

Transgender In Court: Judicial Interpretations of Gender Identity from 1966 to 2022

Julian Applebaum

is an MPhil candidate at the University of Oxford's Centre for Socio-Legal Studies researching how municipal regulations of public space impact queer sex-on-premises sites in London. Previously, Julian graduated from Macalester College and was recognized as a Truman Scholar for his transgender rights advocacy and commitment to public service.

✉ julian.applebaum@regents.ox.ac.uk

As the number of transgender legal cases reaching American courts increases, a growing body of scholarship has begun to examine how judges and institutions struggle to reconcile gender variance in a system with deeply entrenched gender normativity. Scholars have examined how judges become the interpreters of gender when presiding over cases concerning transgender inclusion and civil rights, constructing narratives of what it means to be transgender and codifying it as law. This paper presents a novel systematic analysis of judicial frameworks courts use to adjudicate gender identity. Analyzing 70 court opinions from 1966 to 2022, I examine how judges rhetorically describe gender variance and gender variant people to anchor them within deeply entrenched gender normativity. Updating and recontextualizing past scholarship within the current post-Bostock transgender rights crisis, I present a typology of four categories of judicial interpretation—biological gender essentialism, medicalism, assimilationism, and deferential to the litigant—and note other rhetorical and juridical trends for interpreting gender variance. I argue that the frameworks that most likely lead to a trans litigant's victory are ones which reify the gender binary and pathologize transgender people, and discuss the problematics of that success.

KEYWORDS transgender law and litigation; gender identity adjudication; transgender legal cases; judicial interpretation of gender; gender normativity in court
DOI [10.57814/7576-X746](https://doi.org/10.57814/7576-X746)
LICENSE Creative Commons Attribution-NonCommercial-NoDerivatives ([by-nc-nd](https://creativecommons.org/licenses/by-nc-nd/4.0/))

When presiding over sex classification and trans discrimination cases, judges become the legal interpreters of gender and codify their understanding into law.¹ Judges con-

1 Terminology for gender variance is continuously evolving. Because some court opinions and sources referenced in this paper use “transsexual” and others use “transgender,” I use “trans” to avoid confusion.

struct their beliefs of what gender and sex are and how bodies are categorized, and trans litigants must “prove” they are their asserted gender within these frameworks in cases concerning discrimination, legal name changes, access to health care, and more. In ruling on the validity of a transgender litigant’s claims, a judge must mediate competing epistemologies and explain the basis on which they define the boundaries of gender. Here, the judge becomes the arbiter of what gender is and constructs the boundaries of gender when deciding how to categorize the trans person before them. The court can probe a transgender litigant and ask: “When is a man a man, and when is a woman a woman? And the court, not the transgender person, gets to answer” (Vade 2004, 297).

This paper examines the negotiation of gender and gender variance² through court adjudications where judges deliberate on the tenability³ of the litigant’s asserted gender identity. Queer⁴ people unsettle conventional categorizations of gender, and judges and institutions struggle to reconcile gender variance in a system with deeply entrenched gender normativity. When judges decide claims raised by transgender litigants on the basis of gender tenability, “they comment on and help construct not only transsexual identity but their own identity as confident interpreters of gender” (Keller 1999, 339). Often, judges seem perplexed by having to define gender, yet at the same time feel constrained to make the litigant legible in their normative worldview, not unlike other members of society in everyday social interactions (Keller 1999, 348). They draw on non-legal sources such as gender stereotypes, medical and scientific tes-

2 I use the term gender variant/variance broadly to refer to people whose gender identity and/or expression does or is perceived to not match stereotypical gender norms associated with their birth-assigned gender. This includes transgender binary, nonbinary, and intersex people, as well as gender-nonconforming people. Sometimes I use transgender interchangeably with gender variant since transgender identities are the focus of the essay, but some people who fit the above definition do not self-identify as transgender. For instance, masculine women may fit the above definition of transgender, yet not all masculine women identify as transgender. Similarly, drag queens and kings defy conventional expectations of maleness and femaleness, but not all drag queens and kings self-identify as transgender (Vade 2004, 297).

3 Susan Ellen Keller (1999) explains: “The different models for understanding transsexual identity can be plotted along an axis of ‘tenability,’ a term used by sociologist Dave King. According to King, ‘[t]enability ... refers to the issue of whether or not the behaviour is considered acceptable on the basis of some standard—whether medical, religious, political or whatever.’”

4 Queer, being used here as an umbrella term for gender and sexual minorities, is a contentious term. As Dylan Vade (2004) explains: “There is a debate concerning the appropriate use of words such as ‘queer,’ ‘dyke,’ and ‘fag.’ These words can certainly be used as epithets. Some people within the LGBT (Lesbian, Gay, Bisexual, and Transgender) communities prefer that people outside of the LGBT communities not use these terms. Yet, within parts of the LGBT communities, the words are reclaimed and used proudly.” This article uses ‘queer’ in a descriptive and celebratory, not derogatory, sense. For a more detailed discussion, see Michelangelo Signorile, “The Word ‘Queer’ Belongs in the Mainstream,” *Newsday*, November 25, 2003.

timony, “common sense” reasoning, and facts about the litigant’s childhood. This has involved invasive evidence-collecting like gathering testimony from family and community members, scrutinizing the litigant’s genitals,⁵ inquiring whether they urinated seated or standing,⁶ noting what undergarments they wear,⁷ and evaluating what sexual acts they perform with their spouses (Romeo 2004, 727–28). Judges have also often held a litigant’s body, dress, behavior, and lifestyle against higher gendered standards than their cisgender (i.e., non-transgender) counterparts (Vade 2004, 271–72). Judges have cast doubt on a trans litigant’s identity based on traits or choices that cisgender people enjoy innocuously, like having a unisex name or working in a traditionally gendered occupation.⁸

Sometimes a judge’s explanation of why a litigant is male or female takes on an editorializing undertone, reflecting on existential implications of destabilizing the sex binary and labeling gender variance as immoral, fraudulent, and perverted. Judges have described transgender people in remarkably insulting ways such as comparing them “gargoyles of medieval architecture, with their distortion of human and animal figures,”⁹ analogizing gender transition with the desire to transform into a donkey,¹⁰ and reciting an expert’s testimony about how they are “among the most miserable people I have ever met.”¹¹ Occasionally a judge will affirm a litigant’s identity and explain the criteria the litigant met that legitimized their gender, like undergoing certain surgeries or wearing appropriately gendered clothing. Legal constructions of gender variance, and what it takes to “prove” you are your gender in court, send symbolic messages about the social meanings of male, female, normative, and deviant (Levit 1998, 64). It also has material implications for transgender legal equality and the distribution of life chances by administrative and legal systems (Spade 2015, 5).

5 M.T. v. J.T., 140 N.J. Super. 77, 355 A.2d 204, 1976 N.J. Super. LEXIS 895 (Superior Court of New Jersey, Appellate Division March 22, 1976).

6 Kantaras v. Kantaras, 884 So. 2d 155, 2004 Fla. App. LEXIS 10997, 29 Fla. L. Weekly D 1699 (Court of Appeal of Florida, Second District July 23, 2004).

7 Meriwether v. Faulkner, 821 F.2d 408, 1987 U.S. App. LEXIS 8105 (United States Court of Appeals for the Seventh Circuit June 4, 1987).

8 See Phillips v. Michigan Dep’t of Corrections, 731 F. Supp. 792, 1990 U.S. Dist. LEXIS 2332 (United States District Court for the Western District of Michigan January 26, 1990), where a judge remarked on expert testimony claiming that a trans woman was not truly a woman because she had a unisex name (Lindsey) and worked in a male-dominated job (being a female impersonator).

9 In re Petition of Richardson to Change Name, 1982 Pa. Dist. & Cnty. Dec. LEXIS 332, 23 Pa. D. & C.3d 199 (Common Pleas Court of Dauphin County, Pennsylvania September 24, 1982).

10 Ashlie v. Chester-Upland School District, 1979 U.S. Dist. LEXIS 12516 (United States District Court for the Eastern District of Pennsylvania May 9, 1979).

11 Anonymous v. Weiner, 50 Misc. 2d 380, 270 N.Y.S.2d 319, 1966 N.Y. Misc. LEXIS 1868 (Supreme Court of New York, Special Term, New York County May 18, 1966).

LAW AND IDENTITY

Law generates and maintains identity categories, and scholars of gender adjudication have much to learn from critical race theorists in subjecting the legal system to radical critique (Currah 2002, 714). Scholars have explored how “the modern adjudication of sex puts courts and agencies to work in ways that resemble the administration of an earlier set of socially constructed categories: racial classifications and the racial caste system” (Ezie 2011, 168). Endeavors to police non-white bodies and maintain racial hierarchies of privilege and subordination created the legal construction of whiteness. When people went to court to challenge their designation as slaves, to defend their status as free persons, to seek citizenship, to determine the school district in which a child belonged, and to bring accusations of reputational injury, the courts were tasked with making racial determinations of who was white and what “whiteness” was (Ezie 2011, 168–69). In his book, *White By Law*, Ian Haney Lopez (1996, 542–43) explains how naturalization cases especially “forced the courts into a case-by-case struggle to define who was a ‘white person’” and if “race was to be measured by skin color, facial features, national origin, language, culture, ancestry, the speculations of scientists, popular opinion, or some combination of the above... the courts had to wrestle in their written decisions with the nature of race in general and of white racial identity in particular.” In deliberations on race, courtrooms were sites of racial theater, requiring that litigants performed a racial identity while simultaneously constructing the categories and borders of race through these performances (Ezie 2011, 171).

A similar process can be recognized within the legal constructions of “manhood” and “womanhood” to maintain a hierarchy between the sexes and imbue bodies with social meanings. Constitutional discourse has long ingrained a biological model of sex and gender focused on a natural order, and the courts read the Constitution in ways that preserve a hierarchy of power between the sexes. Historically, this has taken the form of claiming biological differences between men and women matter socially, and therefore must be inscribed legally (Levit 1998, 66). For example, in 1873 Justice Bradley of the US Supreme Court waxed poetic about separate “spheres and destinies” for men and women when denying Myra Bradwell admission to the Illinois bar, claiming that “the constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. (Levit 1998, 66). The Supreme Court employed similar arguments in *Muller v. Oregon* in 1908 to uphold a law restricting women’s working hours, concluding that males possessed “superior physical strength,” and that “woman’s physical structure, and the functions she performs in consequence thereof” justified state intervention (Levit 1998, 68). In this case, and countless others, sex is rendered as biological, ideological, and teleological; a woman’s “inferior” biology is evidence of her natural, God-given predisposition for subordinate social roles, and the law must acknowledge and maintain them.

Like legal constructions of race and sex, gender variance is adjudicated as a mixed question of fact, social traditions, ideology, and law. However, trans identity presents legal puzzles distinct from race and sex. Unlike racial minorities and cisgender women, trans litigants face a second line of scrutiny from judges: skepticism of the identity on which the discrimination or reclassification claims are based. Judges tend to not deliberate over the existence of race or if a cisgender woman is a woman. They

start with the assumption that such categories exist and then their construction becomes a site of judicial ideation. However, for trans litigants, the judiciary can decide that gender variance is a fiction and gender variant identities are expressions of moral deviancy and psychological disturbance. Any acknowledgement of the trans litigant's claims represents an instance of flexibility on the boundaries of gender, even if they ultimately deny the claim (Keller 1999, 381).

Furthermore, "transgender" is a medico-juridical identity, meaning medicine and law are inextricably bound when interpreting and regulating a gender variant person (Enke 2012, 73). The standards for legal transition, more often than not, have demanded proof of medical transition or written approval from healthcare professionals, who have historically used inflexible criteria for their diagnoses. Activist and scholar Dylan Vade (2004, 272) illustrates this inflexibility with an anecdote from his time in legal aid:

Since, by and large, the legal and medical communities have a particular view of what it means to be transgender, in order to get rights and/or medical care, transgender people, in these settings, have to conform themselves to the expectations. I have gone to countless transgender support group meetings where transgender people shared: "only if you say x, y, and z about yourself will this doctor/clinic provide you care," or "only if you say x,y, and z about yourself will you get a letter from the doctor that will then allow you to change the gender on your driver's license." Since the Social Security office only recognizes male and female gender identities, I counsel people that using that setting to talk about their complex genderqueer identity may not be the most effective.

Only some genders and gender presentations are intelligible to the courts, medical professionals, and society at large. When trans people cannot be "recognized" by them, they lose their personhood (Garrison 2018, 614). This reflects how "claiming a new public gender identity involves active negotiation" and demands "a story of selfhood that not only claims affiliation with their preferred gender category, but also disclaims affiliation with the sex category assigned to them at birth" (Garrison 2018, 618). What gender presentations are courts willing to accept as legitimate? When confronted with a gender variant person, how do judges re-anchor them within gender norms? How do they articulate the boundaries of gender using tropes or narratives, and when do we see moments of doubt or flexibility in their use?

METHOD

In this article, I examine court opinions from cases involving transgender litigants to investigate how judges reconcile the litigant's gender variance with their preestablished normative views of gender, and how those views may get inscribed into legal discourse. I read the majority opinions of 70 transgender rights cases at the district and appellate level, including the two United States Supreme Court cases with trans litigants, *Bostock v. Clayton County* (2020) and *Farmer v. Brennan* (1994). Legal matters represented in the universe include name and gender marker changes, marriage validity, incarceration, workplace discrimination, school facilities exclusion, parental standing, sports participation, a crossdressing ordinance, Medicaid access, and bath-

room access in a private building. To find cases, I looked at cases utilized in past scholarship, precedents cited in recent high-profile cases, and news coverage of trans rights developments, as well as calling upon personal knowledge of important court cases. I then used LexisNexis's Shepardization to snowball with cases that had been cited in the opinion or ones which cited the case. The cases were selected if the legal issue positioned the judge to interpret the plaintiff's gender and rule based on a perception of its legitimacy. Regretfully, I found too few cases regarding intersex and nonbinary litigants to base any findings on them and they have been removed from the case universe. The earliest case used is from 1966 while the latest is from 2022.

Because gender is a nebulous concept, every judge may interpret gender in a different way and elaborate their rationale through different descriptors, criteria, and explanations. Therefore, no prescribed rubric or set of searchable keywords would accurately capture judges' feelings towards gender variance. I read through each opinion to tease out what was written about gender and identified recurring patterns and themes.

Drawing on the past scholarship, I developed a list of rhetorical devices to flag as I read opinions. Following Susan Ella Keller (1999), I looked for the pronouns used for the litigant, name(s) litigant is referred to by, use of metaphors and imagery for describing gender variance, and criteria for how they decide if a transgender person is or is not their asserted gender. Many of the devices are only tangential to the legal outcome; something as small as the pronouns used to refer to the transgender litigant speaks volumes about the judge's perception of the legitimacy of their identity claim. Tonal language is similarly indicative of how they interpret a litigant's gender. For example, a judge writing "Jeanette has altered her body to appear as if she were female" suggests significantly more skepticism than "Jeanette transitioned and lives as a woman." Thus, scrutinizing word choices is key to revealing the judges' attitudes towards gender variance.

I also identify narratives that judges use to reconcile gender variance with the gender binary. Chinyerie Ezie (2011) provides one such approach in their discussion of how law and medicine has naturalized myths of innate binary sex differences and pathologized gender variance. Similarly, Paisley Currah (2003, 716) references the "medical model" of transsexuality used in litigation, where gender variance is conceptualized as a psychological disorder and therefore it is unlawful to discriminate against transgender people based on a pathological condition. I term this "medicalism." I looked for narratives of gender variance as a physical or spiritual affliction curable through medical treatment, including "disordered minds, disordered bodies" tropes (Ezie 2011, 159), "trapped in the wrong body" descriptions (Vade 2004, 271–72), fact-finding from expert medical testimony and medical records, and scrutiny of bodies—particularly genitalia and surgical alterations of them. I also looked for legal conclusions made on the basis of surgery or medical treatments (for example a judge authenticating a litigant's gender because they underwent surgery), and allusion to gender variance being a disorder that deserves legal protection.

Vade (2004, 297) recounts his experience working with transgender litigants and explains that judges value conformity to gender stereotypes when authenticating gender, such as a trans woman who dresses femininely and played with dolls when she was young. This provides a model for my analysis that I term "assimilationism," a term

I borrow from gay and lesbian politics that describes when queer people appeal to heterosexual social norms to gain equality and protection rather than challenge the dominance of those norms (Hequembourg and Arditì 1999, 664). Here, I use it to describe when a litigant's gender is authenticated based on the litigant's perceived conformity to cisgender/patriarchal stereotypes of manhood and womanhood, and/or ruling that a litigant is their gender because their community validates it.

Vade (2004, 297) also argues that courts rely on a sex-gender distinction where sex is more important and real than gender and that a transgender person's biological sex is an insurmountable truth that can never be erased. I looked for presentations of a sex/gender dichotomy where sex is immutable, natural, and real while gender is changeable and less than real, and I borrow the term "biological gender essentialism" to describe it.¹² I paid special attention to court's attempts at defining sex and gender and a fixation on a litigant's genitals, since, as feminist scholars Suzanne Kessler and Wendy McKenna put it, genitals are an essential sign of gender as natural and dichotomous (Currah and Moore 2009, 114).

Finally, I also looked for signs that a judge was willing to affirm the litigant's identity and trust their self-identification. Cases where the judge defers to a lower court for a determination on the litigant's gender do not qualify. This is specifically for if a judge deferred to the litigant and took the self-asserted identity at face value.

ANALYSIS

After examining 70 judicial opinions, I identified four types of legal reasoning and some subtypes within them. These are medicalism, biological gender essentialism, assimilationism, and deferential to the litigant. In this section I present each of the four types and their subtypes and how they reveal themselves in the texts of the opinions. Table 1 lays out an overview of these types.

Medicalism

The first type of reasoning on Table 1 is medicalism, the belief that gender transition could only be legitimized through medical interventions and expert testimony. Medicalism was the most frequent and persistent method of legal conceptualization across all courts, decades, and legal matters. Elevating common sense reasoning with a scientific veneer, judges adopted a conceptualization of sex as changeable with appropriate medical procedures in order to treat a psychologically disturbed mind. The medical model of gender emerged as an alternative to biological gender essentialism by explaining gender variance through pathology. Since biological sex is viewed as an

12 "Essentialism—the idea that social groups have meaningful biological differences that explain group-level variation in traits (e.g., ability, personality) and behavior—is a pervasive psychological belief. Broadly, essentialism increases the perceived dissimilarity between social groups and implies observed group differences are inborn, inevitable, and unchangeable" (Wilson et al. 2019, 883). Biological gender essentialists are "people who hold strong gender essentialist beliefs [and] view gender as an inflexible dichotomy (e.g., man or woman) resulting from underlying biological factors such as chromosomes or hormones" (Wilson et al. 2019, 883).

Table 1. Judicial interpretations of gender variance

Type	Reasoning	Examples and subtypes
Medicalism	Sex/gender can be meaningfully changed with appropriate medical intervention.	<p><i>Sex as medically alterable.</i> “Only after Petitioner undergoes his planned sex reassignment surgery will this court grant legal recognition to petitioner’s name change.”</p> <p><i>The most miserable patients.</i> “A transsexual experiences severe mental anguish over the incongruence between their psychological and physical gender, and has sought medical treatment to alleviate this suffering.”</p>
Biological Gender Essentialism	Sex/gender is natural, immutable, and assigned at birth.	<p><i>Your gender identity must be the same as your sex, so you lose.</i> “Throughout the pendency of this case, Petitioner remained both biologically and anatomically identical to biological females—not males.”</p> <p><i>Your sex and gender identity are different and sex matters more, so you lose.</i> “Plaintiff claims to be a transsexual woman, whose sense of self differs from their biological makeup. This may be true, however it is generally accepted that a person’s true sex is determined at birth by an anatomical examination by the birth attendant.”</p> <p><i>Your sex and gender identity are different and sex matters more, so you win.</i> “Discrimination against a plaintiff who is transgender for failing to act and/or identify with his or her birth sex is no different from the discrimination directed against a woman who does not act sufficiently feminine. Thus, it is encompassed by the court’s previous rulings on sex discrimination, since the discrimination is based on non-conformity with Plaintiff’s birth sex.”</p>
Assimilationism	Gender is socially earned through conformity to gender norms and stereotypes.	<p>“Petitioner has been described as a loving mother and wife, and their husband, family, and community accepts them as a woman. They appeared before this court and, were it not for the fact that their background was known to the court, the court would have found it impossible to distinguish this person from any other female.”</p>
Defer to Litigant	The litigant’s self-asserted identity is respected and uncontested.	<p>“In the complaint, Plaintiff alleges that he identifies as a male, and being a transsexual male he may be considered part of a subgroup of men. There is no reason to permit discrimination against that subgroup.”</p>

objective truth, judges rely on medical testimony as objective evidence that biological sex could be transgressed. A trans person’s testimony is not considered objective (Vade 2004, 300).

Medicalism is based on the belief that only two genders, male and female, exist and that a trans person suffers from a rare disorder, which means their mental gender is incongruent with their physical gender. This disorder leads to severe anguish and self-harming behavior, as well as antisocial deviant behavior like cross dressing

or perverted sexual practices. The affliction can be treated with appropriate medical care from specialized clinics and care teams. To begin this treatment, a trans person must receive a diagnosis of “gender identity disorder” or “gender dysphoria,” which is considered by the courts to be a severe psychiatric disorder. The diagnostic criteria have changed over time, but since the 1970’s have generally included an on-going desire since early childhood to be the “opposite” gender, a desire to physically modify one’s body, and heterosexual desires aligned with the gender with which one identifies (Romeo 2004, 725). Many clinics required that patients live as their asserted gender for years before they would permit surgery to ensure that the patient was truly trans.

In this preoperative period, medical professionals looked for strict conformity to gender norms and stereotypes as proof of a legitimate gender identity. For example, one expert testified in court that they did not believe the litigant had passed the “real life” test because she had chosen an ambiguously gendered name and because some of the work she did was in a male profession (she worked as a “female impersonator,” also known as a drag queen).¹³ If successful at convincing the medical professionals, one could attain surgery and hormones. Once the body and brain were harmonized, the transition to a new sex was complete and the trans person would be considered worthy of legal recognition.

The most miserable patients

In a truly binary-sexed world, gender variance would not exist. Therefore, characterizing gender variance as disordered is essential to reconciling it with the belief that the gender binary is natural and fixed. As Paisley Currah (2003, 716) notes, “We must remember that the purpose of any pathologizing discourse is not simply to define the ‘sick,’ but also to describe and identify the ‘healthy,’ and to set the boundary between them.” Courtrooms became the site of medical theater. Expert testimony used sensational language to illustrate trans litigants’ anguish and emphasized their “sickness” through vivid descriptions of self-harm. Language emphasizing victimhood garnered sympathy, placing the trans person at the mercy of misfortune and undeserving of their suffering. One doctor testified that the transsexual was “among the most miserable people I have ever met.”¹⁴ Another’s definition of transsexuality emphasized the litigant’s agony: “a transsexual believes that he is the victim of a biologic accident, cruelly imprisoned within a body incompatible with his real sexual identity.”¹⁵ A third definition conjured images of spiritual suffering, saying that “they consider themselves to be members of the opposite sex cursed with the wrong sexual apparatus.”¹⁶ Descriptions of litigants as “cruelly imprisoned” in the wrong body made multiple appearances, invoking carceral imagery to portray the litigant as in need of medical treatment to become free.

Judges imposed their own perceptions of medicalization, describing gender affirming care in shocking language and highlighting the litigant’s mental disturbanc-

13 *Phillips* 1990 U.S. Dist. LEXIS 2332.

14 *Anonymous*, 1966 N.Y. Misc. LEXIS 1868.

15 *Meriwether*, 1987 U.S. App. LEXIS 8105.

16 *Richards v. United States Tennis Asso.*, 93 Misc. 2d 713, 400 N.Y.S.2d 267, 1977 N.Y. Misc. LEXIS 2670 (Supreme Court of New York, Special Term, New York County August 16, 1977).

es such as calling hormone therapy “chemical castration”¹⁷ or declaring that “someone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder.”¹⁸ Judges also fixated on self-harming behavior to confirm that gender variance is a severe malady. For example, the opinion in *White v. Farrier* (1988) lists all four of the litigant’s previous attempts at self-castration and which instruments were used, and the opinion in *Wolfe v. Horn* (2001) links the litigant’s gender identity disorder to histories of depression, alcoholism and suicidal impulses. In cases where the trans litigant succeeded, judges tended to highlight the litigant’s suffering and sympathetically framed medical transition as a therapeutic relief.¹⁹ Where trans litigants failed, judges often cast litigants as deranged and gender transition as barbaric.²⁰ The body of medicalist cases erected a barrier between the “sick” trans person and the “healthy” cisgender person, and concluded that the only way of curing the former was by converting them to the latter.

Sex as medically alterable

At the crux of medicalism is the belief that although sex is a biological reality, sex can be meaningfully changed with appropriate medical intervention. The majority of these cases elevate genital reassignment surgery as a necessary condition for a successful transition. In judicial opinions there were typically two justifications for this: 1) irreversible genital modification demonstrated a commitment to living as the other sex or 2) conceptions of maleness and femaleness often centered the ability to perform penetrative heterosexual intercourse, even if such intercourse would not lead to procreation. Regarding the first, judges feared that allowing self-identified trans people to legally reclassify their sex would open the door to criminals changing their identity documents for fraudulent purposes. To make sure trans people were not “perpetrating fraud upon the public,” judges sought out evidence that litigants were “permanently committed to living as a member of the opposite sex.”²¹ Courts assumed that someone superficially interested in transitioning genders, or who sought to perpetrate fraud, would not go to such drastic lengths as surgical genital modification. Thus, genital surgery became a hurdle for trans litigants seeking legal reclassification.²²

17 *Meriwether*, 1987 U.S. App. LEXIS 8105.

18 *Maggart v. Hanks*, 131 F.3d 670, 1997 U.S. App. LEXIS 34413 (United States Court of Appeals for the Seventh Circuit December 9, 1997).

19 See *Pinneke v. Preisser*, 623 F.2d 546, 1980 U.S. App. LEXIS 16219 (United States Court of Appeals for the Eighth Circuit June 27, 1980): “[M]edical testimony establishes that this treatment, sex reassignment surgery, is the only procedure available for treatment of the condition from which Pinneke suffers, transsexualism, and was medically necessary for her, based upon an individualized medical evaluation.”

20 See *Maggart*, 1997 U.S. App. LEXIS 34413: “Someone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder.”

21 *In re Harris*, 707 A.2d 225 (Pa. Super. Ct. 1997).

22 See *Matter of McIntyre*, 552 Pa. 324, 715 A.2d 400 (Pa. 1998): “this court holds that the complete and irreversible act of sex reassignment surgery will legally change the person of Robert Henry McIntyre into Katherine Marie McIntyre. Only after petitioner undergoes his planned sex reassignment surgery will this court grant legal recognition.”

Furthermore, some judges who struggled to define gender turned to the most common gendered pastime for direction—sexual intercourse. Heterosexual penetrative sex has clearly delineated and hierarchical roles based on gender, and it is imbued with social meaning. In the heteronormative societal imaginary, a sexually dominant male penetrates a sexually submissive female with his penis, and the act of giving is masculinized and receiving is feminized even between same-sex partners. Therefore, gaining the sexual abilities of the other sex or losing the sexual abilities of one's sex assigned at birth constituted a transformation worthy of recognition. In *M.T. v. J.T.* (1976), the court notes that an examination of the litigant's vagina revealed that "her vagina had a 'good cosmetic appearance' and was 'the same as a normal female vagina after a hysterectomy'," capable of being penetrated by her husband's penis.²³ As such, the litigant was no longer a male "since she could not function as a male sexually either for purposes of 'recreation or procreation.'"²⁴ Alternatively, in *Frances B. v. Mark B.* (1974), a trans man's marriage was invalidated because he did not have a penis and thus could not fulfill the obligations of a husband.²⁵ Additionally, courts were particularly worried about trans people tricking heterosexual people into marrying someone of the same sex, with one judge fearing that permitting a trans person to change their name "would start us down the slippery slope to judicially legislating same-sex marriages."²⁶ Defining gender by conformity to heterosexuality mitigated the threat gender variance poses to heteronormativity by demanding that trans people conform to heterosexual anatomy and lifestyles.

Some cases, particularly more recent ones, permitted other types of medical intervention as grounds for a successful transition, including hormones and breast removal or augmentation. Still, judges used normative cisgender bodies as barometers for gender tenability. Litigants who were successful under medicalist frameworks changed their bodies to match their cisgender counterparts as closely as possible, undergoing years of psychological evaluation and expensive procedures. Those who could not or did not want to adhere to cisgendered norms were dismissed as illegitimate or mentally ill. Medicalism puts trans people in what Dean Spade (2006, 328) rightfully calls a "double bind"—it is just as pathological not to adhere to gender norms as it was to adhere to them.

Biological Gender Essentialism

The second type of legal reasoning, as identified in Table 1, is biological gender essentialism, where judges declared that a litigant's biological sex superseded feelings of gender dysphoria, medical procedures, and other markers of gender transition. The majority of these cases are at the appeals court level concerning marriage validity and workplace discrimination. In this approach, the court conceptualizes trans people as someone whose self-identity is in conflict with their real biological and anatomical

23 *M.T.*, 1976 N.J. Super. LEXIS 895.

24 *M.T.*, 1976 N.J. Super. LEXIS 895.

25 *Frances B. v. Mark B.*, 78 Misc. 2d 112, 355 N.Y.S.2d 712, 1974 N.Y. Misc. LEXIS 1341 (Supreme Court of New York, Special Term, Kings County April 23, 1974).

26 *In re Application of Marriage License for Nash*, 2003-Ohio-7221, 2003 Ohio App. LEXIS 6513 (Court of Appeals of Ohio, Eleventh Appellate District, Trumbull County December 31, 2003).

sex. The biological model of gender categorizes all bodies into one of two strict categories, male or female, based on anatomy at birth. This sex designation is viewed as dimorphic, innate, and unchangeable.

The traits that determine one's biological sex include external genitalia, internal reproductive organs, secondary sex characteristics, and chromosomes, but these are relied upon in inconsistent combinations. As gender-affirming medical care has become more advanced and accessible, biological gender essentialists have had to devise new indicators of one's "true" sex, such as one North Dakota lawmaker who attempted in 2022 to legislate a definition of gender as being established by one's DNA (SB 2199, 68th Legislative Assembly of North Dakota). The model further assumes that those with male biology present a masculine gender identity and those with female biology present a feminine gender identity, and that those presentations are the natural product of their sex. Since biological sex is immutable, being trans is something you *do*, not something you *are*. Starting with this premise, judges typically express biological gender essentialism following one of three legal narratives as identified in Table 1.

"Your gender identity must be the same as your sex, so you lose."

Deviation from the biological sex binary is considered unnatural, and transgressive performances of gender are characterized as artificial. Some cases, especially earlier ones, refuse to acknowledge a legal difference between gender identity and sex. They concluded that sex should be given its "traditional definition" of biologically determined and immutable when interpreting statutes.²⁷ All medical transitions, no matter how convincing, are futile attempts to artificially recreate what can only be bestowed by nature. Judges have ridiculed trans litigants' medical transitions, with one proclaiming that a woman "cannot be created from what remains of a man"²⁸ and another stating that "assuming, as urged, that defendant was a male entrapped in the body of a female, the record does not show that the entrapped male successfully escaped."²⁹ One judge likened a trans woman's desire to change her legal name to a "freakish rechristening" that would "pervert the judicial process."³⁰ Fully denying self-identification on its face, no trans litigant could succeed. The use of this narrative waned as medicalism and the other two types of biological gender essentialism increased in frequency. However, the Eleventh Circuit revived the logic in 2022, ruling that a transgender boy was legally identical to a cisgender girl because of their immutable biological traits.³¹

27 *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 1982 U.S. App. LEXIS 22775, 27 Fair Empl. Prac. Cas. (BNA) 1217, 27 Empl. Prac. Dec. (CCH) P32,318 (United States Court of Appeals for the Eighth Circuit January 8, 1982).

28 *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 1983 U.S. Dist. LEXIS 10383, 35 Fair Empl. Prac. Cas. (BNA) 1332, 34 Empl. Prac. Dec. (CCH) P34,334 (United States District Court for the Northern District of Illinois, Eastern Division December 28, 1983).

29 *Frances B.*, 1974 N.Y. Misc. LEXIS 1341.

30 *Richardson*, 1982 Pa. Dist. & Cnty.

31 *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 2022 U.S. App. LEXIS 35962, 29 Fla. L. Weekly Fed. C 2011 (United States Court of Appeals for the Eleventh Circuit December 30, 2022).

“Your sex and gender identity are different and sex matters more, so you lose.”

Here, judges acknowledged the litigant’s sincerely held identity but concluded that biological sex carries more legal weight. Although both exist and may differ, biological sex is considered real while gender identity is less than real. For example, the court in *Littleton v. Prange* (1999) agreed that “there are individuals whose sexual self-identity is in conflict with their biological and anatomical sex,” but held that a post-operative trans person is still their birth sex because “[t]here are some things we cannot will into being. They just are.”³² Similarly, in 1977 the Supreme Court of Oregon acknowledged that a trans woman underwent a sex change but decided that birth certificates were meant to record sex at birth and not any time after and denied her petition for legal reclassification.³³ In *Hispanic Aids Forum v. Estate of Bruno* (2005), the New York Supreme Court reversed a decision protecting a clinic serving Hispanic AIDS patients whose landlord suspended their lease due to complaints about trans people using bathrooms in the building. The court’s rationale relied on the conclusion that “the defendants’ designation of restroom use, applied uniformly, on the basis of ‘biological gender,’ rather than biological self-image, was not discrimination.”³⁴ Although a judge could recognize, and perhaps even sympathize with, people with lived experiences of gender variance, biological sex was considered superior to self-identification and was more deserving of legal recognition.

“Your sex and gender identity are different and sex matters more, so you win.”

Biological gender essentialism denies the reality of gender variance and discredits trans people’s lived experiences. Yet, in employment discrimination cases, biological gender essentialism has become key to achieving protection for trans people under Title VII of the Civil Rights Act. The reshaping of biological gender essentialism followed the US Supreme Court’s ruling in *Price Waterhouse v. Hopkins* (1989). In *Price Waterhouse*, a female senior manager in an accounting firm had been denied partnership in the firm because she was considered too masculine. This constituted sex discrimination because it would not have occurred but for her sex, and an employer could not punish employees for failure to conform to the stereotypes of one’s sex. The Sixth Circuit utilized this logic to protect trans people’s gender expression in *Smith v. City of Salem* (2004). Because trans people defy the expectations placed upon their birth sex, the judge drew a direct comparison between trans employees and the cisgender *Price Waterhouse* plaintiff: “[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.”³⁵ This was a pivot point for trans workplace protections, but one only possible by making trans people equivalent to gender-nonconforming cisgender employees.

32 Littleton v. Prange, 9 S.W.3d 223, 1999 Tex. App. LEXIS 7974 (Court of Appeals of Texas, Fourth District, San Antonio October 27, 1999).

33 K. v. Health Div., Dep’t of Human Resources, 277 Ore. 371, 560 P.2d 1070, 1977 Ore. LEXIS 1124 (Supreme Court of Oregon March 3, 1977).

34 Hispanic Aids Forum v. Estate of Bruno, 16 A.D.3d 294, 792 N.Y.S.2d 43 (N.Y. App. Div. 2005).

35 Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

Fastening gender identity discrimination onto sex stereotyping reasoning situates gender variance as merely an atypical derivative of a litigant's legible biological sex. This proved remarkably persuasive and culminated in the United State Supreme Court's *Bostock v. Clayton County* (2020), where the Court delivered a landmark ruling that Aimee Stephens, who had been fired after coming out as transgender, was the victim of sex discrimination. Trans people's gender expression was therefore protected under Title VII as an extension of their sex and the sex stereotyping doctrine. For example, if a male employee and a female employee bring their wives to a company event but only the female employee is punished, her sex is the distinguishing factor. Similarly, if a cis man and a trans man both wear the men's employee uniform but only the trans man is fired, "the individual employee's sex plays an unmistakable and impermissible role in the discharge decision."³⁶ Thus, "to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."³⁷ This transforms gender identity into a subordinate legal category—one which is changeable, secondary, and reliant on sex for legal recognition.

The ruling in *Bostock* upholds biological sex as an unshakeable, controlling truth of the plaintiffs' existences. A trans person who has transitioned in conformity with normative gender standards, who "passes" fully and has medically transitioned, remains anchored to their assigned sex at birth under the law. Although the opinion affirms Aimee Stephens' identity in the factual portion of the opinion, explaining that "Stephens presented as a male" before transitioning, the legal ruling necessarily reduces her to her biological sex.³⁸ The Court expounds that the dissimilarity between Stephens and other women is fixed as an incident of her birth. It is not her identity as a transgender woman, but rather her ineffaceable biological sex, that creates a route for her to seek legal repair. The opinion by Justice Neil Gorsuch alludes to this distinction, saying:

When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—both the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.³⁹

Gender identity is merely a "something else," even if the employer intended to discriminate against trans people. The incorporation of trans people under Title VII is indeed a win for trans employees everywhere. Yet, the victory comes at a cost to trans legal equality by undercutting legal legitimization of gender variance and positioning it as secondary to sex.

36 *Bostock v. Clayton County* 140 S. Ct. 1731, 207 L. Ed. 2d 218, 2020 U.S. LEXIS 3252, 104 Empl. Prac. Dec. (CCH) P46,540, 28 Fla. L. Weekly Fed. S 294 (Supreme Court of the United States June 15, 2020).

37 *Bostock*, 2020 U.S. LEXIS 3252.

38 *Bostock*, 2020 U.S. LEXIS 3252.

39 *Bostock*, 2020 U.S. LEXIS 3252.

Assimilationism

The third reasoning on Table 1 is assimilationism, where litigants socially earn their gender by conforming to gender norms and stereotypes. Trans litigants were victorious in the few cases with assimilationist reasoning, although assimilation was never the dominant method of reasoning. Judges usually buttressed medicalist conclusions with descriptions of social gender compliance as evidence that the medical transition was successful. Even when judges did not overtly turn to gender conformity as a standard, adherence to gender norms often flavored their interpretations of the trans litigants. Judges took notice of what attire litigants wore to appear in court,⁴⁰ what undergarments they preferred day-to-day,⁴¹ their participation (or lack thereof) in gendered childhood activities,⁴² if they experienced satisfying relationships with family and others while presenting as their gender,⁴³ and if they convincingly passed as their gender among the general public.⁴⁴ One judge marveled at their own inability to find a fault in the litigant's gender presentation: "The applicant appeared before this court and, were it not for the fact that petitioner's background was known to the court, the court would have found it impossible to distinguish this person from any other female."⁴⁵ Yet, no judge was persuaded to rule in favor of a trans litigant based on their passable gender presentation alone.

Defer to Litigant

Judges seldom gave legal weight to a trans litigant's self-identification unless it was backed by scientific testimony and a diagnosis. But in these few cases, all trans litigants succeeded on their claims. In some earlier cases involving legal name changes, judges invoked personal freedom and judicial restraint, declaring that "a person has a right to a name change" and that a trans person's gender presentation is "a matter which is of no concern to the judiciary."⁴⁶ In later appellate equal protection cases concerning youth in schools such as *N.H. v. Anoka-Hennepin School District* (2020), *Doe v.*

40 *In re Dowdrick*, 1978 Pa. Dist. & Cnty. Dec. LEXIS 434, 4 Pa. D. & C.3d 681 (Common Pleas Court of Cumberland County, Pennsylvania February 2, 1978).

41 See *Meriwether*, 1987 U.S. App. LEXIS 8105: "She has feminine mannerisms, wears makeup and feminine clothing and undergarments when permitted, considers herself to be a female, and in fact has been living as a female since the age of fourteen."

42 See *M.T.*, 1976 N.J. Super. LEXIS 895: "M.T. testified that she was born a male... As a youngster she did not participate in sports and at an early age became very interested in boys."

43 *In re Estate of Araguz*, 443 S.W.3d 233, 2014 Tex. App. LEXIS 1573, 2014 WL 576085 (Court of Appeals of Texas, Thirteenth District, Corpus Christi - Edinburg February 13, 2014).

44 See *Harris*, 707 A.2d 225: "For twenty-two years, petitioner's visage has been such that, but for those times when he must present official identification, he convincingly passes among the general public as a woman. As such, we find that a legal name change would benefit both petitioner and the public at large and, in accordance with good sense and fairness to all concerned, should have been granted."

45 *In re Anonymous*, 57 Misc. 2d 813, 293 N.Y.S.2d 834, 1968 N.Y. Misc. LEXIS 1197 (Civil Court of the City of New York, New York County September 17, 1968).

46 *Matter of Eck*, 245 N.J. Super. 220, 584 A.2d 859, 1991 N.J. Super. LEXIS 5 (Superior Court of New Jersey, Appellate Division January 11, 1991).

Boyertown (2018), and *G. G. v. Gloucester County School Board* (2016), rulings in favor of trans litigants turn on self-identification, saying that trans boys (none have had trans girls) are similarly situated to cisgender boys solely because of their asserted identity and persistence living as their identity without medical treatments.⁴⁷ This approach is inextricable from the litigants' perceived youthful innocence. Past and present demonization of trans people as sexual perverts and corrupting influences has led to courts bearing down on trans people in public spaces, but trans children are considered less of a threat. Trans children, treated as sexless and morally pure, are afforded judicial sympathy that their adult counterparts are not. Further research should explore the implications of the judicial construction of transgender youth, especially as it relates to the political panic around gender affirming care.

CONCLUSION AND IMPLICATIONS

To better understand how judges define gender in cases where the litigant's gender is a legal question, this article offers four main types of reasoning, and several subtypes, extrapolated from 70 court opinions. These types emerged from analyzing the rhetoric deployed by judges as they established gender categories and set criteria for a body's membership in the categories. This work reflects the evolution of trans law and politics into 2022. While this is not the first article to analyze judicial opinions to uncover social and legal constructions of transgender identities, this is the first to do so post-2011.⁴⁸ To say that much has changed since then would be an understatement. *Obergefell*, *Bostock*, state legislature upheavals, the Trump administration and escalation of Christian nationalism, momentum of TERF ideology, onslaughts on the bodily autonomy of pregnant people, culture wars around visible queerness, and more have transformed the political conditions of trans existence in the United States. Observations from previous scholarship have been revisited with a retrospective lens. For example, grafting gender identity discrimination to sex discrimination in 2004 marks a novel extension of biological gender essentialist reasoning. While previous works were conscious of this development, we can now trace its impact to the United States Supreme Court's endorsement in *Bostock* and critique how its emergence amplified the dominant view of gender identity as inferior to biological sex.

47 *Doe v. Boyerton*, 897 F.3d 518, 2018 U.S. App. LEXIS 20792, 2018 WL 3581456 (United States Court of Appeals for the Third Circuit July 26, 2018); *G. G. v. Gloucester County School Board*, 822 F.3d 709, 2016 U.S. App. LEXIS 7026 (United States Court of Appeals for the Fourth Circuit April 19, 2016); *N.H. v. Anoka Hennepin School District*, 950 N.W.2d 553, 2020 Minn. App. LEXIS 272 (Court of Appeals of Minnesota September 28, 2020).

48 The most recent work of this nature, as far as the author is aware, is Chinyere Ezie's "Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—The Need for Strict Scrutiny" published in the *Columbia Journal of Gender and Law* in 2011. Ezie's work offers a rigorous analysis of legal and rhetorical constructions of sex as it relates to the adjudication of trans and intersex identities and argues for the application of strict scrutiny. There's also *Before Bostock: The Accidental LGBTQ Precedent of Price Waterhouse v. Hopkins* by Jason Pierceson (University Press of Kansas, 2020), which focuses on a much narrower slice of adjudication (employment discrimination) than is covered in this article.

This work is a novel systematic analysis of judges' rhetorical constructions of gender variance, presenting a cohesive scheme for understanding legal interpretations of gender identity. This article deepens the previously identified categories of medicalism and biological gender essentialism rhetoric and contributes the assimilationism and "defer to litigant" types. The scarcity of assimilationism in court opinions reveals how courts view social relationships as a substandard metric of gender tenability, and how earning one's gender socially among family and peers does not translate into legal legitimacy unless authenticated with medical evidence. The uncommonness of deferring to the litigant suggests a hesitancy to bestow self-identification with legal weight for fear of destabilizing binary sex categories and undermining their social authoritativeness. This typology hopefully can be a tool for further investigating the treatment of trans people by the legal system.

The endurance of medicalism over five decades is another noteworthy discovery, and its continued deployment by courts is all the more striking alongside state legislatures' attacks on gender affirming care in the 2010s and 2020s. Medicalism, as used by the courts, perpetuates an oppressive conceptualization of gender as based in the makeup of one's body and its proximity to cisness. However, many trans litigants have succeeded under medicalism, although those rulings turn on the ongoing pathologization of gender variance. Additionally, medicalist standards have loosened over time, shifting from a fixation on genital reconstruction to considering a wider catalog of medical interventions. If courts continually conclude that legal recognition turns on medical transition, might this offer further insight into right-wing suppression of gender affirming care as a movement tactic?

Tracing the evolution of biological gender essentialism reveals that favorable court opinions are often pyrrhic, reimagining and redirecting oppression instead of alleviating it. Victory can only be achieved by inserting trans people into the normative gendered hierarchies without challenging the hierarchy itself. Now, it is true that trans people materially benefit from name changes, workplace nondiscrimination protections, safer conditions in prison, and other legal outcomes. And yet, these wins come at a cost. This framework does not challenge essentialist assumptions, threaten categorization based on sex, or demand legal recognition of self-identification. Rather, it reifies the sex binary as natural and authoritative while carving out a precarious space for trans people within those two categories. The legitimacy of the categories themselves remains uncontested, to the detriment of trans people everywhere.

Furthermore, these cases aid in understanding power as "bottom-up" and depersonalized, where for gendered roles and behavior "the disciplinarian is everyone, yet no one in particular" (Cooper 1994, 438). The four types of reasoning in these opinions stem from engrained social norms on what gender is and how gendered bodies ought to look and act. When a judge gestures to genitalia, clothing, chromosomes, or mannerisms in assessing the tenability of a litigant's gender, they are reciting cultural norms that have been impressed on them. These sites of power exist far beyond the courtroom, but they take root in legal analysis. This is perhaps where a biopolitical analysis falters and a disciplinarian approach can be useful in tandem. In transgender rights cases, the judge is both a social actor attempting to reconcile gender variance with their ingrained belief systems and a state actor who can wield the power of the law to codify and enforce their view of gender. Analysis of these cases reveals how the

legal system produces and reinforces gender categories on dual axis; male and female, and natural and deviant. To preserve the gender binary and defend the dominance of gender normativity, trans people must be read as victims of psychological or spiritual disturbance. Then, a trans person's self-identified gender is only tenable if authorized by medical experts and if their desired presentation falls in line with gendered social norms. Should these boxes be checked, a judge may allow a trans person access to judicial processes in accordance with their gender identity. The courts stamp out disruptive gender expressions and renders them legally illegible, and therefore legally nonfunctional. By doing so, the state maintains a hierarchy of power that disadvantages trans people and delegitimizes gender variance.

This article is limited in its case sample and analytical depth. With no cases representing nonbinary or intersex litigants, there is a significant gap in assessing how those identities are interpreted by judges and how these sections of the LGBTQI+ community experience legal marginalization. Additionally, there is no way to be certain that this case universe is representative of the entire body of gender identity adjudication.

While this article addresses the interaction between a litigant's gender identity and sexual orientation, further research should take an intersectional approach to analysis and examine how the race, class, dis/ability, and social capital of a litigant may contribute to a judge's willingness to authenticate their gender identity. This is particularly critical for cases related to incarceration where litigants often face overlapping oppressions based on race, class, drug user status, poverty, citizenship, sex work, and criminality. Building on these findings with an intersectional lens is necessary to appreciate the complexities of legal marginalization and domination.

How judges interpret gender in their legal rulings represents the conditions trans people experience by participating in public life. They construct narratives to negotiate gender variance, impose standards on bodies to authenticate self-identification, and create rules to regulate their existence. Courts do not simply reflect gender normativity; courts manufacture it. They create and impose static, legible boundaries on what gender is allowed to be. Yet, trans litigants consistently succeed in disrupting their attempts to uphold a fixed gender-sex binary. How this disruption unfolds, and how courts embrace or rebuff it, will continue to shape the treatment of gender variance under the law.

REFERENCES

- Cooper, Davina. 1994. "Productive, Relational and Everywhere? Conceptualising Power and Resistance Within Foucauldian Feminism." *Sociology* 28 (2): 435–54.
- Currah, Paisley. 2003. "The Transgender Rights Imaginary." *Georgetown Journal of Gender and the Law* 4 (2): 705–20.
- Currah, Paisley, and Lisa Jean Moore. 2009. "'We Won't Know Who You Are': Contesting Sex Designations in New York City Birth Certificates." *Hypatia* 24 (3): 113–35. <https://doi.org/10.1111/j.1527-2001.2009.01048.x>.
- Enke, Finn. 2012. *Transfeminist Perspectives in and beyond Transgender and Gender Studies*. Philadelphia: Temple University Press.
- Ezie, Chinyere. 2011. "Deconstructing the Body: Transgender and Intersex Identi-

- ties and Sex Discrimination—The Need for Strict Scrutiny.” *Columbia Journal of Gender and Law* 20 (1): 141–200.
- Garrison, Spencer. 2018. “On the Limits of ‘Trans Enough’: Authenticating Trans Identity Narratives.” *Gender & Society* 32 (5): 613–37. <https://doi.org/10.1177/0891243218780299>.
- Haney-López, Ian. 1996. *White by Law: The Legal Construction of Race*. New York: New York University Press.
- Hequembourg, Amy, and Jorge Ardití. 1999. “Fractured Resistances: The Debate over Assimilationism among Gays and Lesbians in the United States.” *The Sociological Quarterly* 40 (4): 663–80. <https://doi.org/10.1111/j.1533-8525.1999.tb00573.x>.
- Keller, Susan Etta. 1999. “Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity.” *Harvard Civil Rights–Civil Liberties Law Review* 34 (2): 329–84.
- Levit, Nancy. 1998. *The Gender Line: Men, Women, and the Law*. New York: New York University Press.
- Pierceson, Jason. 2020. *Before Bostock: The Accidental LGBTQ Precedent of Price Waterhouse v. Hopkins*. Lawrence: University Press of Kansas.
- Romeo, Franklin H. 2004. “Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law Note.” *Columbia Human Rights Law Review* 36 (3): 713–54.
- Spade, Dean. 2006. “Mutilating Gender.” In *The Transgender Studies Reader*, edited by Susan Stryker and Stephen Whittle, 315–30. New York: Routledge.
- Spade, Dean. 2015. *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law*. Durham, NC: Duke University Press.
- Vade, Dylan. 2004. “Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That is More Inclusive of Transgender People.” *Michigan Journal of Gender & Law* 11 (2): 253–316.
- Wilton, Leigh S., Ariana N. Bell, Colleen M. Carpinella, Danielle M. Young, Chanel Meyers, and Rebekah Clapham. 2019. “Lay Theories of Gender Influence Support for Women and Transgender People’s Legal Rights.” *Social Psychological and Personality Science* 10 (7): 883–94. <https://doi.org/10.1177/1948550618803608>.

ACKNOWLEDGEMENTS

The original version of this article was completed as an undergraduate honors thesis. Thank you to my mentors and reviewers at Macalester College: Patrick Schmidt for supervising this research, and Myrl Beam, Lesley Lavery, and Duchess Harris for reviewing my work. Thank you to Paisley Currah, the *Bulletin* Editor, and the anonymous reviewers for providing helpful feedback on this article. Thank you to my best friend Austin Wu for his continued support. Finally, thank you to all of my trans siblings whose strength in the face of persecution inspires me every day.

APPENDIX 1: LIST OF CASES

United States Supreme Court

Bostock v. Clayton County (2020)

Farmer v. Brennan (1994)

Federal Appeals Court

Adams v. Sch. Bd. of St. Johns Cnty. (2022) (US 1st Cir.)

EEOC v. R.G. (2018) (US 6th Cir.)

Doe v. Boyertown Area Sch. Dist. (2018) (US 3rd Cir.)

G. G. v. Gloucester Cnty. Sch. Bd. (2016) (US 4th Cir.)

Glenn v. Brumby (2011) (US 11th Cir.)

Smith v. City of Salem (2004) (US 6th Cir.)

Schwenk v. Hartford (2000) (US 9th Cir.)

Farmer v. Moritsugu (1998) (DC. Cir.)

Maggart v. Hanks (1997) (US 7th Cir.)

Farmer v. Haas (1993) (US 7th Cir.)

White v. Farrier (1988) (US 8th Cir.)

Meriwether v. Faulkner (1987) (US 7th Cir.)

Supre v. Ricketts (1986) (US 10th Cir.)

Ulane v. Eastern Airlines (1984) (US 7th Cir.)

Sommers v. Budget Marketing (1982) (US 8th Cir.)

Kirkpatrick v. Seligman & Latz, Inc. (1981) (US 5th Cir.)

Pinneke v. Preisser (1980) (US 8th Cir.)

Holloway v. Arthur Andersen & Co. (1977) (US 9th Cir.)

Federal District Court

G.G. v. Gloucester County Sch. Bd. (2015) (E.D. Va)

Radtke v. Misc. Drivers & Helpers Union (2011) (D. Minn.)

Trevino v. Ctr. for Health Care Servs. (2008) (W.D. Tex.)

Tronetti v. TLC Healthnet Lakeshore Hosp. (2003) (W.D. NY)

Wolfe v. Horn (2001) (E.D. Pa.)

Farmer v. Hawk (1998) (D.D.C)

Phillips v. Michigan Dep't of Corrections (1990) (W.D Mich.)

Farmer v. Carlson (1988) (M.D. Pa.)

Lamb v. Maschner (1984) (D. Kan.)

Ulane v. Eastern Airlines (1983) (N.D. Ill.)

Doe v. McConn (1980) (S.D. Tex.)

Ashlie v. Chester-Upland School District (1979) (E.D. Pa.)

Darnell v. Lloyd (1975) (D. Conn.)

State Appeals Court

N.H. v. Anoka-Hennepin Sch. Dist. No. 11 (2020) (Minn. Ct. App.)

In re N.I.V.S. (2015) (Tex. 4th Dist. Ct. App.)

Beatie v. Beatie (2014) (Ariz. Ct. App.)

In re Estate of Araguz (2014) (Tex. 13th Dist. App.)

Hispanic Aids Forum v. Estate of Bruno (2005) (N.Y. Supreme. Ct.)

Kantaras v. Kantaras (2004) (Fla. 2nd Dist. Ct. App.)
In re Application of Marriage License for Nash (2003) (Ohio Ct. App.)
In re Heilig (2003) (Md. Ct. App.)
In re Gardiner (2002) (Kan. Supreme. Ct.)
Goins v. West Group (2001) (Minn. Supreme. Ct.)
In re Gardiner (2001) (Kan. Ct. App.)
Goins v. West Group (Minn. Ct. App.)
Littleton v. Prange (1999) (Tex. 4th Dist. App.)
In re Harris (1997) (Pa. Super. Ct.)
Maffei v. Kolaeton Indus. (1995) (N.Y. Supreme. Ct.)
Matter of Eck (1991) (N.J. Super. Ct.)
G. B. v. Lackner (1978) (Cal. 1st Dist. Ct. App.)
Richards v. United States Tennis Asso. (1977) (N.Y. Supreme. Ct.)
K. v. Health Div. (1977) (Or. Supreme. Ct.)
Doe v. State, Dep't of Public Welfare (1977) (Minn. Supreme. Ct.)
M.T. v. J.T. (1976) (N.J. Super. Ct.)
K. v. Health Div. (1976) (Or. Ct. App.)
Frances B. v. Mark B. (1974) (N.Y. Supreme. Ct.)
Anonymous v. Weiner (1966) (N.Y. Supreme. Ct.)

State District Court

Adams v. Sch. Bd. of St. Johns Cnty. (2018) (M.D. Fla.)
Diamond v. Owens (2015) (M.D. Ga.)
Norsworthy v. Beard (2015) (N.D. Ca)
Lopez v. River Oaks Imaging & Diagnostic Group, Inc. (2008) (S.D. Tex.)
Kantaras v. Kantaras (2003) (Fla. Trial Ct.)
Matter of McIntyre (1996) (Pa. Common Pleas)
In re Anonymous (1992) (Civ. Ct. of City of New York)
In re Ladrach (1987) (Ohio Common Pleas)
In re Petition of Richardson to Change Name (1982) (Pa. Common Pleas)
In re Dowdrick (1978) (Pa. Common Pleas)
In re Dickinson (1978) (Pa. Common Pleas)
In re Anonymous (1970) (Civ. Ct. of City of New York)
In re Anonymous (1968) (Civ. Ct. of City of New York)