's motion simply states that "I am a woman" and argues that failure to refer to him with female pronouns "leads me to feel that I am being discriminated against based on my gender identity." Varner's reply brief elaborates that "[r]eferring to me simply as a male and with male pronouns based solely on my biological body makes me feel very uneasy and disrespected." We deny the motion for the following reasons.

[10] First, no authority supports the proposition that we may require litigants, judges, court personnel, or anyone else to refer to gender-dysphoric[2] litigants with

1. The district court's order refers to Varner with male pronouns, as does the government's letter brief.

2. "Gender dysphoria" refers to a condition where persons perceive a "marked incongruence" between their birth sex and "their experienced / expressed gender." *See Gibson v. Collier*, 920 F.3d 212, 217 (5th Cir. 2019) (citing American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) ("DSM-5"), at 452) (cleaned up). Someone suffering from this condition may identify with the opposite sex, but the condition "may include a desire to be of an alternative gender" beyond the "binary" of male and female. DSM-5 at 453.

pronouns matching their subjective gender identity. Federal courts sometimes choose to refer to gender-dysphoric parties by their preferred pronouns.[3] On this issue, our court has gone both ways. *Compare Rush v. Parham*, 625 F.2d 1150, 1153 n.2 (5th Cir. 1980) (adopting "for this opinion" the "convention" in "medical literature" of using "feminine pronouns . . . to describe a transsexual with a male biological gender"), *with Gibson*, 920 F.3d at 217 n.2 (using "male pronouns" to refer to gender-dysphoric prisoner who was "born male" but has "lived as a female since the age of 15"); *see also Praylor v. Tex. Dep't of Crim. Justice*, 430 F.3d 1208, 1208–09 (5th Cir. 2005) (per curiam) (using male pronouns to refer to "transsexual[ ]" inmate who sought injunction requiring prison "to provide him with hormone therapy and brassieres"). But the courts that have followed this "convention," *Schwenk*, 204 F.3d at 1192, have done so purely as a courtesy to parties. *See, e.g., Farmer v. Haas*, 990 F.2d at 320 (using female pronouns to "respect [petitioner's] preference"). None has adopted the practice as a matter of binding precedent, and none has purported to obligate litigants or others to follow the practice.

Varner's motion in this case is particularly unfounded. While conceding that "biological[ly]" he is male, Varner argues female pronouns are nonetheless required to prevent "discriminat[ion]" based on his female "gender identity." But Varner identifies no federal statute or rule requiring courts or other parties to judicial proceedings to use pronouns according to a litigant's gender identity. Congress knows precisely how to legislate with respect to gender identity discrimination, because it has done so in specific statutes. *See Witt-*

The condition affects a tiny fraction of people. *See* DSM-5 at 454 (estimating prevalence for adult males from "0.0005% to 0.014%" and for adult females from "0.002% to 0.003%"). When it affects children, the condition often does not persist into adolescence or adulthood. *See id.* at 455 (estimating persistence for boys from "2.2% to 30%" and for girls from "12% to 50%"). Finally, "gender dysphoria" is to be distinguished from a "disorder of sex development," in which the development of male or female sex organs is affected by genetic or hormonal factors. *See id.* at 451, 456.

3. *See, e.g., Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993) ("[T]he defendants say 'he,' but Farmer prefers the female pronoun and we shall respect her preference."); *Farmer v. Circuit Court of Maryland for Baltimore Cty.*, 31 F.3d 219, 220 n.1 (4th Cir. 1994) ("This opinion, in accord with Farmer's preference, will use feminine pronouns."); *Murray v. U.S. Bureau of Prisons*, 106 F.3d 401 n.1 (6th Cir. 1997) ("Murray uses the feminine pronoun to refer to herself. Although the government in its brief used the masculine pronoun, for purposes of this opinion we will follow Murray's usage."); *Schwenk v. Hartford*, 204 F.3d 1187, 1192 (9th Cir. 2000) ("In using the feminine rather than the masculine designation when referring to Schwenk, we follow the convention of other judicial decisions involving male-to-female transsexuals which refer to the transsexual individual by the female pronoun."); *Cuoco v. Moritsugu*, 222 F.3d 99, 103, 103 n.1 (2d Cir. 2000) ("We . . . refer to the plaintiff using female pronouns" because "[s]he [is] a preoperative male to female transsexual."); *Smith v. Rasmussen*, 249 F.3d 755, 757 (8th Cir. 2001) ("As did the parties during the proceedings in the district court, we will refer to Smith, in accordance with his preference, by using masculine pronouns."); *Kosilek v. Spencer*, 740 F.3d 733, 737 (1st Cir. 2014) ("We will refer to Kosilek as her preferred gender of female, using feminine pronouns."); *Pinson v. Warden Allenwood USP*, 711 F. App'x 79, 80 (3d Cir. 2018) ("Because Pinson has referred to herself using feminine pronouns throughout this litigation, we will follow her example."); *but see Jeune v. U.S. Atty. Gen.*, 810 F.3d 792, 796 n.1 (11th Cir. 2016) (despite petitioner's use of "feminine pronouns in referring to himself on appeal," using "masculine pronouns" given that petitioner previously "identified as a male, and the immigration judge and BIA so referred to him, using masculine pronouns").

mer v. Phillips 66 Co., 915 F.3d 328, 338 (5th Cir. 2019) (Ho, J., concurring) (citing *Hively v. Ivy Tech Comm. Coll. of Indiana*, 853 F.3d 339, 363–64 (7th Cir. 2017) (Sykes, J., dissenting)) (observing that "both Congress and various state legislatures have expressly prohibited ... gender identity discrimination by using the term[ ] ... 'gender identity' discrimination"). As Judge Sykes pointed out in her *Hively* dissent, Congress has expressly proscribed gender identity discrimination in laws such as the Violence Against Women Act, 34 U.S.C. § 12291(b)(13)(A), the federal Hate Crimes Act, 18 U.S.C. § 249(a)(2)(A), and elsewhere. *See id.* at 363–64 (citing 42 U.S.C. § 3716(a)(1)(C); 20 U.S.C. § 1092(f)(1)(F)(ii); 42 U.S.C. § 294e-1(b)(2)). But Congress has said nothing to prohibit courts from referring to litigants according to their biological sex, rather than according to their subjective gender identity.

[11, 12] Second, if a court were to compel the use of particular pronouns at the invitation of litigants, it could raise delicate questions about judicial impartiality. Federal judges should always seek to promote confidence that they will dispense even-handed justice. *See* Canon 2(A), Code of Conduct for United States Judges (requiring judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"). At its core, this judicial impartiality is "the lack of bias for or against either party to the proceeding," which "assures equal application of the law." *Repub. Party of Minn. v. White*, 536 U.S. 765, 775–76, 122 S.Ct. 2528, 153 L.Ed.2d 694 (1992) (cleaned up); *see also, e.g., Buntion v. Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008) (explaining that defendants' "right to a fair trial" is in part "fulfilled by a judicial officer who impartially presides over the trial") (citing *Bracy v. Gramley*, 520 U.S. 899, 904–05, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997)). Increasingly, federal courts today are asked to decide cases that turn on hotly-debated issues of sex and gender identity. *See, e.g.*, *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018), *cert. denied*, —— U.S. ——, 139 S. Ct. 2636, 204 L.Ed.2d 300 (2019) (evaluating school district policy allowing students to use bathrooms and locker rooms corresponding to their gender identity instead of their sex); *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla.*, 318 F. Supp. 3d 1293, 1296 (M.D. Fla. 2018) (stating that "what this case is about" is "whether Drew Adams is a boy"). In cases like these, a court may have the most benign motives in honoring a party's request to be addressed with pronouns matching his "deeply felt, inherent sense of [his] gender." *Edmo v. Corizon, Inc.*, 935 F.3d 757, 768 (9th Cir. 2019) (cleaned up). Yet in doing so, the court may unintentionally convey its tacit approval of the litigant's underlying legal position. *See*, *e.g.*, *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 297 (5th Cir. 1977) (observing that a trial judge "must make every effort to preserve the appearance of strict impartiality," including by "exhibit[ing] neutrality in his language"). Even this appearance of bias, whether real or not, should be avoided.

Third, ordering use of a litigant's preferred pronouns may well turn out to be more complex than at first it might appear. It oversimplifies matters to say that gender dysphoric people merely prefer pronouns opposite from their birth sex—"her" instead of "his," or "his" instead of "her." In reality, a dysphoric person's "[e]xperienced gender may include alternative gender identities beyond binary stereotypes." DSM-5, at 453; *see also, e.g.*, Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that Is More Inclusive of Transgender People*, 11

Mich. J. Gender & L. 253, 261 (2005) (positing that gender is not binary but rather a three-dimensional "galaxy"). Given that, one university has created this widely-circulated pronoun usage guide for gender-dysphoric persons:

1	2	3	4	5
(f)ae	(f)aer	(f)aer	(f)aers	(f)aerself
e/ey	em	eir	eirs	eirself
he	him	his	his	himself
per	per	pers	pers	perself
she	her	her	hers	herself
they	them	their	theirs	themself
ve	ver	vis	vis	verself
xe	xem	xyr	xyrs	xemself
ze/zie	hir	hir	hirs	hirself

Pronouns – A How To Guide, LGBTQ+ Resource Center, University of Wisconsin-Milwaukee, https://uwm.edu/lgbtrc/support/gender-pronouns/; *see also* Jessica A. Clark, *They, Them, and Theirs*, 132 Harv. L. Rev. 894, 957 (2019) (explaining "[s]ome transgender people may request . . . more unfamiliar pronouns, such as ze (pronounced 'zee') and hir (pronounced 'hear'))." If a court orders one litigant referred to as "her" (instead of "him"), then the court can hardly refuse when the next litigant moves to be referred to as "xemself" (instead of "himself"). Deploying such neologisms could hinder communication among the parties and the court. And presumably the court's order, if disobeyed, would be enforceable through its contempt power. *See Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995) ("A party commits contempt when he violates a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order."); *see also* 18 U.S.C. § 401. When local governments have sought to enforce pronoun usage, they have had to make refined distinctions based on matters such as the types of allowable pronouns and the intent of the "misgendering" offender. *See* Clark, 132 Harv. L. Rev. at 958–59 (discussing New York City regulation prohibiting "intentional or repeated refusal" to use pronouns including "them/them/theirs or ze/hir" after person has "made clear" his preferred pronouns).[4] Courts would have to do the

4. *See also* NYC Commission 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(23),* 4-5 (2015) https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderID_InterpretiveGuide_2015.pdf [https://perma.cc/C994-QAMV]; D.C. Mun. Regs. tit. 4, § 808.2(a) (2017) (making evidence of "unlawful harassment and hostile environment," *inter alia*, "[d]eliberately misusing an individual's preferred name form of address or gender-related pronoun," in light of the "totality of the circumstances . . . including the nature, frequency, and severity of the behavior, [and] whether it is physically threatening or humiliating, or a mere offensive utterance").

same. We decline to enlist the federal judiciary in this quixotic undertaking.

***

We VACATE the district court's judgment. Varner's motion to require use of female pronouns, to submit a photograph, and to appear are DENIED. Varner's motion to file an out-of-time reply brief is GRANTED.

JAMES L. DENNIS, Circuit Judge, dissenting.

I respectfully dissent. In my view, the majority errs in (1) deciding that the district court lacked jurisdiction to entertain and deny Varner's motion under Rule 36; (2) overbroadly construing Varner's motion in this court seeking the use of feminine pronouns; and (3) denying Varner's request to refer to her using female pronouns.

I.

The majority errs in concluding that the district court did not have jurisdiction to consider and rule on Varner's pro-se motion to amend the judgment of conviction to recognize her change of name. Federal Rule of Criminal Procedure 36 allows the court, at any time, to correct "a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." FED. R. CRIM. PROC. 36. The district court explained that the name change, which occurred several years after the finality of the judgment, did not constitute a clerical error in that judgment that could be corrected under Federal Rule of Criminal Procedure 36 and that Varner's motion did not suggest any other rule or statute under which the name change amendment could be made. The majority determines that because Varner's request to amend the judgment of conviction fails on the merits under Rule 36, the district court lacked jurisdiction to entertain her motion. I disagree.

We have repeatedly denied relief under Rule 36 when the motion failed on the merits without questioning the district court's jurisdiction to entertain the motion. *See United States v. Ramirez-Gonzalez*, 840 F.3d 240, 247 (5th Cir. 2016) (affirming district court's denial of defendant's Rule 36 motion because "there is no error to be corrected"); *United States v. Buendia-Rangel*, 553 F.3d 378, 379 (5th Cir. 2008) (declining defendant's Rule 36 motion because "[w]e find no clerical error in the judgment below"); *United States v. Slanina*, 359 F.3d 356, 357 (5th Cir. 2004) (affirming district court's denial of defendant's Rule 36 motion because defendant "has not shown that the discrepancy between the orally imposed sentence and the written judgment is a clerical mistake or oversight which the district court may correct pursuant to Rule 36"). Moreover, we have evaluated prisoners' motions to change their names in the judgment of conviction, again without questioning the district court's jurisdiction. *See United States v. Smith*, 520 F. App'x 248, 249 (5th Cir. 2013) ("[W]e find no error in the district court's denial of the motion to change Smith's committed name."); *United States v. Jordan*, No. 98-10287, 1998 WL 770660, at *1 (5th Cir. Oct. 14, 1998).

The cases cited by the majority as authority for its conclusion that the district court lacked jurisdiction to entertain Varner's motion are inapposite here. For example, in *United States v. Early*, 27 F.3d 140, 141 (5th Cir. 1994), the defendant appealed the district court's denial of his motion for a reduction of his sentence, arguing that this court had jurisdiction under 18 U.S.C. § 3742(a). We found that § 3742 provided no jurisdictional basis for Early's motion because "[t]he provisions for modification of a sentence under § 3742

are available to a defendant only upon direct appeal of a sentence or conviction," and Early did not file a notice of appeal from final judgment. *Id.* at 142. We also evaluated other statutes and determined that none provided a jurisdictional basis for Early's motion to reduce his sentence. *Id.* at 141-42.

Unlike the defendant's motion in *Early*, Federal Rule of Criminal Procedure 36 provides the jurisdictional basis for Varner's motion. The rule plainly provides a court with authority to, at any time, correct a clerical error in its judgment. *See* FED. R. CRIM. P. 36. This necessarily recognizes a court's authority to entertain motions to ascertain whether there is an error that falls within the rule's ambit and therefore must be corrected. I have found no cases interpreting a failure to succeed on the merits under Rule 36 as precluding a court's jurisdiction to entertain the motion. I agree with the majority that "[a] name change obtained six years after entry of judgment is not a clerical error within the meaning of Rule 36," but I believe this is a basis for affirming the district court's denial of Varner's motion, not for concluding that the district court lacked jurisdiction to consider it. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case."). The Supreme Court has cautioned against "drive-by jurisdictional" rulings similar to the majority's here, stating:

> Judicial opinions, the Second Circuit incisively observed, "often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Da Silva* [*v. Kinsho Int'l Corp.*], 229 F.3d [358,] 361 [(2d Cir. 2000)]. We have described such unrefined dispositions as "drive-by jurisdictional rulings" that should be accorded "no precedential effect" on the question whether the federal court had authority to adjudicate the claim in suit. *Steel Co.*, 523 U.S. at 91 [118 S.Ct. 1003].
>
> *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006).

I do not question the district court's jurisdiction to entertain Varner's motion to have her judgment of conviction altered to reflect her new name, and I would affirm that judgment for the reasons stated by the district court.

II.

In addition to her appeal, Varner, a pro-se prisoner, submitted the following motion to this court:

> Motion to Use Female Pronouns When Addressing Appellant
>
> I am a woman and not referring to me as such leads me to feel that I am being discriminated against based on my gender identity. I am a woman—can I not be referred to as one?

The majority concludes that, based on Varner's two-sentence, pro-se motion, Varner seeks, "at a minimum, to require the district court and the government to refer to Varner with female instead of male pronouns." But Varner's request is not so broad. The terms "district court" and "government" are not mentioned in Varner's motion. The motion was filed in *this* court and is titled "Motion to Use Female Pronouns When Addressing Appellant." Var-

ner's use of the term "appellant" to describe herself leads to the conclusion that her request is confined to the terms used by this court in this proceeding.

In my view, Varner is simply requesting that *this court*, *in this proceeding*, refer to Varner using her preferred gender pronouns. Not only is this the most faithful interpretation of her motion given the language she uses, it is also the narrowest. Because I would affirm the district court for the reasons it assigns without writing further, I think it is not necessary to use any pronoun in properly disposing of this appeal.

If it were necessary to write more and use pronouns to refer to Varner, I would grant Varner the relief she seeks. As the majority notes, though no law compels granting or denying such a request, many courts and judges adhere to such requests out of respect for the litigant's dignity. *See, e.g.*, *Kosilek v. Spencer*, 740 F.3d 733, 737 n.3 (1st Cir. 2014) ("We will refer to Kosilek as her preferred gender of female, using feminine pronouns."); *Cuoco v. Moritsugu*, 222 F.3d 99, 103, 103 n.1 (2d Cir. 2000) ("We . . . refer to the plaintiff using female pronouns" because "[s]he [is] a preoperative male to female transsexual."); *Pinson v. Warden Allenwood USP*, 711 F. App'x 79, 80 n.1 (3d Cir. 2018) ("Because Pinson has referred to herself using feminine pronouns throughout this litigation, we will follow her example."); *Farmer v. Circuit Court of Md. for Baltimore Cty.*, 31 F.3d 219, 220 n.1 (4th Cir. 1994) ("This opinion, in accord with Farmer's preference, will use feminine pronouns."); *Murray v. U.S. Bureau of Prisons*, 106 F.3d 401, 1997 WL 34677, at *1 n.1 (6th Cir. 1997) ("Murray uses the feminine pronoun to refer to herself. Although the government in its brief used the masculine pronoun, for purposes of this opinion we will follow Murray's usage."); *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993) ("[T]he defendants say 'he,' but Farmer prefers the female pronoun and we shall respect her preference."); *Smith v. Rasmussen*, 249 F.3d 755, 756 n.2 (8th Cir. 2001) ("As did the parties during the proceedings in the district court, we will refer to Smith, in accordance with his preference, by using masculine pronouns."); *Schwenk v. Hartford*, 204 F.3d 1187, 1192 n.1 (9th Cir. 2000) ("In using the feminine rather than the masculine designation when referring to Schwenk, we follow the convention of other judicial decisions involving male-to-female transsexuals which refer to the transsexual individual by the female pronoun."); *Qz'etax v. Ortiz,* 170 F. App'x 551, 553 (10th Cir. 2006) ("[W]e have no objection to Appellant's motion for the continued usage of proper female pronouns and will continue to use them when referring to her.").

Ultimately, the majority creates a controversy where there is none by misinterpreting Varner's motion as requesting "at a minimum, to require the district court and the government to refer to Varner with female instead of male pronouns," when she in fact simply requests that this court address her using female pronouns while deciding her appeal. The majority then issues an advisory opinion on the way it would answer the hypothetical questions that only it has raised. Such an advisory opinion is inappropriate, unnecessary, and beyond the purview of federal courts. *See F.C.C. v. Pacifica Found.*, 438 U.S. 726, 735, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) ("[F]ederal courts have never been empowered to issue advisory opinions."); *Whitehouse Hotel Ltd. P'ship v. Comm'r*, 615 F.3d 321, 343 (5th Cir. 2010) (Garza, J., concurring in part) ("Federal courts are only permitted to rule upon an actual 'case or controversy,' and lack jurisdiction to render merely advisory opinions beyond the rulings necessary to resolve a dis-

pute."); *In re Michaelson*, 511 F.2d 882, 893 (9th Cir. 1975) ("This Court does not intend to and cannot, issue an advisory opinion on a hypothetical fact situation."). The majority's lengthy opinion is dictum and not binding precedent in this court. *United States v. Becton*, 632 F.2d 1294, 1296 n.3 (5th Cir. 1980) ("We are not bound by dicta, even of our own court.").

For these reasons, I respectfully but emphatically dissent.

ENERGY INTELLIGENCE GROUP, INCORPORATED; Energy Intelligence Group (UK) Limited, Plaintiffs - Appellants Cross-Appellees

v.

KAYNE ANDERSON CAPITAL ADVISORS, L.P.; K.A. Fund Advisors, L.L.C., Defendants - Appellees Cross-Appellants

Energy Intelligence Group, Incorporated; Energy Intelligence Group (UK) Limited, Plaintiffs - Appellants

v.

Kayne Anderson Capital Advisors, L.P.; K.A. Fund Advisors, L.L.C., Defendants - Appellees

No. 18-20350
cons w/18-20615

United States Court of Appeals,
Fifth Circuit.

FILED January 15, 2020

Background: Publisher of subscription newsletter brought action against subscriber, alleging that subscriber violated Copyright Act and Digital Millennium Copyright Act (DMCA) by distributing copies of newsletters to its employees and others who were not subscribers. The United States District Court for the Southern District of Texas, Sim Lake, J., 2017 WL 3206896, denied subscriber's motion for referral to Register of Copyrights, and after jury verdict in favor of publisher, awarded attorney fees and costs to publisher, 2018 WL 2048896, and granted subscriber's motion in part for costs pursuant to offer of judgment rule, 326 F.R.D. 453. Parties appealed.

Holdings: The Court of Appeals, Higginson, Circuit Judge, held that:

(1) on issue of first impression, mitigation was not absolute defense to statutory damages under Copyright Act;

(2) on issue of first impression, mitigation was not complete defense to DMCA statutory damages;

(3) portable document format (PDF) file names identifying each version of copyrighted daily newsletter were copyright management information (CMI);

(4) immediate referral to Copyright Office was not required whenever party alleged that inaccurate information was knowingly included on application for copyright registration;

(5) district court did not clearly err when it concluded that publisher did not knowingly include inaccuracies in its copyright registration; and

(6) judgment had to be vacated and case remanded to determine proper statutory damages for each of 1,646 infringed works.

Vacated and remanded.

1. Copyrights and Intellectual Property ⚿87(3.1)

Mitigation is not absolute defense to statutory damages under Copyright Act.

Reading Guide for *U.S. v. Varner*

1. For what reason does the majority of the Court of Appeals conclude the district court lacked jurisdiction over the transgender woman appellant's motion to change the name on her judgment of confinement? For what reason does the dissenting judge believe that conclusion erroneous, and how would the dissent rule on the appeal of the district court's denial of that name change motion?
2. What does the majority interpret the appellant's motion to use female pronouns when addressing her? For what reasons does it deny the motion so construed? (What is its argument about lack of authority? What is its argument about federal statutes or rules? What is its judicial impartiality argument? What is its argument about nonbinary gender?) What does it say about the appellant's motion to submit a photograph or to appear at the appeal?
3. How does the dissenting judge construe the appellant's pronoun motion? What is the dissent's preferred resolution of that motion? In the alternative, how would the dissenting judge resolve the motion? On what grounds does the dissent criticize the majority's resolution?

UNITED STATES of America, Plaintiff-Appellee
v.
Norman VARNER, Defendant-Appellant
948 F.3d 250 (5th Cir. Jan. 15, 2020)

Before SMITH, DENNIS, and DUNCAN, Circuit Judges.

STUART KYLE DUNCAN, Circuit Judge:

Norman Varner, federal prisoner # 18479-078, appeals the denial of his motion to change the name on his judgment of confinement to "Kathrine Nicole Jett." The district court denied the motion as meritless. We conclude that the district court lacked jurisdiction to entertain the motion and so vacate the court's judgment. In conjunction with his appeal, Varner also moves that he be addressed with female pronouns. We will deny that motion.

I.

In 2012, Varner pled guilty to one count of attempted receipt of child pornography and was sentenced to 180 months in prison, to be followed by 15 years supervised release.... In 2018, Varner wrote a letter to the district court requesting that the name on his judgment of committal ("Norman Keith Varner") be changed to reflect his "new legal name of Kathrine Nicole Jett." Varner's letter explained that he "ca[me] out as a transgender woman" in 2015, began "hormone replacement therapy" shortly after, and planned to have "gender reassignment surgery in the near future" in order to "finally become fully female." Attached to Varner's letter was a certified copy of a 2018 order from a Kentucky state court changing Varner's name.

The government opposed Varner's request, arguing principally that Varner alleged no defect in the original judgment and that a "new preferred name" was not a basis for amending a judgment. *See* FED. R. CRIM. P. 36 (upon notice, court may "correct a clerical error in a judgment, order, or other part of the record"). The government also pointed out that, under Bureau of Prisons ("BOP") regulations, Varner would be able to use his preferred name as a secondary name or alias. Finally, the government argued that Varner's name change was, in any event, improperly obtained under Kentucky law: Varner swore in his petition that he was then a resident of "Covington, Kentucky," when, in fact, he was at the time incarcerated at a federal facility in Waymart, Pennsylvania.

The district court construed Varner's letter as a motion to correct his judgment of committal

and denied it on the merits. The court reasoned that a "new, preferred name is not a legally viable basis to amend the previously entered Judgment" .... Additionally, the court concluded that Varner "does not appear to have legally changed his name" under Kentucky law because his prison records reflected that he was not a resident of Kentucky when he petitioned for a name change. Finally, the court noted that the relief Varner sought is "achievable without amending the Judgment." As the court explained, BOP regulations allow Varner to use "Kathrine Nicole Jett" as a secondary name and also authorize BOP staff "to use either gender-neutral or an inmate's requested gender-specific pronoun or salutation when interacting with transgender inmates."

Varner appealed the district court's denial of his motion to amend the judgment, which we review *de novo*. Along with his appeal, Varner has filed various motions in our court, including a "motion to use female pronouns when addressing Appellant" and motions to "submit [his] photograph into evidence" or to "appear ... either by phone, video-conference, or in person."

II.

A.

[Varner's] letter request does not fall into any of the recognized categories of postconviction motions. Although a district court has authority to correct a sentence under Federal Rule of Criminal Procedure 35 and to correct clerical mistakes in judgments and orders under Federal Rule of Criminal Procedure 36, Varner's request does not fall under either rule.... A name change obtained six years after entry of judgment is not a clerical error within the meaning of Rule 36.

Nor was Varner's request authorized under 18 U.S.C. § 3582(c)(2) because it was not based upon an amendment to the Sentencing Guidelines. Additionally, the district court could not construe the request as a motion arising under 18 U.S.C. § 3742, which applies only to direct appeals. Finally, the request did not arise under 28 U.S.C. § 2255 because Varner did not challenge the validity of his conviction or sentence. In sum, Varner's request to change the name on his judgment was an unauthorized motion that the district court lacked jurisdiction to entertain.

B.

We next consider Varner's motion for the "use [of] female pronouns when addressing [Varner]." We understand Varner's motion as seeking, at a minimum, to require the district court and the government to refer to Varner with female instead of male pronouns.[1] Varner cites no legal authority supporting this request.... Varner's reply brief elaborates that "[r]eferring to me simply as a male and with male pronouns based solely on my biological body makes me feel very uneasy and disrespected." We deny the motion for the following reasons.

First, no authority supports the proposition that we may require litigants, judges, court personnel, or anyone else to refer to gender-dysphoric[2] litigants with pronouns matching their subjective gender identity. Federal courts sometimes choose to refer to gender-dysphoric parties by

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[1] The district court's order refers to Varner with male pronouns, as does the government's letter brief.

[2] "Gender dysphoria" refers to a condition where persons perceive a "marked incongruence" between their birth sex and "their experienced/expressed gender." Someone suffering from this condition may identify with the opposite sex, but the condition "may include a desire to be of an alternative gender" beyond the "binary" of male and female. DSM-5. The condition affects a tiny fraction of people. *See id.* (estimating prevalence for adult males from "0.0005% to 0.014%" and for adult females from "0.002% to 0.003%"). When it affects children, the condition often does not persist into adolescence or adulthood. *See id*. (estimating persistence for boys from "2.2% to 30%" and for girls from "12% to 50%"). Finally, "gender dysphoria" is to be distinguished from a "disorder of sex development," in which the development of male or female sex organs is affected by genetic or hormonal factors.

their preferred pronouns. On this issue, our court has gone both ways.... But the courts that have followed this "convention" have done so purely as a courtesy to parties. *See, e.g., Farmer v. Haas* (using female pronouns to "respect [petitioner's] preference"). None has adopted the practice as a matter of binding precedent, and none has purported to obligate litigants or others to follow the practice.

Varner's motion in this case is particularly unfounded. While conceding that "biological[ly]" he is male, Varner argues female pronouns are nonetheless required to prevent "discriminat[ion]" based on his female "gender identity." But Varner identifies no federal statute or rule requiring courts or other parties to judicial proceedings to use pronouns according to a litigant's gender identity. Congress knows precisely how to legislate with respect to gender identity discrimination, because it has done so in specific statutes.... Congress has expressly proscribed gender identity discrimination in laws such as the Violence Against Women Act, the federal Hate Crimes Act, and elsewhere. But Congress has said nothing to prohibit courts from referring to litigants according to their biological sex, rather than according to their subjective gender identity.

Second, if a court were to compel the use of particular pronouns at the invitation of litigants, it could raise delicate questions about judicial impartiality. Federal judges should always seek to promote confidence that they will dispense evenhanded justice. *See* Canon 2(A), CODE OF CONDUCT FOR UNITED STATES JUDGES (requiring judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"). At its core, this judicial impartiality is "the lack of bias for or against either party to the proceeding," which "assures equal application of the law." *Repub. Party of Minn. v. White*, 536 U.S. 765 (1992). Increasingly, federal courts today are asked to decide cases that turn on hotly-debated issues of sex and gender identity. *See, e.g.*, *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018) ([restroom and locker room access for transgender students]); *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018) (stating that "what this case is about" is "whether Drew Adams is a boy"). In cases like these, a court may have the most benign motives in honoring a party's request to be addressed with pronouns matching his "deeply felt, inherent sense of [his] gender." *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019). Yet in doing so, the court may unintentionally convey its tacit approval of the litigant's underlying legal position. *See*, *e.g.*, *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 297 (5th Cir. 1977) (observing that a trial judge "must make every effort to preserve the appearance of strict impartiality," including by "exhibit[ing] neutrality in his language"). Even this appearance of bias, whether real or not, should be avoided.

Third, ordering use of a litigant's preferred pronouns may well turn out to be more complex than at first it might appear. It oversimplifies matters to say that gender dysphoric people merely prefer pronouns opposite from their birth sex – "her" instead of "his," or "his" instead of "her." In reality, a dysphoric person's "[e]xperienced gender may include alternative gender identities beyond binary stereotypes." DSM-5. Given that, one university has created this widely-circulated pronoun usage guide for gender-dysphoric persons:

1	2	3	4	5
(f)ae	(f)aer	(f)aer	(f)aers	(f)aerself
e/ey	em	eir	eirs	eirself
he	him	his	his	himself

per	per	pers	pers	perself
she	her	her	hers	herself
they	them	their	theirs	themself
ve	ver	vis	vis	verself
xe	xem	xyr	xyrs	xemself
ze/zie	hir	hir	hirs	hirself

Pronouns – A How To Guide, LGBTQ+ Resource Center, University of Wisconsin-Milwaukee, https://uwm.edu/lgbtrc/support/gender-pronouns/; *see also* Jessica A. Clark, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 957 (2019) (explaining "[s]ome transgender people may request ... more unfamiliar pronouns, such as ze (pronounced 'zee') and hir (pronounced 'hear'))." If a court orders one litigant referred to as "her" (instead of "him"), then the court can hardly refuse when the next litigant moves to be referred to as "xemself" (instead of "himself"). Deploying such neologisms could hinder communication among the parties and the court. And presumably the court's order, if disobeyed, would be enforceable through its contempt power. When local governments have sought to enforce pronoun usage, they have had to make refined distinctions based on matters such as the types of allowable pronouns and the intent of the "misgendering" offender. *See* Clark (discussing New York City regulation prohibiting "intentional or repeated refusal" to use pronouns including "them/them/theirs or ze/hir" after person has "made clear" his preferred pronouns).[4] Courts would have to do the same. We decline to enlist the federal judiciary in this quixotic undertaking.

***

We VACATE the district court's judgment. Varner's motion to require use of female pronouns, to submit a photograph, and to appear are DENIED. Varner's motion to file an out-of-time reply brief is GRANTED.

JAMES L. DENNIS, Circuit Judge, dissenting.

I respectfully dissent....

I.

The majority errs in concluding that the district court did not have jurisdiction to consider and rule on Varner's pro-se motion to amend the judgment of conviction to recognize her change of name. Federal Rule of Criminal Procedure 36 allows the court, at any time, to correct "a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." FED. R. CRIM. PROC. 36.... The majority determines that because Varner's request to amend the judgment of conviction fails on the merits under Rule 36, the district court lacked jurisdiction to entertain her motion. I disagree.

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[4] *See also* NYC Commission 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(23), 4-5 (2015) https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderID_InterpretiveGuide_2015.pdf [https://perma.cc/C994-QAMV]; D.C. MUN. REGS. tit. 4, § 808.2(a) (2017) (making evidence of "unlawful harassment and hostile environment," *inter alia*, "[d]eliberately misusing an individual's preferred name form [*sic* – Ed.] of address or gender-related pronoun," in light of the "totality of the circumstances ... including the nature, frequency, and severity of the behavior, [and] whether it is physically threatening or humiliating, or a mere offensive utterance").

We have repeatedly denied relief under Rule 36 when the motion failed on the merits without questioning the district court's jurisdiction to entertain the motion. Moreover, we have evaluated prisoners' motions to change their names in the judgment of conviction, again without questioning the district court's jurisdiction.

The cases cited by the majority as authority for its conclusion that the district court lacked jurisdiction to entertain Varner's motion are inapposite here. For example, in *United States v. Early*, 27 F.3d 140 (5th Cir. 1994), the defendant appealed the district court's denial of his motion for a reduction of his sentence, arguing that this court had jurisdiction under 18 U.S.C. § 3742(a). We found that § 3742 provided no jurisdictional basis for Early's motion because "[t]he provisions for modification of a sentence under § 3742 are available to a defendant only upon direct appeal of a sentence or conviction," and Early did not file a notice of appeal from final judgment. We also evaluated other statutes and determined that none provided a jurisdictional basis for Early's motion to reduce his sentence.

Unlike the defendant's motion in *Early*, Federal Rule of Criminal Procedure 36 provides the jurisdictional basis for Varner's motion. The rule plainly provides a court with authority to, at any time, correct a clerical error in its judgment. This necessarily recognizes a court's authority to entertain motions to ascertain whether there is an error that falls within the rule's ambit and therefore must be corrected. I have found no cases interpreting a failure to succeed on the merits under Rule 36 as precluding a court's jurisdiction to entertain the motion. I agree with the majority that "[a] name change obtained six years after entry of judgment is not a clerical error within the meaning of Rule 36," but I believe this is a basis for affirming the district court's denial of Varner's motion, not for concluding that the district court lacked jurisdiction to consider it....

I do not question the district court's jurisdiction to entertain Varner's motion to have her judgment of conviction altered to reflect her new name, and I would affirm that judgment for the reasons stated by the district court.

II.

In addition to her appeal, Varner, a pro-se prisoner, submitted the following motion to this court:

> Motion to Use Female Pronouns When Addressing Appellant
>
> I am a woman and not referring to me as such leads me to feel that I am being discriminated against based on my gender identity. I am a woman – can I not be referred to as one?

The majority concludes that, based on Varner's two-sentence, pro-se motion, Varner seeks, "at a minimum, to require the district court and the government to refer to Varner with female instead of male pronouns." But Varner's request is not so broad. The terms "district court" and "government" are not mentioned in Varner's motion. The motion was filed in *this* court and is titled "Motion to Use Female Pronouns When Addressing Appellant." Varner's use of the term "appellant" to describe herself leads to the conclusion that her request is confined to the terms used by this court in this proceeding.

In my view, Varner is simply requesting that *this court*, *in this proceeding*, refer to Varner using her preferred gender pronouns. Not only is this the most faithful interpretation of her motion given the language she uses, it is also the narrowest. Because I would affirm the district court for the reasons it assigns without writing further, I think it is not necessary to use any pronoun in properly disposing of this appeal.

If it were necessary to write more and use pronouns to refer to Varner, I would grant Varner

the relief she seeks. As the majority notes, though no law compels granting or denying such a request, many courts and judges adhere to such requests out of respect for the litigant's dignity. [String citation of nine cases with parenthetical quotations from First through Fourth and Sixth through Tenth Circuits omitted.]

Ultimately, the majority creates a controversy where there is none by misinterpreting Varner's motion as requesting "at a minimum, to require the district court and the government to refer to Varner with female instead of male pronouns," when she in fact simply requests that this court address her using female pronouns while deciding her appeal. The majority then issues an advisory opinion on the way it would answer the hypothetical questions that only it has raised. Such an advisory opinion is inappropriate, unnecessary, and beyond the purview of federal courts. The majority's lengthy opinion is dictum and not binding precedent in this court. *United States v. Becton*, 632 F.2d 1294 (5th Cir. 1980) ("We are not bound by dicta, even of our own court.").

For these reasons, I respectfully but emphatically dissent.

Discussion

1. Does the disagreement between the majority and the dissent on the question of the district court's jurisdiction have any practical significance?
2. If the appellant's motion regarding pronoun use were construed as the dissent would have interpreted it, how much weight if any would the majority's arguments about lack of binding judicial or statutory authority carry?
3. Is the majority's judicial impartiality argument persuasive? If a court ought not refer to a party litigating an issue related to their gender by pronouns consistent with their gender identity, how ought it to refer to that party (and avoid what the majority purports to be avoiding)? Is the majority's argument about nonbinary gender persuasive, or are there justifiable ways for courts to avoid the consequences about which the majority claims to be concerned?