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STANDING TRANS BEFORE THE LAW

by

KYLA BENDER-BAIRD

A dissertation submitted to the Graduate Faculty in Sociology in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

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This manuscript has been read and accepted for the Graduate Faculty in Sociology in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

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ABSTRACT

Standing Trans Before the Law

by

Kyla Bender-Baird

Advisor: Barbara Katz Rothman

In the 1960s, trans people in the United States began asserting their rights, petitioning courts for name changes, updating sex markers on birth certificates and other identity documents, and confirming whether their marriages were legal. However, it was not until the mid-2000s that courts began recognizing trans discrimination claims. While trans people enjoyed numerous legal inroads under the Obama administration, within its first two years, the Trump administration had effectively reversed these legal gains. Being vulnerable to the political winds contributes to a feeling of legal precarity, which, in turn, shapes how trans people think about and approach the law.

This dissertation asks what causes trans people in the United States to turn to the law and how are they defined by and sometimes stymied by law? In asking why trans people turn to the law, I was interested in both what types of social problems lead trans people to legal encounters as well as, and perhaps even more so, what is the appeal of law that people lay their troubles before it?

To answer these questions, I utilized a multi-method approach including interviews and content analysis. The content analysis facilitated an understanding of medicalization in legal discourse while interviews sought to understand why trans people turn to the law, how they are represented before the law, and how their experience with the law shapes their understanding of justice. I interviewed 20 trans people who had considered hiring a lawyer (who I call trans rights-

seekers), 56 lawyers who had represented at least one trans client in a non-criminal case, and 12 advocates (e.g., paralegals, social workers, policy directors) who used law in their work on behalf of and with trans communities. Through these interviews, I uncovered multiple legal issues including name and gender marker changes, employment discrimination, housing disputes, divorce and custody battles, and asylum claims.

Based on these interviews as well as an analysis of 53 published employment discrimination court decisions involving a trans plaintiff, I argue that trans people turn to the law for its normative power which sets the parameters of inclusion that, in some ways, constrains lives even as they enable them. To be normal is not only to be average but also to be valued, which counterbalances the stigma and dehumanization many marginalized populations have faced. For those facing exclusion and prejudice, legal recognition can be a meaningful symbol of inclusion and a weapon against bias. However, norms are double-sided. The cost of social inclusion through the establishment of legal norms is being subject to the law's terms. As discussed in this dissertation, trans rights-seekers are regulated through medicalization. While there was some evidence that medicalization sometimes helped the court arrive at a favorable outcome for the plaintiff, it came at a cost. By including details of the plaintiff's medical transitions, focusing especially on genital surgery, even when such details were not used to determine the plaintiff's legal standing, courts reduced trans plaintiffs to their medical procedures and perpetuated genital narcissism.

Thus, in turning to the law for its normative power by demanding inclusion and harnessing the power of law to support normalizing inclusive name and gendering practices, trans people are also subjected to the regulatory power of law as a normative institution that imports the norm-deviance boundary-making of medicalization. This dissertation contributes to

sociolegal understanding of how previously excluded minority groups are incorporated within legal landscapes and under what circumstances.

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Chapter 1: Introduction

“For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity” (Patricia Williams 1991: 153)

On its May 2014 cover, *Time* magazine declared a “transgender tipping point,” featuring black trans¹ actress and activist Laverne Cox, then star of the popular Netflix show *Orange is the New Black* (Steinmetz 2014). The accompanying article discussed how despite growing awareness, less than ten percent of Americans reported having a trans loved one and trans people faced high rates of discrimination. With the tagline “America’s next civil rights frontier,” *Time* linked trans rights with other marginalized groups in the United States, which have turned to the law to fight for inclusion, protection, and formal equality.

Civil rights can be defined as “rights of inclusion for the individual whom society otherwise excludes” (Engel and Munger 2003:3). In the mid-20th Century, the civil rights movement paved a way for the powerless of society to redress harm and pursue social reform by

¹ In this dissertation, trans refers to transgender. Historian Susan Stryker defines the concept of transgender as “the movement across a socially imposed boundary away from an unchosen starting place, rather than any particular destination or mode of transition” (2017:1). Language around this broad identity category has shifted repeatedly and rapidly during the time period examined (1950s – 2020s). Shifts in terminology are common as political identities are not static but come out of political struggle; trans is no exception (Murib 2015). “Transsexual” was the nomenclature used when non-cisgender identities materialized through medical discourses in the 1950s as a category in the U.S. In the late 1960s and early 1970s, some trans people began to challenge the medical model (Meyerowitz 2002) and a new identity category emerged: transgender. Transgender in the 1960s was for people living full time in a gender identity not aligned with their sex assigned at birth without undergoing any medical transitions (Ekins and King 2006; Stryker 2008b). In the 1990s, “transgender” took on new meaning following the circulation of a pamphlet by activist Leslie Feinberg. Since then, transgender has been used expansively to include all forms of gender variance, hearkening back to before medicalization contained expansive gender variance into one category-that-does-not-fit-all (Denny 2004; Schilt 2009b; Stryker 2008b, 2008a; Taubes 2009). Although this is the recognized historical trajectory of the category – medicalized 1950s transsexual, non-medical 1960s transgender, anti-normative 1990s transgender – recent scholarship from historian Williams challenges this neat history. She found instances of medical professionals, journalists, and famous trans people using “transgender” and “transsexual” dating back to the mid-1960s suggesting a longer trend in nomenclature rather than abrupt shifts and new meanings (Williams 2014).

turning to law (Brown 1995; Merry 1990; Rosenberg 2008). Laying the groundwork for rights movements were what Charles Epp (1998) calls a “rights revolution.” In the years following WWI, there was a dramatic shift from a focus on property rights to the recognition of civil liberties and individual rights, which led to a constitutional reinterpretation from limited government to the protection of individual rights. Supporting this legal mobilization were rights-advocacy organizations – particularly the NAACP (founded 1909) and the ACLU (founded 1920) – changes in the legal profession, funding, and government rights-enforcement agencies. Rights-advocacy organizations sponsored cases, provided cooperating attorneys, submitted briefs with arguments courts adopted in supporting rights claims, and sustained litigation in lower courts prior to landmark decisions in the Supreme Court, which is often reluctant to take cases that have not percolated in lower courts first. In the 1880s legal training shifted from an apprenticeship model to law school, which led to a diversification of the profession, allowed the development of legal theory, and provided a foundation for judges rethinking of themselves as protectors of fundamental rights. The early 1900s also saw the growth of law firms, allowing specialization, long-term strategic planning, and cooperating attorneys. Funding, which facilitated greater access to litigation, came in multiple forms including philanthropy, right-to-counsel policies, legal aid, and fee shifting where the party that does not win the case covers the attorney fees for the prevailing party. Finally, when the Justice Department and EEOC started bringing cases in their own names, there was an increase in civil liberties cases (Epp 1998).

Courts in particular have been a popular venue of choice for minority claims as courts are supposedly not beholden to the “tyranny of the majority.” In contrast to the other branches of government, the judicial branch is believed to be less responsive to the voting public, sheltered by judicial independence, and consequently positioned to protect politically unpopular

minorities, although legal scholars point to the limits of judicial independence (Adler 2018). Some judges are, in fact, elected by the public and Rosenberg (2008) suggests that the appointment process for others limits judicial independence. Judges also do not make decisions in a vacuum: they tend to be quite responsive to the political climate – sometimes measured by public opinion – and often take into account the opinions of their colleagues, including those in other branches of government (Andersen 2006; Epstein and Jacobi 2010). Minow (1991) further suggests that because judges tend to come from dominant groups and often fail to acknowledge their own perspective, their decisions may inadvertently perpetuate unstated norms. Despite this critique, courts are an appealing venue for asserting minority rights due to the belief that judges can act in the face of public opposition. For instance, the majority of LGBT equal rights victories have been won in the courts, with administrative law being another important venue for trans rights in particular (Adler 2018; Andersen 2006; Mezey 2020; Taylor and Haider-Markel 2014).

This dissertation asked why trans people in the United States turn to the law. I was interested in both what types of social problems lead trans people to legal encounters and, even more so, what is the appeal of law that people lay their troubles before it? Through interviews with trans people and the lawyers who represent them, this dissertation uncovered multiple legal issues including name and gender marker changes, employment discrimination, housing disputes, divorce and custody battles, and asylum claims. Based on these interviews as well as an analysis of published employment discrimination court decisions involving a trans plaintiff, I argue that trans people turn to the law for its normative power which sets the parameters of inclusion that, in some ways, constrains lives even as they enable them.

TRANS RIGHTS IN THE COURTROOM

Starting in the 1960s, trans people in the U.S. began asserting their rights, petitioning courts for name changes, updating sex markers on birth certificates and other identity documents, and confirming whether their marriages were legal (Meyerowitz 2002). Faced with having to spell out a legal definition of sex, something up until then taken for granted, the courts turned to medicine. Lawyers representing trans clients called on medical doctors to testify as expert witnesses. A handful of law review articles also called for the legal recognition of trans people's post-operative gender. Thus, from the start, trans rights claims have been framed by medicalization, the "process by which nonmedical problems become defined and treated as medical problems usually in terms of illness and disorders" (Conrad 2007:4). As will be discussed further in Chapter 6, medicalization of trans people while making rights claims continues today even though medical definitions and legal interpretations have shifted.

Although initially reticent, courts and administrative agencies generally granted trans people's requests to update their identity documents (e.g., passports, birth certificates, driver's licenses). In 1952, the U.S. State Department changed the passport for Christine Jorgensen – perhaps the first U.S. trans celebrity – after she provided a doctor's letter. Nearly two decades later, the State Department changed their policy to require a court order. In 1966, the New York County Supreme Court upheld the Board of Health's denial of a birth certificate amendment in *Anonymous v. Weiner*,² basing sex classification on chromosomal sex. Ten other states already allowed birth certificate amendments and New York's Department of Health had changed sex markers on birth certificate for three other people. In 1968, Judge Pecora reversed the *Weiner* decision, basing sex or gender classification on the "harmonization" of anatomical and

² *Anonymous v. Weiner*, 270 N.Y.S. 2d 319 (1966).

psychological sex, granting the petitioner's name change, and ordering the Department of Health to attach a copy of the name change order to the petitioner's birth certificate.³ Justices in other jurisdictions followed Pecora's example (Meyerowitz 2002). In 1971, The New York City Department of Vital Statistics updated its birth certificate policy, issuing new birth certificates with no sex marker to trans people who provided proof of either phalloplasty or vaginoplasty, a policy that remained in place until 2006 (Currah and Moore 2009).

Trans discrimination claims took much longer for the courts to recognize. Starting in the 1970s, trans people filed employment discrimination claims, sometimes with the backing of civil rights organizations like the ACLU. In 1971, a New Jersey school board suspended without pay elementary school music teacher Paula Grossman after she started living as a woman. Grossman filed a lawsuit, putting forward several claims, including a Title VII sex discrimination claim. A New Jersey district court dismissed her case in 1975, saying Grossman had failed to state a claim entitling legal remedy. Judge Barlow wrote in his opinion that Grossman's sex discrimination claim failed on two counts. First, she alleged discrimination not because of her status as a female but because of a change in sex. Second, having no clear direction from Congress that Title VII was intended to "include transsexuals", Barlow stuck with the "plain meaning" of sex (*Grossman v. Bernards Township Board of Education*). Throughout the 1970s and 1980s, courts consistently ruled against trans plaintiff's Title VII claims, interpreting the "plain meaning" of sex to refer only to biological, anatomical sex.⁴ During the same period, the Supreme Court expanded interpretation of Title VII, clarifying that prohibited sex discrimination included discrimination against (cisgender) women with pre-school aged children, height and weight requirements that

³ *Matter of Anonymous*, 293 N.Y.S. 2d 834 (1968).

⁴ E.g., *Sommers v. Budget Marketing Inc.*, 667F .2d 748 (1982); *Ulane v. Eastern Airlines*, 471 U.S. 1017 (1985).

were not bona fide occupational qualifications, unequitable pension contributions, sexual harassment, and discrimination on the basis of pregnancy (Thomas 2016).

A pivotal case in 1989, *Price Waterhouse v. Hopkins*, altered the direction of Title VII jurisprudence, widening the definition of sex discrimination to cover sex stereotyping. In 1982, Ann Hopkins went up for partnership at Price Waterhouse. Of the 88 candidates up for partnership that year, she was the only woman. Although she had a strong record of bringing in business and excellent performance evaluations, some members of the firm found her leadership style abrasive. A firm partner submitted a written comment on her partnership evaluation suggesting Hopkins needed a “course in charm school.” After her promotion was postponed a year, Hopkins met with the head of her department, Thomas Beyer, who advised Hopkins to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have hair styled, wear jewelry” in order to increase her chance of promotion. When Hopkins was denied partnership a second year, she filed a Title VII sex discrimination lawsuit. As Hopkins’ case made its way to the Supreme Court, her counsel brought on social psychologist Dr. Susan Fiske as an expert witness. Fiske supplied the theory of sex stereotyping, testifying that Price Waterhouse’s promotion procedure had allowed sex stereotyping to flourish. The promotion procedure relied on subjective criteria like an excellent reputation rather than objective criteria like how much business brought in. Fisk testified that the more subjective the criteria, the more opportunity to default to stereotypic notions of what behavior is and is not appropriate for a woman. Some partners also had limited contact with Hopkins, which meant they were more likely to rely on stereotypes in their assessment. Price Waterhouse had no checks on biased decision-making with no written nondiscrimination policy or training for partners on how to

avoid stereotypes in evaluations. Ruling in favor of Hopkins, U.S. Supreme Court Justice

Brennan wrote in the majority opinion that

we are beyond the day when an employer could evaluate the employees by assuming or insisting they matched the stereotype associated with their group...An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind. (*Price Waterhouse v. Hopkins*, 1989)

Following the *Price Waterhouse* decision,⁵ courts subsequently interpreted Title VII to protect discrimination based on sex stereotyping.

While the expanded interpretation of sex discrimination could have potentially covered trans plaintiffs, courts continued to deny their claims for several decades. Some courts were explicit that Title VII did not cover trans people regardless of the *Price Waterhouse* decision.⁶ For instance, in *Broadus v. State Farm Insurance Company*,⁷ the court ruled that the difference between the current case and *Price Waterhouse* was that “Ann Hopkins was not a transsexual and that the current plaintiff was” (Dunson 2001:478). Left untouched by *Price Waterhouse* was the first line of reasoning that led Judge Barlow to reject Paula Grossman’s claim in 1971: Title VII covered sex, not change of sex. This proved to be a strong line of reasoning applied in several early trans employment cases.⁸ However, as pointed out by lawyer JoAnna McNamara (1996), the same logic was not applied in religious discrimination cases: if someone converts to a new religion, they are still protected from discrimination based on religion. Not until the 2008 *Schroer v. Billington* decision would a court apply McNamara’s logic.

⁵ *Price Waterhouse v. Hopkins*, 490 U.S. 288 (1989).

⁶ See *Sommers v. Iowa Civil Rights Commission*, 337 N.W. 2d 470, 474 (1983); *James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478, 481, n. 4 (1995); *Underwood v. Archer Mgmt. Servs. Inc.*, 857 F. Supp. 96, 98 (1994).

⁷ *Broadus v. State Farm Insurance Co.*, 2000 WL 1585257 (2000).

⁸ *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (1977).

In 2004, the Library of Congress hired retired U.S. Army Colonel Diane Schroer for a specialist in terrorism and international crime position with the Congressional Research Service. At the time of application, Schroer was in the process of transitioning and had applied using her birth name. After accepting the position, Schroer invited her future supervisor out to lunch, explained that she was trans, and intended to start her new position as a woman. The Library of Congress rescinded its job offer the following day, and Schroer filed a Title VII sex discrimination lawsuit. In 2008, the U.S. District Court of the District of Columbia handed down a landmark decision in her favor. In writing the court's opinion, Judge Robertson found that sex stereotyping protections are extended to employees regardless of their gender identity. Furthermore, he found that gender identity is a component of sex and is therefore protected by sex discrimination law. Finally, Robertson wrote that "courts have allowed their focus on the label 'transsexual' to blind them to the statutory language itself."⁹ By drawing an analogy between a change in sex to a change in religion, Robertson demonstrated that trans employees are covered by the statutory language of Title VII, which prevents discrimination based on religion, national origin, race, color, or sex. People who experience discrimination because they change their religion are covered by Title VII; therefore, people who change their sex must also be covered. The *Schroer* decision signaled a change in trans jurisprudence. Beginning in the mid-2000s, courts increasingly recognized Title VII protections for trans employees.

Under the Obama administration, trans people enjoyed numerous legal inroads including courts' expanded interpretation of federal civil rights not only in employment but also education and healthcare. Furthermore, the Obama administration used its authority to hold back the

⁹ *Schroer v. Billington*, 577 F. Supp. 2d. 293, 321 (D.D.C. 2008).

expansion of religious liberty at the expense of LGBT rights (Mezey 2020). Additionally, the Department of State updated its passport policy, allowing sex markers to be changed with a physician's letter rather than proof of surgery (U.S. Department of State 2010). The tipping point heralded by *Time* magazine in 2014 seemed to be bearing fruit.

The switch from the Obama Administration to the Trump Administration in 2016 abruptly reversed direction regarding LGBT rights, and trans rights in particular. The Trump Administration encouraged a constricted interpretation of federal civil rights, acquiesced to demands of the religious right, and “left it up to the states what rights were extended to LGBT people” (Mezey 2020:176–77). Effectively within the first two years of Trump's presidency, eight years of legal gains made under the Obama Administration were reversed. As I will show in Chapter 3, being vulnerable to the political winds contributes to a feeling of legal precarity, which, in turn, shapes how trans people think about and approach the law.

In a somewhat surprising turn, on June 15, 2020, the U.S. Supreme Court ruled in *Bostock v. Clayton County* that LGBT employees are protected from sex discrimination by Title VII.¹⁰ The case, which was actually three Title VII cases lumped together, was the first time the U.S. Supreme Court had heard an LGBT employment discrimination case. The *New York Times* (Liptak 2020) declared the decision historic, putting it in company with *Brown v. Board of Education* (racial segregation), *Loving v. Virginia* (interracial marriage), and *Obergefell v. Hodges* (same-sex marriage).

Two of the cases – *Bostock v. Clayton County* and *Altitude Express Inc. v. Zarda* – involved a gay male plaintiff while in the third case – *R.G. & G.R. Harris Funeral Homes Inc. v.*

¹⁰ *Bostock v. Clayton County*, 590 U.S. ____ (2020).

Equal Employment Opportunity Commission – the plaintiff was a trans woman. Clayton County, Georgia fired Gerald Bostock, a child welfare coordinator working with abused and neglected children, after he joined a gay recreational softball league, finding his conduct “unbecoming” for a county employee. The Eleventh Circuit dismissed Bostock’s suit stating that Title VII does not prohibit discrimination because someone is gay. Altitude Express fired skydiving instructor Donald Zarda a few days after he mentioned being gay to a female customer concerned about being strapped to Zarda during a tandem dive. The Second Circuit allowed Zarda’s Title VII claim to proceed. The Sixth Circuit also allowed Aimee Stephens’s claim to proceed. Harris Funeral Homes fired Stephens two weeks after she informed them that she planned to start presenting as a woman at work. Stephens worked as a funeral director at Harris for six years before transitioning. By the time the Supreme Court handed down its decision, two of the three plaintiffs – Zarda and Stephens – were deceased.

It is notable that the Supreme Court considered trans and gay plaintiffs’ employment rights in tandem given a previous trend identified by legal scholar Valdes (1995): a sexual orientation loophole in antidiscrimination law. Since sexual orientation was not protected under Title VII or any other federal antidiscrimination law, defendants could argue that they discriminated on the basis of sexual orientation, regardless of whether or not the plaintiff was actually a sexual minority, and courts dismissed the plaintiff’s sex discrimination claim. Given how gender non-conformity is often read as a sign of someone’s LGBTQ sexuality, the sexual orientation loophole impacted trans people’s sex discrimination claims. For instance, in *Blackwell v. United States Department of Treasury* (1986)¹¹, the court justified discrimination

¹¹ *Blackwell v. United States Department of Treasury*, 265 U.S. App. D.C. 299 (1986).

against a crossdresser on the basis that the employer assumed the plaintiff was gay. By lumping sexual and gender minority plaintiffs' sex discrimination together, the Supreme Court bypassed the sexual orientation loophole.

Lumping the cases together was significant also considering the legislative history of states and municipalities passing antidiscrimination laws covering sexual orientation or gender identity only, which stirred up tensions within LGBT communities. One of the most notorious examples of legislative strategy dividing the LGBT community was in 2007 when Representative Barney Frank split the Employment Nondiscrimination Act (ENDA) into two bills: one covering sexual orientation and one covering gender identity. The Employment Nondiscrimination Act had been introduced into nearly every Congress since 1994, and 2007 was the first time gender identity was included. After splitting the bill, only the sexual orientation ENDA was brought up for a vote. LGBT advocates immediately protested the split with over 350 organizations pledging to support nothing less than a fully inclusive ENDA. The Human Rights Campaign was the only national LGBT organization that did not sign onto the pledge. In a nod to the division, when ENDA was brought up for a floor vote, Representative Tammy Baldwin briefly introduced the Baldwin Amendment, which would have added gender identity back into the bill, but almost immediately withdrew it. In November 2007, the House passed a sexual orientation-only ENDA, which was subsequently never introduced into the Senate. The split, as well as HRC's inaction, is still a sore spot in many LGBT communities.

Another surprise in the *Bostock* opinion is that it was written by Justice Gorsuch, a Trump appointee. Gorsuch, a textualist, bypassed legal theories developed over the decades and went right to statutory language. For instance, in writing the majority opinion, Gorsuch jumped past the sex stereotyping theory presented by Stephens' counsel during oral arguments, which

said that Harris Funeral Homes fired Stephens for being “insufficiently masculine.” As pointed out by political theorist Currah (2019), in making this argument, Stephens’ legal counsel both misrepresented their client as a “man who identifies and wishes to dress as a woman” and backed themselves into a corner when the issue of bathroom access came up. Instead, Gorsuch found that to fire someone for being gay or trans is sex discrimination by the plain meaning of the statute: “For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII’s plain terms....” Coming full circle, the plain meaning of the statute, used to deny trans employees protections in the 1970s, is now understood to protect gay and trans workers.

The *Bostock* decision highlights why so often courts are turned to in order to protect minority rights. In reading the political environment, people on both sides of the issue assumed the court would rule against the plaintiffs (Currah 2020). The legislative branch had stalled on LGBT protections for decades. In 2015, Congressional members stopped introducing ENDA and instead introduced a more comprehensive bill that actually has a longer legislative history than ENDA: The Equality Act. The first Equality Act was introduced in 1974 by Representative Bella Abzug and would have prohibited discrimination on the basis of sex, sexual orientation, and marital status in federally assisted programs, housing sales, rentals, financing, and brokerage services. The Equality Act was swapped out for the narrower ENDA, which only covered employment, in the mid-1990s. The most recent version of the Equality Act would amend the 1964 Civil Rights Act to explicitly prohibit discrimination based on sexual orientation and gender identity as well as expand the covered areas from employment, housing, and education to also include public accommodations and all federally funded programs. On February 18, 2021

(eight months after *Bostock*) the House passed the Equality Act (Kurtzleben 2021). Alongside legislative stalls, LGBT people, and particularly trans people, faced extreme hostility from the Trump Administration. Notably, a leaked 2018 Department of Health and Human Services memo indicated that the federal government interpreted sex discrimination to only cover biological sex as defined by your sex assigned at birth. This interpretation reversed the trajectory of judicial interpretation, taking it back to a 1970s understanding of sex discrimination. Given the hostility trans people were facing from the executive branch and the lack of legislative movement, *Bostock* seemed to fulfill the promise of the courts – to protect minorities from the tyranny of the majority.

CRITIQUES OF LAW AND SOCIAL CHANGE

Even as litigation continues in the playbook of movements fighting for social inclusion and formal equality, scholars caution against putting too much stock into legal cases.

Law and society scholars consistently show that focusing on cases that make it to court is only looking at the very tip of the dispute resolution pyramid. Before a person gets to court, they must first perceive an experience as causing them injury and then transform it into a grievance, dispute, or claim (Felstiner, Abel, and Sarat 1981). Along each stage of the transformation, there is drop off so that only a fraction of injurious experiences is ever transformed into legal claims. Part of the reason is that most people do not recognize their social problems as legal matters (Sandefur 2014). Even if they do understand their issue as a legal matter, people may still not pursue legal action due to the financial and emotional costs of litigation (Berrey, Nelson, and Nielsen 2017), fear that they will not be taken seriously (Bumiller 1988), and the stigma associated with victims of discrimination (Berrey et al. 2017; Bumiller 1988). Rather than file a formal complaint, most people will simply “lump it” (Galanter 1974) and not take any action,

avoid or resign themselves to the conflict (Bumiller 1988), or remove themselves from the situation including quitting a job (Albiston 2001). Those few disputes that make it to court rarely end in a formal adjudication (Galanter 1983), with many resolved through negotiation (Miller and Sarat 1981). Thus, we are faced with what Engel and Munger (2003) refer to as the paradox of rights talk and rights assertion: rights are seen as a defining characteristic of American citizenship and a solution to a range of social problems yet are rarely invoked, especially civil rights.

Political theorists join law and society scholars in questioning the effectiveness of litigation for addressing social problems, arguing that a focus on rights tends to individualize social harm, resulting in depoliticization (Brown 1995; Edelman, Erlanger, and Lande 1993; Rosenberg 2008). Scheingold (2004) called this “the myth of rights”: assuming that litigation in courts are a platform for declaring and realizing rights and that such realization is social change. Americans are very responsive to the myth of rights, but ultimately it is a myth that can never fulfill its promises. To explain why law fails to fulfill its promises, Bumiller (1988) points to inadequacies in antidiscrimination doctrine, which can be traced back to Reconstruction and the post-Civil War legal system, which imposed new politics of social control on black citizens. Antidiscrimination doctrine, particularly the 14th Amendment’s equal protection clause, provides the groundwork for most minority claims. However, while the “historic intent of the clause was to prevent the enactment of slavery through state legislation” (p. 6) that intent was quickly undermined through the universalization of rights – “persons under the law” (p. 13) – which “makes the invocation of rights meaningless if the victim cannot state their claims in terms of treatment of a disadvantaged class” (pp. 15-16). Further, “the structure of these laws did not provide the newly created citizens with affirmative civil rights or strategies of enforcement that

could initiate social change” (p. 46). Consequently, Bumiller suggests that the civil rights movement – and movements that adapt its strategies – will never achieve their goals of social reform but instead reinforce the victimization of the groups they are advocating on behalf of (e.g., racial minorities, women, sexual minorities). Minow (1991) similarly argues that “law ends up contributing to rather than challenging assigned categories of difference that manifest social prejudice and misunderstanding (p. 9). These differences, Brown (1993, 1995) argues, are products of power which antidiscrimination law neutralizes by atomizing them into lists of protected attributes. Furthermore, law favors “repeat players” – typically institutions with financial resources that are prepared to repeatedly face litigation (Albiston 1999; Galanter 1974) – disadvantaging the everyday citizen coming before the law activating their civil rights. On the rare occasion of a prominent case favoring everyday citizens, political theorists question whether the legal decision results in a redistribution of power or is simply a symbolic victory (Fraser 2003).

The big legal wins of LGBT equality — marriage equality,¹² nondiscrimination, and hate crime legislation — are critiqued for prioritizing symbolic recognition over economic redistribution (Adler 2018). Queer critics of marriage equality argue that it mostly benefits privileged LGBT people: those with employer-sponsored healthcare to extend to partners, and

¹² While ultimately it was a Supreme Court decision (*Obergefell v. Hodges*) that declared marriage equality an issue of equal dignity for the law, the movement for state recognition of same-sex partnerships had a legislative strategy preceding the Court decision by a decade. In the early to mid 2000s, the legislative strategy pursued a civil rights framing, pointing to the over 1,000 federal rights and benefits bundled by marriage which were denied to same-sex couples. This framing connected marriage to redistribution. While there was some success, a shift in framing in the late 2000s to focusing on love and family, emphasizing how much same-sex couples were like their heterosexual counterparts, led to an uptick in states granting marriage rights to same-sex couples. In other words, changing the focus from the economic side of marriage to symbolic values helped turned the tide.

wealth and assets to pass on to partners and children.¹³ Furthermore, marriage equality narrowed queer relationship structures to a dyad whereas queer family is often much more expansive. By granting marriage equality, the state ranked marriage above other legally recognized relationships such as domestic partnerships. For instance, after New York State passed marriage equality in 2011, Columbia University informed faculty that if they were registered domestic partners, they had a year to get married or would no longer be able to share health insurance benefits with partners. Rather than pursue marriage equality, critics favoring economic redistribution advocated delinking benefits like health insurance from marriage and supported other policy solutions such as universal healthcare (Spade and Willse 2013).

Like marriage equality, antidiscrimination and hate crime legislation are critiqued for dominating the LGBT rights agenda and for failing to help those most in need. While the *Bostock* ruling is historic, sending a signal of inclusion in the midst of an anti-trans political climate, it is unclear how the ruling may help the high rates of poverty and economic insecurity faced by trans people. Trans people are twice as likely to be in poverty compared to cisgender straight people (Badgett, Choi, and Wilson 2019). Nondiscrimination laws do not guarantee employment, and their effectiveness at deterring discrimination is questionable. What they provide is a pathway to recourse following discrimination if someone has the financial and emotional wherewithal to pursue legal action. Spade (2011) argues that prioritizing antidiscrimination legislation focuses too much on “what the law says about us” and does little to

¹³ Those with financial interests in marriage equality funded the movement. After marriage equality, donations dried up rather than going to support more marginalized members of the community, like homeless youth. Four years after marriage equality in New York, the Empire State Pride Agenda — the state’s leading advocate in LGBT civil rights for 25 years — announced it was closing its doors in 2015 after accomplishing its mission (McKinley 2015). However, it was not until 2019 that gender identity and gender expressed were added to the state’s human rights and hate crime laws.

improve the life chances of trans people. Antidiscrimination laws are therefore critiqued for being ineffective.

Hate crime legislation, on the other hand, is critiqued for potentially doing harm. In 2009, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act became the first piece of U.S. federal law that explicitly included gender identity. The Act enhances punishment of violent acts motivated by bias against protected categories, including actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. While the Act may have symbolically acknowledged the reality of anti-LGBT violence, critics argued that by emphasizing individual prejudice, hate crimes legislation washed over systemic and institutional violence (Spade and Willse 2000). The Act was passed as a rider to the National Defense Authorization Act. In effect, protecting minorities from violence within U.S. borders was contingent on authorizing the state to commit violence elsewhere. Queer scholar Chandan Reddy (2011) characterized this as “freedom with violence.” Organizations working on behalf of queer and trans people of color, like the Sylvia Rivera Law Project, were also critical of hate crimes legislation for expanding police budgets when police officers were often the ones harassing and attacking trans people, especially trans women of color (Sylvia Rivera Law Project 2012). A study of trans Latinas in Los Angeles County found that two-thirds had been verbally harassed by law enforcement as well as 21 percent physically assaulted and 24 percent sexually assaulted by law enforcement (Mallory, Hasenbush, and Sears 2015). Finally, while expanding the apparatus of state violence, the Hate Crimes Prevention Act has been ineffective at preventing anti-LGBT violence. In 2018, the FBI reported that one in five hate crimes were motivated by anti-LGBT bias (Fitzsimons 2019). In fall 2020, President-elect Biden called the increase in murders of trans people, particularly trans women of color, an “epidemic” (Taylor 2020).

WHY COURTS: RECOGNITION AND NORMALIZATION

While the evidence is clear that most people do not understand their problems through legal frames and consequently do not turn to the law, some people do. People turn to the courts to solve interpersonal disputes (Merry 1990) or seek recourse for discrimination (Berrey, Hoffman, and Nielsen 2012). It was the goal of this dissertation to better understand why people, especially those from a socially and legally marginalized group, turn to the law. Rather than asking whether or under what conditions does litigation produce social change, I asked what is the appeal of law? What does it offer everyday people? I suggest that the pull of law is recognition and normalization, which are appealing for those constantly pushed to the margins of society. Because our identities are built through interaction with others (Goffman 1963), recognition plays an essential role in everyday life (Connell 2009; West and Zimmerman 1987). Nonrecognition, or being made invisible, can inflict harm (Fraser 2003; Taylor 1992). Trans people have historically been denied their humanity – called perverts, psychologically sick, and monstrous (Bryant 2009, 2011; Daley and Mulé 2014; Meyer-Bahlburg 2010; Nordmarken 2014; Stryker 1994; Winters 2006). Recognition can be a way of re-thinking (Halley 2001) and engagement with law may offer a way to disrupt stereotypes (Barclay, Jones, and Marshall 2011). The importance of legal recognition for many trans people was perhaps best articulated by Joy, a professor I interviewed for this dissertation:

I literally thought I would die before living as myself. The legal stuff that you're researching is a significant part of that. It's a way of trying to write trans identity into some kind of cultural intelligibility and to hitch it in some broader concept of citizenship and humanity.

Legal inclusion can assist with depathologization, normalization, and social inclusion. Law's power to extend legitimacy and affirm norms (Albiston 2001; Allport 1954; Bumiller 1988;

Galanter 1983) explains why movements invoke legal norms in their efforts to effect social change (Andersen 2006). To be normal is not only to be average but also to be good (Halley 2001), which counterbalances the stigma and dehumanization many marginalized populations have faced. Faced with accusations of immorality (Fingerhut, Riggle, and Rostosky 2011), some sexual minorities turned to the courtroom as a way of asserting themselves into the mainstream (Rimmerman 2001). Scholars debate how effective law is at producing new norms rather than upholding the status quo (Bernstein 2001; McCann 1994, 2006; Scheingold 2004). However, “even without resorting to litigation, simply knowing one *has* rights can dramatically improve the lived experience of individuals” (Berrey et al. 2017:12). For those facing exclusion and prejudice, legal inclusion can be a meaningful symbol of inclusion and a weapon against bias. As I will show in Chapter 4, participants used their legal name changes to demand respectful social interactions, feel safe in daily public life, and access institutions.

In this dissertation, I argue that trans people turn to the law for its normative power. But norms are double-sided. On the one hand, norms are mechanisms of inclusion and legitimacy. They confer approval and value and offer an alternative to the pathological. On the other hand, they are regulatory, ways of keeping people in line (Warner 1999).¹⁴ The cost of social inclusion through the establishment of legal norms is being subject to the law’s terms. As articulated by

¹⁴ I first discovered this double meaning of norms when working as a non-profit research and programs manager, focusing particularly on women in the United States. In order to stay on top of the latest research and debates, I made it part of my job to attend gender and sexuality public events. I quickly noticed how differently norms, particularly legal norms, were framed. At one event, law was a mechanism to change norms in order to provide protections and inclusion for marginalized communities. For instance, a running theme at the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 30th anniversary event was how country representatives used the international treaty as a model of new gender equality norms to pressure their government in altering its legal structures. But at other events, norms and laws were part of a regulatory apparatus that instead of making life possible constrained the possibilities of living. Normativity was not something to be worked towards but against. Normativity constrained rather than protected. The one through line was that norms and laws were connected.

Janet Halley “to seek recognition is to concede the authority of those whose regard is sought” (2001:99). In seeking state recognition of same-sex marriages, couples invited regulation of their relationships (Harding 2011) and, as predicted, marriage equality was won by framing the issue in dominant norms of love and commitment (Bernstein 2001). Legal scholar Franke (2015) further argues that marriage equality required the de-sexing of homosexuality.

Another consequence of normalization, including through legal means, is the maintenance of a constitutive outside. As pointed out by queer legal theorists, legal norms secure the inclusion of some through the exclusion of others (Bernstein, Marshall, and Barclay 2009; Spade 2011). In the case of marriage equality, the constitutive outside includes racialized and religiously identified others, “bad gays” (i.e. those not seeking state recognition of their relationships, engaging in casual sex, with polymorphous relationship configurations, and non-normative gender presentations), and the unmarried (Adler 2018). While it’s unclear who is the constitutive outside created by state recognition of trans rights claims, this dissertation will take a critical look at how trans rights seekers are regulated through medicalization.

PLAN FOR DISSERTATION

After discussing the methodological approach in Chapter 2, Chapter 3 presents an analysis of the 20 interviews with trans rights-seekers. In relaying their stories of employment discrimination, housing disputes, divorce and child custody battles, personal injury claims, and name changes, participants revealed their legal consciousness, or the way they think about, understand, and utilize law. Previous scholarship on LGB legal consciousness focused almost exclusively on relationship recognition, positioning same-sex couples as outside the law. However, while my participants also articulated a feeling of being outside the law, they also shared stories of legal engagement. I suggest this represents a duality common among other

minority experiences. Both inside and outside the law, I argue trans people display a dual legal consciousness as they utilize the law while remaining cognizant of the ways law fails to fully include them. All participants critiqued their community's exclusion from formal equality, which I suggest is an example of "against the law" legal consciousness. Simultaneously, all participants articulated an understanding of law as a space outside of everyday life that operates according to objective rules ("before the law") or law as a game where one deploys resources in pursuit of strategic goals ("with the law"). By studying trans rights-seekers in their multiple legal engagements, I am able to show how trans people continue to make rights claims even as they are not fully covered by legal protections. This in turn reinforced legal hegemony as those excluded from the law demand inclusion rather than questioning law's legitimacy. Chapter 3 shows trans people turning to law to not only solve their disputes but also in pursuit of symbolic inclusion.

Chapter 4 examines the most reported legal matter in my 88 interviews with trans rights-seekers, lawyers who have represented trans clients, and advocates: name changes. As anchors for our personal and social identities, names are meaningful. Names are integral to our sense of self and how others recognize us, both as an individual and a member of various social groups (e.g., family, ethnicity, gender). Name changes, therefore, are associated with a change in identity. Most of the literature on name changes focuses on ethnic groups managing stigma and patterns of marital name changes. My findings in chapter 4 contributes to an emerging literature on the importance of name changes for trans people. Participants reported that name changes have a ripple effect on people's daily lives, institutional access, and other legal cases. They provided internal dignity through affirmation and external dignity through respectful interactions with others. Legal name changes are an example of the normative power of law.

While chapters 3 and 4 highlight the normative power of law, chapters 5 and 6 show the other side: how trans rights-seekers are regulated through medicalization. As trans people file claims of employment discrimination, their identities are constructed by the law through medical discourse. For bodies and/or identities that do not conform to social norms, medicalization has been a technique to “fit” people within existing legal classifications. Such efforts to “fit” people into legal classifications reauthorizes hegemonic values and norms. In the case of trans plaintiffs, the hegemonic value reauthorized via medicalization is cisnormativity. Previous studies showed how courts use medicalization along with other logics like normalization and stability to make trans plaintiffs intelligible. Chapter 6 extends the analysis by focusing specifically on the role of medicalization in published employment discrimination court decisions, examining its persistence despite changes in law and medical discourse. Through a content analysis of these opinions, this chapter substantiates how trans plaintiffs are made intelligible through inclusion of medical transition details and deference to medical authority.

Chapter 2: Methodology

This dissertation asks what causes trans people in the United States to turn to the law and how are they defined by and sometimes stymied by law? In asking why trans people turn to the law, I was interested in both what types of social problems lead trans people to legal encounters as well as, and perhaps even more so, what is the appeal of law that people lay their troubles before it? Therefore, I investigated the following: 1) What catalyst(s) bring trans people before the law? 2) How and why do trans people decide to pursue legal action? 3) How do lawyers decide which strategies to deploy in representing their trans clients? 4) How are trans plaintiffs medicalized when they make rights claims before the courts?

In order to answer these questions, I utilized a multi-method approach including interviews and content analysis. The content analysis facilitated an understanding of medicalization in legal discourse while interviews sought to understand why trans people turn to the law, how they are represented before the law, and how their experience with the law shapes their understanding of justice.

INTERVIEWS

This dissertation includes three sets of participants who were interviewed between March 2017 and March 2019.

The first set of participants are 20 trans rights-seekers, defined as people who considered retaining legal representation for non-criminal matters. These interviews sought to understand what brings people into contact with the law, how they decide whether or not to pursue legal action, and how they understand the law more broadly. During our interview, we discussed how they came to consider retaining a lawyer, their relationship with the lawyer, the procedures of their case, and how they felt about the outcome. Many participants talked about multiple legal

issues, and it was common for them to hire representation for some legal issues while handling others on their own. The legal matters discussed included name changes (14 participants), employment discrimination (8 participants), divorce and/or custody proceedings (7 participants), housing issues (3 participants), and personal injury (1 participant). Six of the rights-seekers may be classified as transmasculine, eleven as transfeminine, and three as non-binary. The exact gender identities of each participant can be found in the Appendix, which lists participant characteristics. All but three participants were white, with two identifying as black, and one as mixed race. Half of the participants were living in the Northeast, two in the Southeast, three in the Midwest, two in the Southwest, and three in the West. They represented a wide range of ages (20 – 65) and incomes (\$15,000 - \$100,000). One participant declined to share their income. Three reported their income as \$0: one was living on their savings after being fired from a six-figure job, one was currently in between jobs, and one was a student living with their mother. In terms of educational attainment, six participants had less than a college degree, seven earned college degrees, and seven held graduate degrees.

The second set of participants are 56 lawyers who have represented trans clients. The purpose of these interviews was to ascertain lawyers' understanding of trans identities, how they make strategic decisions on representing trans clients, and their vision of what the law can do for trans people. During our interview, we discussed their legal career, what type of law they practice, how they first started representing trans clients, and how many trans clients they have worked with on what type of legal issues. Only three-quarters of the lawyers were able to estimate how many trans clients they had worked with, and those who shared their numbers reported a wide range, from currently representing their first trans client to working with thousands. By far, the most common legal issue lawyers helped their trans clients with were

name and/or gender marker changes (39), followed by employment (18), health insurance or medical care (18), family law (14), public benefits (9), immigration (8), housing (5), and education (3). Just under half of the lawyers were in private practice and/or direct services, around 20 percent did impact litigation, and a handful worked in government or for a non-profit firm. Similar to the rights-seekers, nearly half of the lawyers were located in the Northeast (25), ten in the Southeast, eleven in the Midwest, and five each in the Southwest and West. Exactly half may be classified as cisgender while the other half may be classified as trans and/or non-binary. The exact gender identities of each participant can be found in the Appendix, which lists participant characteristics. Only 12 of the lawyers identified as straight or heterosexual. Although slightly more diverse than the rights-seekers, nearly three-quarters of the lawyers interviewed identified as white. There was a wide range of ages (26-68) and incomes (\$23,000 -- \$250,000) with three declining to share their income.

The third set of participants are 12 non-lawyer advocates who used the law in their work on behalf of and with trans communities. These advocates included social workers, paralegals, policy directors, and non-profit managers. During the interview, we discussed how they advocated for trans communities and the role law played in their advocacy. These interviews allowed me to see how trans people may use the law beyond the traditional lawyer-client relationship. All but one of the advocates may be classified as trans and none identified strictly as straight (see Appendix for exact gender identities, sexual orientations, and other participant characteristics). Half of the advocates identified as white while the other half identified as people of color. The advocates were highly educated with eight having earned an advanced degree.

Participants were recruited through social media, list serves, organizational outreach, my personal network, and referrals. Nearly 60 percent of the interviews were conducted through

video conference (e.g., Skype, Facetime) or over the phone while just over 40 percent were conducted in person at a location selected by the participant including a private home or office or a public place such as a coffee shop or restaurant. The study received ethical approval from a university-based Institutional Review Board. Prior to beginning the interview, I reviewed and signed an informed consent form with the participant, at which time the participant selected a pseudonym or agreed to their first name being used for the study.

Interviews lasted on average one hour with the shortest interviews ending around 25 minutes and the longest lasting over two hours. All but three interviews were audio recorded and subsequently transcribed. Two participants did not consent to audio recording and the audio recorder died at the beginning of the third interview. The three interviews not audio recorded were live transcribed by the researcher.

CONTENT ANALYSIS

To investigate how trans identities are medicalized before the law, I analyzed state and federal court decisions involving a trans plaintiff suing for recourse following employment discrimination. Although lawyers representing trans clients may use a variety of legal strategies, this dissertation focuses on the two most common applicable types of employment claims: sex discrimination and disability discrimination (Nielsen et al. 2008). A LexisNexis search using the keywords transgender/transsexual/transvestite/transgendered and Title VII or disability produced 62 cases decided between 1975 and 2016. After removing cases that were decided on procedural grounds rather than merits of the case, I had a sample of 53 cases decided between 1975 and 2015. Thirty-six of the cases filed a sex claim only, eight filed a disability claim only, and nine filed both a sex and disability claim. There are several possible explanations for why Title VII claims are more common than disability claims in the decisions analyzed. First, this pattern is

consistent with employment discrimination cases more generally. One-third of employment discrimination litigation cases involve more than one type of discrimination claim and Title VII claims are much more common than ADA claims (Nielsen et al. 2008). Second, stigma around disability dissuades some trans people and their lawyers from framing trans as a disability, especially given the movement to depathologize trans identities (Levi and Klein 2006). Third, the federal law prohibiting disability discrimination – the 1990 Americans with Disabilities Act (ADA) – explicitly excludes protections for transsexuality while the statutory language of Title VII prohibiting sex discrimination contains no explicit trans exclusions. Barry et al. (2016) suggest that the ADA’s exclusion of trans people is anomalous among disability antidiscrimination law as most state disability laws do not include such exclusions nor did the ADA’s predecessor: 1973 Federal Rehabilitation Act. Filing multiple claims is not only allowable under legal procedures but may be a tactic (Currah 2003; Spade 2003), especially because courts have not historically extended employment protections to trans people (Bender-Baird 2011).

Other legal strategies found in the LexisNexis search but not included in my analysis because they are less common were appealing to the equal protection clause of the Constitution and state human rights laws. It is also possible that there are employment discrimination cases involving trans people that are not captured in this study if their gender identity or expression was not introduced into court proceedings. For instance, if a trans person of color only filed a race claim and not a sex claim their trans identity may not have been mentioned. Furthermore, not all employment discrimination cases end in a published decision. Best et al. described judicial decisions as the “tip of the iceberg” (2011:1000) with court filings representing only five percent of perceived incidents of employment discrimination (Miller and Sarat 1981), 80-90% of

filed cases not ending with a decision published in Lexis (Siegelman and Donohue 1990), and the majority of employment discrimination cases ending in settlement (Nielsen et al. 2008; Nielsen, Nelson, and Lancaster 2010; Siegelman and Donohue 1990). Cases that end in a published decision tend to be the strongest cases, which are more likely to use traditional legal strategies, including medicalization. Therefore, analysis of published cases may not be representative of all employment discrimination grievances. My goal was to compile a comprehensive if not complete representation of published court decisions meeting the study criteria. I confirmed the comprehensiveness of the decisions analyzed by visiting the websites of non-profits involved in impact litigation for trans clients including Lambda Legal, the Transgender Legal Defense Fund, and the National Center for Lesbian Rights. No sex or disability employment discrimination cases posted on these websites were missing from the decisions I pulled from LexisNexis.

In terms of plaintiff demographics, 48 were trans women, four were trans men, and one was a crossdressing man. This asymmetry may be attributed to the patriarchal dynamic of the U.S. labor market: transwomen report higher levels of job loss and/or difficulty finding a job post transition (Grant, Mottet, and Tanis 2011; Schilt and Wiswall 2008) while some trans men are able to tap into the patriarchal dividend (Schilt 2011). Also, women file 80 percent of sex discrimination claims in cases that advance to litigation (Nielsen et al. 2008). Thirty-four of the decisions referred to the plaintiff as transsexual, ten as transgender, six as transgendered, and one each used the terms transvestite and crossdresser. These terms were not mutually exclusive. While “transsexual” generally predates “transgender” or “transgendered” – and this was reflected in the decisions – there was overlap in the usage of the term. The earliest cases used “transsexual” with “transgendered” first appearing in 2002 and “transgender” in 2005. However,

all three terms were used in 2015 court decisions. Three of the court decisions used none of the recognized terms for trans people, referring to the plaintiff instead with an intent to physically alter their sex. Only two of the decisions referenced race: one African American and one white plaintiff.

To measure the extent of medicalization in these cases, I analyzed the decision that determined the outcome. Of the 53 cases analyzed, nine were state cases. Of these state cases, I analyzed the final published decisions from four appeals, three superior, one commonwealth, and one supreme court(s). Three of the state cases had subsequent decisions in a state supreme court that affirmed the decision or denied review. Among the 44 federal cases, 37 of the final published decisions I analyzed were from a district court and seven were from a circuit appeals court. Eleven of the federal cases had subsequent published opinions that either affirmed the district court opinion or denied a rehearing.

Table 1. Opinion analyzed by state and federal cases

	State	Federal
Number of cases	9	44
Court level of opinion analyzed	4 Court of first hearing 5 Appellate	37 District 7 Appeals
Subsequent decision affirming analyzed opinion or denying rehearing	3	11

Using Atlas.ti, I coded the opinions for medicalization, identifying three ways trans identities were placed within a medical framework: medical authority (citation of a medical authority such as psychiatrist), diagnosis (mention of DSM, gender identity disorder, gender dysphoria, or American Psychiatric Association), and medical transition (mention of medical transition details such as hormone therapy or surgery or the classification of plaintiff as pre-

operative or post-operative). A content analysis of the court decisions revealed the scope of medicalization while a discourse analysis allowed me to tease out the meaning produced by including details of medical transitions, diagnosis, and consulting medical authority, following a trend of conducting discursive analysis of legal language (Richman 2005).

As medicalization may be utilized as a legal strategy for humanizing trans plaintiffs in hopes of increasing the likelihood of winning their case, it is worth looking at the relationship between medicalization and case outcome. I coded the court decision as favorable to the plaintiff if the defendant's motion to dismiss or for summary judgement was denied, judgement on liability was entered for the plaintiff, a *prima facie* case was established, or previous judgement including dismissal of claims was reversed and remanded for further proceedings. In cases that filed multiple claims, it was common for one claim to be dismissed while another went forward. If even one of the plaintiff's claims was allowed, I coded the case as favorable to the plaintiff. Four of the cases denied the motions of both plaintiff and defendant, recommending mediation or sending the case to trial. I coded these cases as neutral. I also compared how sex and disability claims fared to see if certain claims were more likely to result in a favorable decision.

A NOTE ON POSITIONALITY

Before getting into the details of my findings, I first want to offer some reflections on how my social location shaped the project. Feminist standpoint epistemology argues that "no point of view is 'neutral' because no one exists unembedded in the world" (Narayan 2004:218). Claims of objectivity merely mask that all knowledge is situated and partial (Haraway 1991; Smith 1987). Feminist researchers often discuss being insiders, outsiders, or insider-outsiders to highlight the relationality between researchers and the people they research. Such discussion does not claim that a particular relationality is more useful or successful; rather, the positionality

of a researcher in relation to those she researches offers both opportunities and constraints. Furthermore, relationality is not static but a product of particular situations that shift throughout the research process (Kusow 2003; Manohar 2013; Naples 1996). My position as an outsider (non-trans, non-lawyer, and someone who has never sought legal advice or representation) undoubtedly impacted the shape of the project, from the questions I asked, to the participants I was able to recruit, to how I conducted the interviews, to how I have analyzed and framed the findings. In this note, I offer reflections on how awareness of my positionality as a cisgender researcher studying trans experiences informed 1) my methodological choices and how I conduct interviews, and 2) approach to recruitment and how I was received. I will close with some ideas on how to approach qualitative social science research that is trans inclusive going forward.

There is a long history of (cisgender) social science researchers misrepresenting and misappropriating trans voices, which has created a lot of (earned) distrust of cisgender researchers. Since my first project researching trans experiences in 2007, I have followed Jacob Hale's (1997) suggestions to non-trans people writing about trans people, including approaching the field with a sense of humility, interviewing participants as experts of their experiences, and critically interrogating my position throughout the process through self-reflexive journaling. I privilege qualitative interviews and use inclusive citational practices to ensure my work is inclusive of trans voices. Interviews allow the researcher to seek an understanding of social reality from the perspective of their participants (Berg and Lune 2012; Reinharz 1992), which is especially important when the researcher is an outsider. Recognizing the power imbalance in a researcher-participant relationship, I emphasize in the consent form that participants can decline to answer questions, pause the recording, and end the interview at any time. I also bookend each interview with an opportunity for the participant to ask me any question(s). By also allowing the

interviews to be largely participant driven – not sticking to the interview schedule – I got a more comprehensive view of each participant as we went on tangential discussions that gave me a bigger picture of who they were and how that shaped their experiences. At the end of every interview, I asked participants what they thought could improve the lives of trans people in the U.S. This provided an insight into how the legal issues we focused on during the interview fit within participant priorities for their communities. Additionally, I invite feedback and a sustained dialogue with participants by sharing interview transcripts, initial findings, as well as the final product. However, since the project is not participatory, I ultimately retain control over the data analysis and writing. One potential participant initially agreed to be interviewed but upon reading the consent form bowed out because she wanted more control over the information.

In designing my recruitment material, I was cognizant of the history of cisgender people researching trans people and wanted to be transparent from the outset; therefore, I made the decision to identify myself as cisgender. I also initially made the decision to not identify myself as queer. This decision was informed by the historical, and sadly recent resurgence, of trans-exclusionary “radical” feminists. I worried that identifying myself as a queer woman in the recruitment material might have signaled allegiance to that political orientation – which I do not subscribe to – and alienate potential participants. As I began conducting interviews, people brought up how learning their lawyer was LGBTQ or even trans helped them feel comfortable and confident. Also, some colleagues let me know that they had effectively outed me when vouching for me with the connections they referred to me. Eventually, I started occasionally adding into the recruitment script that I was queer, especially if I was connecting with participants through an LGBTQ+ organization.

However, I remain dubious about whether being queer and thus “family” makes me any more trustworthy than a straight identified researcher. There are significant tensions within LGBTQ+ communities, especially along gender lines. Additionally, there were times where it was helpful the participant did not know my identity and thus could approach me as a blank slate. For instance, one participant strongly believed that people could not be “in between” in terms of gender or sexuality: you were a man or a woman, straight or heterosexual. After the interview, as she drove me back to the train station, she returned to this line of thought and asked me directly if I agreed. At that point, I shared that I identified as bisexual and therefore saw the issue differently. Had she known my identity from the beginning of the interview, she may have never shared her perspective or might have censored herself. As a researcher, my main prerogative is to ethically collect accurate data. Identifying myself as queer may have helped me seem more trustworthy (to some) but may have also skewed the data. Unless directly asked, I let people make whatever assumptions they wanted about me.

Primary social science research relies on people’s willingness to participate in the research. Unless you can gain access to the communities you wish to research, your project is dead in the water. Due to ethical standards, I could not approach rights-seekers directly. Instead, I publicized my study in as many places as possible so that those interested in participating could contact me. This indirect method of recruitment comes with a front-loaded motivational threshold: people have to be actively interested in sitting down with a stranger and sharing their personal experiences. They also have to trust me with rather sensitive information: people are often hiring lawyers when something has gone wrong, they are in a vulnerable position, and/or are handling private information. There are a lot of obstacles to making this initial contact. For starters, people have to believe in participating in research. A study of LGBTQ+ young people’s

motivations for participating in qualitative research identified three main motivations: support for scientific knowledge production, commitment to social change, and opportunity for introspection (Schmitz, Tyler, and Robinson 2019). Many participants in both the 2007-2008 and 2017-2019 interviews indicated that they agreed to participate in my study, because they believed education – via research – was important to social change and/or they saw their participation as a way to give back to their community.

In addition to gaining people's trust and overcoming the motivational threshold for participation, I encountered another obstacle to recruitment that was new since my last time in the field: research fatigue. By far the most common question participants asked me in 2007-2008 was how I came to the topic. At that time, there was very little published research on trans people, particularly within the social sciences, that focused on anything other than a person's medical transition. The impression I got from participants was surprise that anyone was interested in the experiences of trans people. In fact, many people thanked me for doing the research. Fast forward ten years and the field had changed considerably. Trans people have made inroads in pockets of U.S. society, including in media, law, and academia, and there is generally more awareness of trans lives. In recruiting participants, instead of encountering surprise and curiosity, I found resistance, critical questions, and research fatigue. With increased interest in trans people's lives, more and more graduate students – and perhaps even college students – are likely writing their theses and dissertations on this population. When reviewing the literature, I noted that many of the books were originally dissertations and that most of the authors had since moved on to other topics and areas rather than continuing to contribute to the expansion of knowledge within trans studies.

Furthermore, there is skepticism how all this research helps the material circumstances of not only the participants but their communities more broadly. Despite greater social awareness, trans people continue to face high rates of discrimination and struggle for legal inclusion. Rather than being asked how I came to the topic, it was much more common for people to ask what I was going to do with the research. Sometimes this was asked as a screening question and if I could not provide a satisfactory answer, people declined to be interviewed. I had one lawyer, in declining to be interviewed, explicitly say that he only participates in studies that were directed by and designed to materially benefit trans communities. Other times, participants asked me at the end of the interview, with several, like in my previous study, connecting education to social change. Whether from research fatigue, distrust of cisgender researchers, or some other reasons, several organizations I contacted with requests to share my recruitment material replied that they had a strict policy of not forwarding research requests to their members.

What also was new was people asking if I compensated participants. There are now expectations that the labor involved in participating in a study should be recognized and, if possible, compensated (Vincent 2018). The level of accountability being required of particularly cisgender people asking for participation of trans people in their studies has increased over the past decade.

What does this mean going forward? Some people are moving away from qualitative work altogether, focusing instead on archival research; however, I still think there is value to qualitative research, in understanding everyday experiences and how people give meaning to their daily lives. I am not ready to abandon the project of including trans people in social science qualitative research but am committed to finding ways to do that are least exploitative and most sensitive to the reality of research fatigue. Obviously, pursuing funding and prioritizing

participant stipends in grant budget is one step. Also, collaboration with trans-identified research partners whether those partners are other academics or community partners via participatory research. In 2017, *The Annual Review of Sociology* featured an article on the development of transgender studies in sociology, noting a shift in the 1990s from a focus on gender deviance to gender difference. The authors also identified three areas of study which they said represented “the current state of the field”: diversity of trans people, quantitative approaches, and examinations of trans people’s experiences within institutional and organizational contexts (Schilt and Lagos 2017). My two projects fit within the latter – looking at trans people’s experiences within the workplace and within legal institutions. However, I do wonder if there is another shift underway. Two recent sociological studies of gender variance in childhood studied the parents of trans and non-binary children rather than the children themselves (Meadow 2018; Rahilly 2020). Within the current project, I ended up with a larger and more diverse group of trans people through my recruitment of lawyers than recruitment of trans people who had considered hiring a lawyer. Perhaps the way forward is to study the institutions that impact trans people’s daily lives – e.g., family, law, workplace, education, medical – and the multiple actors within the institutions, some of whom may also identify as trans or non-binary.

Chapter 3: Dual Legal Consciousness of Transgender Rights-Seekers

On June 15, 2020, the U.S. Supreme Court declared that one cannot be fired simply for being gay or trans. As discussed in Chapter 1, *Bostock* was a historic decision, clarifying that Title VII's employment protections extend to the LGBTQ community. The decision came down during a push by the Trump administration to undo decades of judicial interpretation, returning the meaning of "sex" in sex discrimination federal statutes to a biological definition, an interpretation most prominent in the 1970s. Just three days before the *Bostock* decision, the Department of Health and Human Services finalized a rule that would remove nondiscrimination protections for LGBTQ people in health care and health insurance (Malina, Warbelow, and Radix 2020; Simmons-Duffin 2020). The rule regarded Section 1557 of the Affordable Care Act, which prohibits discrimination based on race, color, national origin, sex, age, or disability. In 2016, the Obama Administration clarified that sex included gender identity. Since then, Section 1557 has been an important legal mechanism for trans people and their lawyers appealing insurance denials and filing claims of mistreatment in medical facilities. With a return to a biological-only understanding of sex discrimination, there was concern that trans people may be turned away from medical care, which is especially concerning during a global pandemic. Several lawsuits were filed in response to the new rule, and, in August 2020, a federal judge issued a preliminary injunction, temporarily blocking the rule from going into effect (Schmidt 2020).

This political ping pong — one branch of government confirming a protection (employment) while another branch takes away a recently granted protection (healthcare) — adds to a feeling of legal precarity. Immigration scholars sometimes use legal precarity to describe a state of "not-yet-full-citizenship," pointing to the tension between inclusion and

exclusion that feature frequently in the lives of undocumented immigrants (Armenta and Rosales 2019; Balčaitė 2019; Kim, Park, and Shukhertei 2017). I use legal precarity to discuss the tension between inclusion and exclusion experienced by trans people who have all the responsibilities of citizenship while their rights remain contingent on where they live and what direction the political wind is blowing. Although the drama of legal precarity was quite pronounced under the Trump Administration, it was nothing new for LGBT people in the United States. For instance, after *Obergefell*, same-sex couples had access to marital rights but, depending on where they lived, may not have enjoyed employment protections. Prior to the *Bostock* decision, there were no federal employment protections for LGBT people. LGBT employees had to rely on local and state laws for protections. According to the Movement Advancement Project, 21 states plus Washington D.C., Puerto Rico, and Guam had laws explicitly prohibiting discrimination in employment and housing based on sexual orientation and gender identity (Movement Advancement Project n.d.). Those living in the other 29 states faced the legal possibility of, as one participant put it, “Married on Sunday, fired on Monday” (Terry). Ever since trans people started making rights claims in the 1960s, they have lived with legal precarity, winning some forms of recognition (e.g., updating identity documents under particular conditions) while denied others (e.g., nondiscrimination protection).

In this chapter, I will explore how legal precarity shapes the way trans people think about, understand, and utilize the law (i.e., their legal consciousness). How do trans people think about law when they are only provisionally and contingently incorporated in it? To answer this question, I analyze the experiences of 20 trans rights-seekers as they filed name change petitions, pursued employment discrimination claims, consulted lawyers about housing disputes and personal injuries, and came to divorce and custody agreements with former spouses. Previous

studies of LG(BT) legal consciousness have focused almost exclusively on same-sex couples and their marriage and family issues (Hull 2016); other legal efforts like the decriminalization of sodomy, depathologization of homosexuality, and antidiscrimination in employment and public accommodations have received less attention (Weinberg and Richman 2016). Studies of same-sex couples also focused on one type of legal engagement wherein they were denied formal equality. As we have learned from socio-legal theory and studies, however, law saturates everyday life through policies and norms that shape social behavior. Focusing on one form of legal exclusion ignores the multiple ways these same-sex couples are also inside the law in their everyday lives through consumer transactions, traffic violations, internet privacy agreements, etc. In other words, even when denied relationship recognition, same-sex couples were never fully outside the law. By including multiple forms of legal engagement, the current study shows how people continue to utilize the law even when it fails to fully include their social group.

Based on my analysis of trans people's multiple forms of legal engagement, I argue that participants expressed what I call a dual legal consciousness. A dual legal consciousness arises from tension between inclusion and exclusion when your social group is both inside and outside the law. Probably the best known use of "dual consciousness" comes from the work of Du Bois (1903) who coined the concept of double-consciousness to convey the sense of duality that arises out of black experiences in the U.S. For Du Bois, double-consciousness was a feeling of "two-ness – an American, a Negro" coming from "a sense of always looking at one's self through the eyes of others" (p. 2). Here, I am using dual legal consciousness to get at the sense of seeing oneself as a rights bearer while also seeing oneself as legally excluded. Participants simultaneously saw themselves as possessing rights – expressed through their name change petitions and engagements with civil law – and as being denied full legal inclusion. While this

concept arises out of my study of trans people seeking recognition and protection before the law, I do not mean to imply that a dual legal consciousness is unique to trans people. It is worth exploring in future studies whether other minority groups who have some rights but are denied others also express a dual legal consciousness.

LEGAL CONSCIOUSNESS: LAW IN EVERYDAY LIFE

Starting in the 1990s, legal consciousness emerged as the study of the way people think about, understand, and use the law (Ewick and Silbey 1998; Merry 1990). Zemans' (1982) theory of legal mobilization foreshadowed legal consciousness in discussing, first, how people may be socialized into a rights consciousness and, second, that the more hegemony law enjoys in a society – lawmaking bodies and their rules seen as legitimate – the more likely that people will comply with and use the law. Scholars of legal consciousness aimed to better understand legal hegemony whereby “law sustains its institutional power despite a persistent gap between the law on the books and the law in action” (Silbey 2005:323). To understand legal hegemony, legal consciousness scholars backed their point of inquiry out of the courthouse and formal institutions of law into everyday life (Sarat and Kearns 1993), asking how people come to see law as having something to offer them and how they conceptualize their entitlement to rights (Ewick and Silbey 1998; Merry 1990). At its core, legal consciousness “takes seriously the idea that ordinary people can be legal actors” (Marshall and Barclay 2003:617). Studies of legal consciousness examine attitudes, perceptions, ideologies, and actions (Harding 2011; Hoffman 2003; Marshall 2005), which may include consulting lawyers and filing lawsuits in response to grievances or simply sharing one's story as an informal type of mobilization (Uggen and Blackstone 2004). These studies have focused on a variety of populations including marginalized groups – such as low-income mothers of color (Hernandez 2010), welfare recipients (Sarat 1990), undocumented

Latinos (Abrego 2008, 2011, 2018), and HIV+ people (Musheno 1995) – and privileged groups, including workplace supervisors (Munkres 2008) and business associations (Ranasinghe 2010). What we learn from these different studies is how much variability there is between groups (Nielsen 2000, 2004) as well as within-group differences (Abrego 2008, 2011; Hernandez 2010). Studies of legal consciousness demonstrate that how people think about and act towards the law is shaped by social structures, interactions, situations, and experiences (Blackstone, Uggen, and McLaughlin 2009; Hernandez 2010; Hoffman 2003; Nielsen 2004).

LEGAL CONSCIOUSNESS AMONG SAME-SEX COUPLES: SEEKING LEGAL RECOGNITION OF FAMILIAL RELATIONSHIPS

An emerging literature on legal consciousness among same-sex couples asks the question, what happens to legal consciousness when a social group is excluded from formal equality? Until recently, sexual minorities in the United States were labeled deviant and therefore undeserving of legal protection. Before the Supreme Court's 2003 decision in *Lawrence v. Texas*, twelve state sodomy laws criminalized homosexuality; for example, in Georgia a same-sex adult couple practicing consensual anal or oral sex in the privacy of their home faced a prison sentence of up to twenty years. With *Lawrence* the Supreme Court declared state sodomy laws unconstitutional. Left untouched by the *Lawrence* decision was the Defense of Marriage Act (DOMA) which banned same-sex couples from being recognized as spouses for the purposes of federal law, effectively disqualifying same-sex couples from the over one-thousand federal benefits tied to marriage. Not until 2015 was DOMA struck down by another court decision – *Obergefell v. Hodges* – in which the Supreme Court declared marriage an issue of equal dignity before the law.

During this period of legal change, several social scientists studied the legal consciousness of same-sex couples seeking legal recognition of their familial relationships either through marital or parental status. These studies found that claims-making for relationship recognition was not just about legal and financial benefits (Richman 2015) but also the symbolic power of legal equality (Lannutti 2005), especially as a vehicle for social acceptance and normalization (Harding 2006; Hull 2003; Nicol and Smith 2008). Marriage equality led to greater feelings of social inclusion (Badgett 2011), even among couples who had been together for decades (Porche and Purvin 2008) and who previously had a civil union (Rothblum, Balsam, and Solomon 2011). The quick pace of change – from criminalization to state recognition within a lifetime – added significant meaning to same-sex couples registering their relationships (Auchmuty 2016). With *Obergefell* securing marital but not necessarily parental recognition, some same-sex parents continue to point out legal gaps, use the laws available to them, and reference the law to legitimize their families (Gash and Raikin 2018).

ADDING THE “T” TO LGBT LEGAL CONSCIOUSNESS

To date, only a few studies have examined trans legal consciousness, mostly focusing on the legal classification of trans and gender non-conforming people in the UK (Renz 2017) and Pakistan (Nisar 2018). It is important to include trans experiences with the law and understandings of the law as they may face different legal questions for the same legal issues as LGB people. For instance, in family law cases, all LGBT families must contend with the courts attempting to fit them within heterosexual marriage scripts; for trans litigants, there is an additional layer of scrutiny as the courts also determine if they will be considered male or female for the purposes of the court case (Herald 2009). Including trans experiences in the literature on LGBT legal consciousness is also significant as trans rights tend to be framed differently than

LGB rights in public discourse. Based on a content analysis of interest group websites and newspaper articles, Tadlock (2014) found that equality, safety/security, and education are the dominant frames shaping debate around trans rights. This is unlike the debate around gay rights where the most prevalent frames are equality and morality.

TYPOLOGIES OF LEGAL CONSCIOUSNESS AND THE DIFFERENT MEANINGS OF “AGAINST THE LAW”

In addition to including trans experiences in studies of legal consciousness, the current study adds to the examination of “against the law” legal consciousness expressed by members of marginalized groups. In one of the canonical studies of legal consciousness, Ewick and Silbey (1998) identified three schemas that describe how people understand the law and how they weave this understanding into everyday interactions. “Before the law” is the story law tells about itself wherein law is an objective space separate from everyday life, operating through fixed rules and is both authoritative and predictable. “With the law” considers the law as a game wherein players have access to different resources to increase their odds of winning. “Against the law” portrays the law as an imposing powerful force, invading people’s everyday lives. People move through the three schemas of legal consciousness depending on the situation and may often express more than one simultaneously.

Pre-marriage equality, LG(BT) legal consciousness scholars posited that “how the law operates is very different for those within its bounds and those outside of it” (Connolly 2002:328) and, consequently, reimagined the classic legal consciousness typology for same-sex couples seeking relationship recognition (Harding 2006, 2011; Hull 2003, 2016). Most significant in this reimagining was a different understanding of “against the law.” Whereas “before/with the law” schemas generally represent engagement with the law, “against the law” is

the schema of resistance. In Ewick and Silbey's original legal consciousness triad, "against the law" was an understanding of law as a "product of power" (p. 28) that is arbitrary and capricious. Rather than seeking justice before the law, people are "caught within the law" or "up against the law" (p. 48). In this conceptualization, law invades everyday life and resistance may look like avoiding the law, foot dragging (taking one's time), or taking up space. However, as stated by Harding, "resistance can only happen from within normative frameworks, not from outside. When positioned outside the law, when formal equality is denied, resistance to the power of law has to be focused on gaining entry to law" (2011:53–54). Therefore, in legal consciousness studies of same-sex couples seeking relationship recognition, "against the law" was often expressed as a critique of the formal exclusion from full equality.

An "against the law" legal consciousness, therefore, may be expressed differently depending on the relationship between a particular minority group and the law. This differentiation is perhaps best seen in Musheno's (1995) case study of organizations serving HIV+ people. Musheno found that while women injection drug users on welfare saw law as "a stark, negative force to be avoided if at all possible" (p. 109), gay men positioned themselves as limited rights-bearers. The women experienced law as an operation of surveillance and persecution and therefore worked to evade it, in line with Ewick and Silbey's original conceptualization of "against the law" legal consciousness. In contrast, gay men were for the most part excluded from formal equality at the time of the study and therefore re-imagined themselves as rights-bearers so that they may access benefits provided by the state. One marginalized group was surveilled by the state and subsequently resisted law's intrusion in everyday life while the other was overlooked by the state and in turn demanded admission. Both were types of "against the law" legal consciousness.

Like the gay men in Musheno's study, all trans rights-seekers in my dissertation expressed an "against the law" legal consciousness when discussing law's treatment of trans people generally, criticizing insufficient protections and demanding inclusion. In this critique, participants indicated feeling outside the law, expressed through examples of legal precarity. Sources of precarity included geography and which way the political winds were blowing. Similar to participants in previous LG(BT) legal consciousness studies, these participants responded to feeling outside the law with demands for inclusion, which reinforces legal hegemony. Ewick and Silbey explain hegemony as being "produced and reproduced in everyday transactions where that which is experience as given is often unnoticed, uncontested, and seemingly not open to negotiation" (2003:1334). Legal hegemony is expressed when the response to legal exclusion is a call for more law rather than questioning law's legitimacy. Law is taken for granted and alternatives to more law are not considered. Many participants called for a federal law spelling out their inclusion in the basic rights and protections of all U.S. citizens. When excluded groups demand inclusion rather than turning away from the law as a solution to their problems, the legitimacy and power of law is upheld.

Unlike previous LGBT legal consciousness studies, however, my participants were not simply positioned outside the law. In order to qualify for the study, participants had to have at least one form of legal engagement. By studying the multiple legal engagements of trans rights seekers, rather than focusing on one right denied to them, this dissertation shows how trans people are both inside and outside the law and subsequently develop a dual legal consciousness. While all participants expressed an "against the law" legal consciousness critiquing their exclusion from full equality, they simultaneously expressed a "before the law" or "with the law" legal consciousness when discussing their engagement with law. A "before the law" legal

consciousness was most commonly expressed when discussing name changes or with participants who did not hire lawyers to assist with their legal problems. A “with the law” legal consciousness was often associated with employment, family, and housing disputes when a lawyer was hired. In the following sections, I will outline these three typologies as expressed by participants and conclude with an illustration of dual legal consciousness.

“BEFORE THE LAW”: GETTING THINGS IN WRITING

Participants expressed a “before the law” legal consciousness when discussing legal name changes and dealing with employment discrimination that did not escalate to a court case. In particular, they shared their experiences with invoking the law to right wrongs, demonstrated faith in fair legal procedures, and emphasized the importance of textualization.

According to “before the law” legal consciousness, law should not be invoked for self-interest but only for the good of others or the collective in order to right wrongs. This normative account of invoking rights was especially strong among participants who had not found legal representation for alleged employment discrimination. For instance, Alex was a young transwoman who felt discriminated against when in October 2016 she was unexpectedly kicked out of an online magazine that had hired her as a model. After being told by a friend currently in law school that the actions of the company were illegal, Alex reached out to the ACLU and Lambda Legal for representation. At the time of our interview, neither organization had responded, and she had not heard anything from the magazine since her dismissal. If she could find an affordable lawyer – Alex was currently unemployed – she was considering filing an employment discrimination claim less out of a desire to get her job back but to show the magazine that what they did was wrong: “if I don’t get back in, I don’t get back in. Oh well. But it’s still the fact that that’s not okay. You can’t kick someone out just because... [trails off].”

Alex's motivation for pursuing an employment discrimination case provides a moral basis for legality that is central to a "before the law" legal consciousness.

Faith in the fairness of legal procedures is connected with turning to the law to right wrongs. Central to this faith is a belief that law operates via fixed rules; therefore, all one has to do is follow the proper procedures and, because law is supposedly impartial, the results will be just. Such an understanding emerged often when participants talked about their legal name changes. As a matter of administrative law, name changes often epitomize bureaucracy, which is the metaphor Ewick and Silbey used to depict "before the law" legal consciousness. Although many participants emphasized that name changes are an easy and straightforward process, they also detailed the tedious steps one must follow to successfully change one's name. The bureaucratic maze of legal name changes is perhaps best represented in the following interview excerpt:

It was all in all a pretty good experience for me. Other than the continual delays. But it's a process. You have to apply to the courts. The judge has to read the documentation. At the same time, apply to Homeland Security. Once the judge rules, you then have an ad in the classifieds section of the local paper that the courts [require]. And *then* you have to get that ad certified by the paper you placed it in. And that has to go back to the county clerk. The judge finally signs off on it. And *then* your name is legal. (Samantha)

Name change procedures vary by geography with each state setting its own policies. However, a through line across the interviews was the time away from everyday life the name change process took. Participants talked about waiting for court dates, waiting for publication requirements to be met, waiting to hear back from the court, even waiting in the courtroom to meet with a judge.

Lawyers were seen as a way to streamline the process and follow the rules as outlined by administrative law. Those who did not hire lawyers assumed that one thing lawyers provided

their clients was navigating the bureaucratic maze of administrative law: “they know what to do and what steps to take” (Kathy). Participants also saw lawyers as insurance that all procedures were followed properly: “if I went and got legal representation [for my name change], it would just be to verify that I’m doing it 100 percent right” (Alex).

A belief in the impartiality of legal actors and fairness of legal procedures led participants to place their trust in the process, even with potentially sensitive information. For instance, Casey does not feel comfortable living openly as trans in his small western town due to safety concerns. However, in filing for a name change, he had no problem sharing his trans identity: “it just didn’t occur to me that I might have to protect myself from the proceedings of the court...The purpose of the judge doing that is to be impartial.” Casey contrasted his faith in the impartiality of the judge with anxiety around his landlord learning about his trans identity. Similarly, Samantha was not bothered about the requirement to disclose her name change in a newspaper, because everyone filing for a name change in her county faced the same requirement. As long as the requirements did not treat her any differently from other name change petitioners, she was willing to comply.

Law retains the authoritative distance necessary to remain objective through textualization which provides law “ontological independence” so that legal texts convey “moral validation” (Ewick and Silbey 1998:103). For participants, seeing their new legal name in print was a source of legitimation – an external confirmation of how they saw themselves. As one participant put it, seeing her name on the court order “was a natural high” (Christine). Although the process is tedious and bureaucratic, the end result is incredibly meaningful. The court order – a simple piece of paper – is saturated with significance. One participant repeatedly expressed disappointment that the form of her final court order did not reflect the pomp and circumstance it

held for her: “I was not impressed with this court order, because my friend got a nice court order with a gold seal from [a neighboring state]. And I just got a piece of paper – a handwritten piece of paper – with a stamp!” (Kathy). Despite its unimpressive aesthetic, the paperwork nevertheless imbued her with a new sense of rights-ness. She was legally female and had the paperwork to prove it: “I can’t be challenged now because I do have a birth certificate and driver’s license that says ‘female’.” The legal paperwork gave her confidence in negotiating social situations where people were having trouble adjusting to her new gender presentation. She shared how she jokingly threatened to sue a lawyer who was helping her change her will when the lawyer struggled to use her new name: “I have a court order, so I’m going to take you to court if you screw it up.” With friends who felt uncomfortable with her now using women’s public restrooms, she pointed out that “it’s now illegal for me to use the men’s room!”

Participants expressed frustration when others refused to respect the authority of their court order, which carried for them the force of law. Quill, a caretaker for their ill father, was exasperated by bank tellers refusing to accept their certified copy of the name change court order to make changes to the trustee list. Bank tellers kept insisting on seeing the original copy, which the courthouse retains. Quill lost their patience in trying to explain that what they presented to the bank was the correct documentation: “This is legal!”

All three of these “before the law” elements – invoking law to right wrongs, faith in fair legal procedures, and textualization – are readily apparent in Levi’s narrative of employment discrimination and his consequent pursuit of justice. Levi was a young trans man living in the rural west. While interning for a non-profit in his state’s largest city, the human resources (HR) manager pulled Levi aside. Although he identified as male, he had not legally changed his name. However, on intake, he was open about his identity and that he used male pronouns and was told

it would not be a problem. After the first week, HR informed him that someone in the office was not comfortable with Levi using the men's restroom and instructed him to use a single-stall restroom located on the other side of the building. Pulling up the organization's nondiscrimination policy, Levi claimed that this request was in violation of their own policy. According to Levi, HR told him "we can pick and choose which laws we follow." He was aghast, emphasizing that he showed them in writing how they were not adhering to their own policy: "I went through this 50-page document and I documented all the laws with footnotes and everything." Levi believed that if people would just follow what was written, justice would be served.

The importance of having things in writing came up again when he tried to file a complaint with the human rights commissioner. He was baffled that they refused to take his complaint and even though "the lady was nice" and let him tell her his story, "she has no paper in front of her, nothing. She didn't even take notes." For Levi, if something is not written down, it did not happen. He associates this with how law works: "I knew right then and there that nothing was going to happen. Zero paperwork. I know government." HR managers and human rights commissioners are tasked with implementing nondiscrimination policies and laws, respectively, thus acting as intermediaries between individuals and the state (Dobbin 2009; Lipsky 1980).

Having things written down came up at Levi's next job where even though he was reassured that there would be no problems with him being trans, because it was not stated in their policy – in writing – he felt precarious: "I could be fired tomorrow." He attributed this feeling to his prior bad experience; however, it is interesting to note that in the internship, he had protections in writing and still faced adverse circumstances. Yet, that had not changed his faith

that having something in writing is the mechanism for protection. Levi believed that if he got things in writing and followed the correct procedures, the law would sort things out.

That might have been part of his confidence in handling both his employment case and name change on his own. He consulted a lawyer but given the financial costs, he felt that he could take his issue before the appropriate legal authorities and get a resolution. Likewise, if he filled out the paperwork correctly, he would get his name change. Levi ended up taking a settlement and signing a gag order, which he felt guilty about as he wishes he could have done more. If he had the economic resources, he said he would have pursued the matter further, “and that way it would have been a little more documented.” He was frustrated that by not taking his complaint, the human rights commissioner could later testify in front of the state assembly that they had had zero reports of anti-trans discrimination. With no documentation it was a “non-issue.” By taking his complaints to the organization’s legal department, the human rights commissioner, and the EEOC, Levi was not pursuing economic self-interest in getting money or a job: he wanted it documented that the organization was not following their own policy. Because he was not able to get that documented, “there wasn’t any closure.”

“WITH THE LAW”: HIRING PROFESSIONAL PLAYERS

Changing one’s name is an administrative law procedure with no opposing party – either the judge grants your name change or does not. As participants encountered more adversarial legal issues – including divorce and custody disputes, employment discrimination, housing insecurity, and personal injury claims – a “with the law” legal consciousness emerged. This type of legal consciousness sees the law as a game that operates alongside everyday life with a set of rules that people may try to change (Ewick and Silbey 1998). People enter the game to pursue self-interest, but not everyone has the same chances of winning due to costs and different levels

of skill or experience. While law provides closure, the outcomes cannot be known beforehand. Therefore, to enhance their chance of winning, people hire lawyers, who are seen as professional players.

Participants displaying a “with the law” legal consciousness entered the legal arena to fight for their threatened self-interests. These interests were primarily economic, with the exception being custody disputes where parents were mostly concerned with the well-being of their children. When the case did not become contentious, sometimes participants did not register it as a legal issue. For example, Terry shared a lengthy narrative of her employment discrimination lawsuit but never brought up her divorce – even though I asked an open-ended question about other instances where she consulted a lawyer. I only discovered that Terry had been divorced when we were closing the interview with demographic questions and Terry mentioned being married before. She had not brought it up before as she and her (now ex-) wife went through divorce mediation in an attempt to make it as stress-free as possible for their daughter. Terry emphasized that they did not need to hire private attorneys as they were both committed to a continued, amicable relationship: “this was not a ‘let’s sue them for all they’ve got.’” For Terry, legal matters were where you had to fight; since she did not have to fight her ex-wife in the divorce, the case had slipped her mind. In contrast, Erica’s story of employment discrimination illustrates the fight at the core of a “with the law” legal consciousness.

Erica was a woman living in a northeastern suburb where she worked for a drugstore chain for nine years. Three years into her tenure, Erica began to transition on the job and says she “met a lot of resistance from human resources, from management, from the store manager, and the district manager.” Over the next six years, she would be fired and reinstated three times due to disputes over her till – which Erica claimed were a pretext for the store’s desire to get rid of

her because she is trans – and an altercation with management. Each time Erica sought assistance from external advocates, determined to hold onto her job not only due to immediate financial concerns but also because she had not completed a legal name change. She worried that if the drugstore chain fired her before she could legally update her identity documents, they would misgender (and out) her when potential future employers called for a reference. Two years after her legal name change, the drugstore chain once again fired Erica; she decided to not appeal it this time for two main reasons. First, she was done fighting: “I felt so beaten down. I wanted to fight but had no more fight left.” Second, she had secured a position at a department store where she felt respected. Although it was a significant pay cut without the union benefits she enjoyed at the drugstore chain, Erica felt it was a worthwhile tradeoff: “I would rather take a job that respects me for who I am and is not compensating me nearly as well as the other one because I feel like a goddamned human being and that’s how I should feel.” Erica’s legal entanglement with her former employer ended when she decided to no longer fight.

Another way participants expressed a “with the law” legal consciousness was in rejecting the impartiality and predictability of law. Some came to this perspective only after going through a legal process. Ruth was a physician living in the South. Two years after divorcing her wife, Ruth transitioned and wanted to inform her children. Ruth’s ex-wife accused her of violating their divorce decree and claimed Ruth was a danger to their children – then ages 8, 7, and 5. Over the next year, Ruth faced these accusations in a series of hearings. Ruth said the experience was a “wake up call.” As a veteran, Ruth entered the legal process believing in the judicial system, in particular, that public servants acted according to their oath of office rather than personal belief. In the courtroom – located in a Bible Belt state – Ruth felt she was treated unfairly with religious bias and anti-trans sentiment reflected in the behavior of opposing

counsel, a Guardian ad Litem, and the judge. Ruth was repeatedly misgendered by all parties (including her own lawyer for one hearing). Misgendering is not only disrespectful but can be embarrassing for many trans people and leads some to feel like their humanity is not being acknowledged. The Guardian ad Litem recommended Ruth only vacation out of state with her children, as supposedly being recognized with their trans parent would be embarrassing for the children. The judge required Ruth to see a therapist of his choosing even though she had a long-standing relationship with her own therapist. Believing the judge was a proponent of conversion therapy, Ruth feared to whom he would send her. Ultimately, the judge found in favor of Ruth's wife. Ruth had to pay for all legal expenses as well as continued child support. This left Ruth "financially devastated." Additionally, Ruth has lost contact with her children. The judge declared that due to religious freedom, Ruth's ex-wife could teach the children whatever she wanted about trans identities and the children have no obligation to maintain contact with Ruth. As a result of this experience, Ruth's conceptualization of the law shifted. While she believed there are some judges who make impartial judgements based on facts, she also believed there are others who base their ruling on religious doctrine and personal views: "That's the reality of the world. I misjudged it."

Many participants indicated that judicial discretion added to their anxiety around the uncertainty of their case outcome. To deal with such unpredictability while fighting for their interests, some participants brought in a professional player – a lawyer. In "with the law" legal consciousness, lawyers are professional players who use their expert knowledge to skillfully play the game of law. Ewick and Silbey described lawyers as "the go-betweeners, the translators, initiated into the rules of the game" (1998:153). Participants were happy to outsource their case to more skilled players in hopes of increasing their chances of winning. A few participants hoped

that the presence of a lawyer would mean their case would be taken more seriously. When Cerys came out at work, he was forced to continue wearing the female uniform. After attempting to negotiate with HR on his own, including presenting the law as he understood it, Cerys threatened to contact a lawyer: “I can contact a lawyer to deal with this, if you would like. But you could just let me wear the uniform.” While Cerys was allowed to wear the appropriate uniform without hiring a lawyer, other participants needed to take that extra step. Many mentioned the complicated nature of their legal case and/or the legal system more broadly as motivating their decision to hire legal representation. Lawyers not only understood legal procedures but also had knowledge of correct terminology and the authority to file the necessary paperwork. Several participants talked about the comfort of having someone in their corner so that they did not have to face the court alone, especially when the other party hired large, high-powered firms and participants felt out-matched. Erica, who availed herself of legal representation in fighting to stay employed, said that she felt she had no agency; she sought advocates for their “ability to attack something that was bigger than myself.” By hiring a lawyer, participants were able to focus on what they wanted out of the case and trusted that their professional players would help them achieve those goals.

A major barrier in hiring legal representation, however, is the cost. As is well-known, private attorneys are very expensive in the U.S. As of 2014, the average hourly rate charged by associates at small private law firms was \$274; the hourly rate increases with seniority and size of firm, among other factors like specialization (“A lawyer's value” 2014). Most participants in the study did not have money to throw at their problems. With one participant not reporting income, the median income among participants in this study was \$30,000, below the national median of \$40,247 (U.S. Census Bureau 2019). While there are free or low-cost legal services

available for many legal issues, the demand often outpaces the supply. According to the Legal Services Corporation, 50 percent of eligible people who seek legal aid from LSC-funded organizations are turned away due to lack of organizational resources (The Current Crisis in Legal Services n.d.). Many participants shared that cost factored into their decision whether or not to hire a lawyer, with some stating plainly that legal representation was cost prohibitive, forcing them to move forward on their own. Others mentioned that they were only able to hire lawyers on commission or through programs offering free legal aid to low-income people. Some of those who were able to afford private attorneys commented on how finances restricted the quality of lawyer they could retain.

Even if participants could not afford a private attorney, several recognized that access to legal knowledge – a form of cultural capital – was another important resource. With a modest income (under than \$60,000 at the time of interview, less at the time of his case) in an expensive Northeastern city, Isaac could not afford to hire a private attorney to handle the paperwork for his name change. However, he made too much money to qualify for free services from legal aid. While he knew of organizations that serve everyone for free, those services were in such high demand that one organization's name change clinic had a backlog of six months. Isaac could not wait that long: he needed a name change so that he could update his passport before flying internationally to a family wedding. Therefore, Isaac handled his name change himself. He made good use, however, of his many personal connections in the legal field. Over the course of getting his name changed, Isaac consulted with four different lawyers. He laughed at himself for “consulting with everyone and their mom.” Isaac was able to get a template petition from the organization with the long backlog and was advised by two friends – one of whom was a lawyer – about which courthouse to go to. However, the recommended courthouse required two

appearances. First, you presented your petition and made an appointment. Then you came back for a second appearance to go before a judge and get a ruling on your petition. When Isaac ran into trouble after ignoring the advice – he was hoping to only take one day off work – he reached out to another lawyer friend for additional language to improve his petition. In addition to filing for a name change, he was also requesting fee and publication waivers. Combining the template from one organization and language on waivers from another organization, along with data he pulled in as a public health advocate, Isaac felt his petition was stronger and resigned himself to the two-day process at the original courthouse he was advised to visit. When he learned which judge he would go before, Isaac once more consulted another lawyer friend to get inside information on which judges tended to rule favorably on name changes. In the end, Isaac's name change was granted, and he was able to attend the family wedding with his new passport. Even though Isaac technically handled his own name change, his access to several lawyers who offered free advice helped Isaac navigate the legal procedure.

Another participant with the cultural capital of legal knowledge was Jake, who was uniquely positioned as an attorney admitted to the bar in his Northeastern state. Although Jake is a barred lawyer, his specialty is criminal law; therefore, he did not feel qualified to be the lawyer on record for his pending housing dispute with his landlord. Since 2015, Jake had been fighting to restore rent stabilization status to his apartment building. When the landlord initiated eviction proceedings against one of the apartments in the building, Jake, on behalf of the tenant association, retained legal representation. Since all of the residents in the building were low-income or fixed income, they were able to hire a lawyer through a non-profit legal service provider that handles multi-tenant cases for low-income clients. The goal of the case was to defend individual tenants in eviction proceedings, restore rent stabilization status to the building,

and secure rent overcharge damage payments to each apartment. Jake's status as a peer allowed him special privileges with the housing lawyer. For instance, Jake reviewed all legal documents before filing, which he said was very unusual. Jake felt he had a special understanding with the lawyer as they speak the same language: "I'm an attorney so they understand what I'm saying. They speak to me as an attorney rather than as a trans person. Attorneys speak attorney." Belonging to the same profession disrupted the power imbalance that often exists between lawyers and their clients.

As demonstrated in these narratives, "with the law" legal consciousness recognizes that law is not equally available to everyone because of costs, access to representation, and cultural capital.

"AGAINST THE LAW": LIVING WITH PRECARITY

When discussing their engagement with law through name change petitions, employment and housing disputes, and family law cases, participants saw themselves as possessing rights – being inside law. At the same time, in our interviews, they also shared feelings of being outside the law. Participants' critique of exclusion from full equality is a type of an "against the law" legal consciousness found in previous LG(BT) legal consciousness studies. A few participants indicated believing that U.S. law provides nothing for trans people, pointing to a lack of access to public space through bathroom laws, mistreatment by police and prison officers, murders of transwomen of color, and missing or problematic employment policies. Participants indicated that the absence of protections left them feeling unsafe and economically insecure. More common than categorical exclusion, however, were feelings of legal precarity, which many participants responded to by demanding legal inclusion through federal legislation explicitly protecting trans people.

Nearly every rights-seeker commented on the legal precarity they felt as a trans person and their consequent anger, fear, or anxiety. One participant characterized legal precarity as “life without a net” (Erica). Sources of precarity included geography-based rights leading to misinformation and forms of law particularly vulnerable to changes in political climate. The rights and protections trans people can access largely depends on where they live. While many municipalities and states have trans-inclusive nondiscrimination laws, without a federal law, coverage remains “patchy” as one participant (Erica) described it. Furthermore, each state has different regulations for changing sex and gender markers on identity documents, leaving many trans people with mismatched and/or inaccurate identification as they move around the country. For example, ten years ago, while living in the South, Aaron, a policy director advocating for LGBT equality in the Northeast, changed his name and gender marker by presenting a court order and letter from a therapist to the DMV. A few years later, both he and his partner moved to the Northeast to attend graduate school. When Aaron went to the DMV, presenting paperwork for a new driver’s license, the DMV informed him that they could not give him a driver’s license with an “M” on it because this northeastern state required proof of surgery. Aaron was left with the option of retaining his expired southern driver’s license with his correct gender marker (M) or being issued a northeastern driver’s license with an incorrect gender marker (F). As Aaron was relying on public transit at the time, he kept his expired driver’s license and waited for the state to change their policy.

A maze of laws and policies can lead to misinformation wherein people are unsure of their rights or the laws they are beholden to. In 2008, when her human resources and store managers accused Erica of insubordination for dressing like a woman while at work, Erica was unsure of her rights. She remembers the HR manager telling her “we could fire you for being

trans. It's legal in [this state]. We hired a man." At the time, Erica was researching how to change her name and had learned of a nearby non-profit specializing in trans legal advocacy. Erica reached out to the non-profit for legal advice after her managers gave her five days to produce a letter from a medical provider stating that it was appropriate for her to adhere to the women's dress code at work. She later learned that the HR manager was incorrect: the county where the store was located had a law protecting trans workers. However, as Erica noted, "if I worked [in a store in a neighboring county], she [the HR manager] would have been within her rights." Recently the state where Erica lives passed a law prohibiting employment discrimination based on gender identity or expression. In the interim decade between this incident and the law's passage, Erica worked in a state where her legal protections depended on the county where her store was located.

Life under the Trump administration brought into sharp relief the legal precarity of trans people in the U.S. All rights-seekers – unprompted – shared how they felt the 2016 presidential election was impacting them and other trans people, especially in relation to legal protections. Rather than federal statutory law, trans people have gained legal protections in the U.S. through state and local legislation, judicial interpretation, and executive orders. This leaves trans people reliant on lawyers, judges, and presidents to interpret their inclusion. For many participants, such legal inclusion felt less secure than federal legislation. The need for uniform, codified protection was accentuated by the actions of the Trump administration. During the Obama administration, there were numerous inroads towards trans legal inclusion (Mezey 2020) including interpretation of sex discrimination protections to include gender identity in employment (*Macy v. Department of Justice* 2012), schools (Margolin 2014), and healthcare (Laurila 2019). The Department of State also updated its passport policy, allowing gender markers to be changed with a physician's

letter rather than proof of surgery (U.S. Department of State 2010). As one participant put it, “the wind was blowing in my direction” (Erica). With the election of President Trump, however, the wind switched directions. Efforts to expand trans rights came to a halt and activists switched into defense mode. In two years, the Trump administration effectively undid eight years of progress under the Obama administration (Mezey 2020). One participant, Jenny, served on the board of a statewide LGBT rights non-profit in her midwestern state for six and a half years. During her tenure, the organization pushed to amend the state birth certificate law so that sex markers could be changed. Following the 2016 election, however, Jenny claims the state legislature lacked the political will and efforts to amend the law stalled.

Participants were watching as their recently secured rights were whittled away by the Trump administration and state legislatures bolstered by the current political climate. One participant aptly assessed the climate as “it’s better than it used to be, but it’s worse than it recently was” (Imani). In particular, participants were angered by the rise of religious exemption laws that would allow businesses and medical providers to not serve LGBT people on the basis of religious beliefs. They are also troubled by the rescinding of Title IX guidelines for trans protections in schools. Participants also mentioned the leaked Department of Health and Human Services memo, which the *New York Times* reported on in October 2018 with the headline “‘Transgender’ Could Be Defined Out of Existence Under Trump Administration” (Green, Benner, and Pear 2018). The memo indicated a move to reverse the trajectory of sex discrimination judicial interpretation by declaring that the federal government understands sex as biological sex – the sex you were assigned at birth. The leaked memo eventually became the HHS rule mentioned at the beginning of this chapter, currently under injunction. One participant found the move back to a biological interpretation of sex discrimination “terrifying” (Quill).

More than a sense of fairness or equality is at stake for trans people. Many participants equated exclusion from formal equality as a denial of their humanity and even the existence of trans people.

The political swing towards once again excluding trans people from fundamental rights has serious consequences. Psychologists have found that anti-LGB(T) legal campaigns increase psychological distress among LGB people (Riggle, Thomas, and Rostosky 2005). The day after the leaked memo, Trans Lifeline – the only 24/7 hotline by and for trans people in the U.S. and Canada – received four times their usual call volume (Fink 2018). Trans people are particularly at risk for suicide with over 40 percent of respondents in the National Transgender Discrimination Survey reporting a suicide attempt (Haas, Rodgers, and Herman 2014).

Anticipating the backswing following the 2016 election, many trans people rushed to change their documents before any alterations to regulations may have prevented them from doing so. To meet the increased demand, many lawyers advertised their expertise and services using the hashtag #translegalhelp (Tan 2016). Kathy was already planning on changing her name but admitted that she upped her timeline after Trump was elected. She wondered if other trans people were afraid to come out in the hostile political climate. For Casey, a transman living in a western rural town, this was the case. When discussing his name change, Casey said that he did not change his sex marker simultaneously, as he was not currently pursuing a medical transition. Part of his hesitation was that he was nervous coming out to people, even in a medical setting, given the current political discourse: “especially considering the rise of walls. Ok, you can use your ‘freedom of religious beliefs’ ...that’s getting dangerously close to a beast I don’t want to poke.” Another participant, Andrew, was applying to graduate programs in other countries because he no longer feels welcome in the U.S.: “I felt like my country had betrayed me almost.”

To remedy these feelings of legal precarity, participants called for a clear statement of legal protections at the federal level based on the core American value of equality. Such protections would recognize trans people's humanity and disallow the denial of trans existence. In making this demand, participants invoked fairness: they wanted what others have – the conferral of respect and dignity under the law through equal rights. Some referenced civil rights through citizenship discourse while others made a broader claim of human rights. One participant specifically juxtaposed her lack of legal inclusion with the rights I enjoy as a cisgender person. Towards the end of our interview when we were discussing what law can and cannot do for trans people, Samantha looked at me and said, "I mean, you're protected. You can't be discriminated because of your sex. You can't be denied housing. You can't be denied work. It's not fair." To Samantha, I represented the legal inclusion she wanted. Both of us are educated, white women living in the Northeast. What separates us is that at birth I was legally assigned female while Samantha was 65 before she was legally recognized as female. Based on that difference, Samantha feels denied the legal protections I take for granted. In reality, I, like anyone, can still be fired, denied housing, and discriminated against. Law does not prevent these things from happening; rather, it offers a vehicle for recourse. The difference that Samantha was pointing to is that according to federal statute, such action against me is prohibited while courts have been debating for decades whether trans people like Samantha are granted the same protections. For Samantha, legal inclusion was a matter of fairness: she wanted what I had regardless of whether law actually fulfilled its promise.

For most rights-seekers, however, what the law can provide for trans people – respect, dignity, rights, protection – is the floor not the ceiling of trans inclusion and acceptance. This sentiment was best articulated by Joy:

The legal thing is about justice. It's really important, because the bottom line is people need to work, have housing, and not be killed or spat on. These are minimums. But trans people I know, and this is certainly true of me, we would like to be understood. We'd like to be loved. We'd like to be seen as full members of a community. And that's not something courts can do any more than a court could make my family a family where being trans was okay with everybody.

Only one participant shared that legal protection was adequate. Samantha, a transwoman living in a Northeastern suburb, stated that "if they pass laws, there's nothing that can't be done.

There's nothing the law can't do." Other participants, however, did not share Samantha's conviction, pointing to the limits of law. Isaac, for example, pointed out that law is reactive, meaning that even if there are laws on the books, trans people must find an attorney willing to take their case and rely on judicial interpretation of the law to achieve their rights. Looking at the present reality of racial inequality despite fifty years of civil rights legislation, Nathan was also wary of putting too much effort into passing laws. Participants frequently shared the belief that accompanying legal change must be wider understanding of trans people and their lived realities, which may be accomplished by storytelling and/or other educational efforts. In understanding themselves as excluded from formal equality and demanding legal change, participants expressed an "against the law" legal consciousness that positions law as one part of a larger mobilization for social acceptance and inclusion.

CONCLUSION: DUAL LEGAL CONSCIOUSNESS OF TRANS RIGHTS-SEEKERS

In this chapter, I argued that trans rights-seekers display a dual legal consciousness as they utilize the law while remaining cognizant of the ways law fails to fully include them. All participants critiqued their community's exclusion from formal equality, which I suggest is an example of "against the law" legal consciousness. Simultaneously, all participants articulated an understanding of law as a space outside of everyday life that operates according to objective rules ("before the law") or law as a game where one deploys resources in pursuit of strategic

goals (“with the law”). By studying trans rights-seekers in their multiple legal engagements, I was able to show how trans people continue to make rights claims even as they are not fully covered by legal protections. The resulting dual legal consciousness can be seen in one participant’s narrative of his legal name change.

In 2015, Andrew, a 22-year-old trans man living in the South, filed a name change petition so that his legal name would “reflect how people address me today.” After a judge denied Andrew’s name change, Andrew and his parents sought legal representation. Although no local lawyers would take the case, a national non-profit known for impact litigation with a similar case pending merged Andrew’s case with their existing case and took him on as a client. The day of Trump’s inauguration, Andrew’s lawyer called to inform him that an appellate judge had granted the name changes without a hearing. Andrew spent the day calling his friends and family sharing the news, which he described as “freeing”: “I just felt like the weight of infinite mass was lifted off my shoulders.”

In retelling his name change challenge, Andrew expressed a “with the law” legal consciousness wherein he rejected the supposed objectivity of law, repeatedly emphasizing how the fate of his case hinged on which judge he went before, demonstrating an awareness of the political and/or religious bias some judges bring to their legal interpretations. Andrew also conveyed a “with the law” legal consciousness in recognizing lawyers as a resource. He initially filed *pro se* believing name changes to be a simple process for which a lawyer is an unnecessary cost. When it came to appealing the judge’s decision, however, he brought in a professional player as “It was just too daunting of a task not to hire a lawyer.”

In addition to law as an arena where differing access to resources impacts one’s chances of a favorable outcome, Andrew also voiced an understanding of the absence of legal protections

for trans people, particularly in his southern state. This critique of the lack of formal equality represents an “against the law” legal consciousness. Like most people in this study, Andrew expressed anxiety about his legal precarity due to the lack of laws regarding trans people: “It’s really all kind of, like, up in the air.” From this place of legal precarity, Andrew and other participants demand inclusion. Thus, Andrew displays two forms of legal consciousness simultaneously – “with the law” and “against the law” – which I argue represent a dual legal consciousness found among trans rights-seekers in this study.

Caught in the tension between inclusion and exclusion wherein they may access some rights and protections but are denied others, trans rights-seekers express a dual legal consciousness. Participants showed an understanding of being inside the law when petitioning for name changes, filing discrimination claims, and/or disputing family law agreements. In these legal engagements, participants positioned themselves as rights-bearers and displayed a “before the law” or “with the law” legal consciousness. At the same time, participants shared feeling outside the law and critiqued their precarity, expressing an “against the law” legal consciousness. Law is an important institution not only for its distributive mechanisms but, just as importantly, its symbolic power. Marginalized communities, such as trans people, turn to the law to seek justice, secure their interests, and demand social inclusion. In doing so, they reinforce legal hegemony, or the legitimate power of law.

Chapter 4: What's in a Name: Legal Name Changes for Transgender People

In my interviews with trans rights-seekers and lawyers who have represented trans clients, we discussed many types of legal cases including employment discrimination, housing disputes, divorce and custody battles, immigration filings, healthcare denial appeals, and benefits advocacy. Name changes were by far the most reported legal matter: 68 percent of the lawyers include name changes in their practices and 66 percent of trans-identified participants discussed their legal name change. I began to wonder – and question participants – why this type of legal case was so common. While easy access and demand seemed to offer at least partial explanations, I argue in this chapter that name changes were the most frequent legal matter because names are meaningful both personally and sociologically. Names are integral to our sense of self and how others recognize us, both as an individual and a member of various social groups. Name changes confer internal dignity for trans people and are a form of affirmation. Additionally, legal name changes harness the power of law to demand recognition and respect from others. Furthermore, name changes have a ripple effect on people's daily lives and institutional access.

In this chapter, I will first show how name changes are common not only because of easy access and high demand but also because names provide an anchor for personal and social identities. Names connect people to kin networks and ethnic groups and are part of the process of sex/gender categorization. Second, I will discuss how name changes indicate a change in personal and social identities by reviewing the literature on ethnic name change and marital name changes, the two most common reasons for legal name changes in the 20th and 21st centuries. Third, I will show how changes provide internal and external dignity, drawing on my interviews with trans people and the lawyers who represent them. While participants insisted that

everyone should be referred to by their chosen name regardless of what is on their legal documents, they also demonstrated how legal name changes can be an effective advocacy tool when such respect is not extended during social, business, and legal interactions. Finally, I will show how legal name changes also allow trans people to have accurate identity documents which facilitates safe daily interactions and institutional access.

ACCESS AND DEMAND

Based on the interviews, the low threshold of access – that name changes are a simple process – seems to partially explain why name changes were such a common legal matter. Over half of participants with whom I discussed name changes characterized it as a simple process. From both a client and attorney viewpoint, name changes are fairly straightforward. The procedures have been in place since at least the 19th Century (Scherr 1986): petitioners must attest they are not changing their name to avoid creditors or marital responsibilities; publication is often required and mostly posted in specialized papers rather than papers of mass-circulation; attorneys usually represent the petitioners. Name changes are an easy legal service for lawyers to offer. With no opposing counsel, lawyers generally only have to prepare paperwork and maybe make a one-time appearance in court. Although there are many reasons a lawyer may be helpful, those seeking a name change can opt to save themselves that expense by filing *pro se*. Organizations and peer support networks often have templates with detailed instructions on how to file a name change that can be accessed online and/or are circulated among community members.

Demand may also partially explain why name changes were a common topic in the interviews. In 2011, Avi and his colleague started a name change mobilization in the Midwest in response to growing demand that they could no longer manage on a one-on-one basis. Once a

month, they set up a table at the courthouse with volunteers ready to assist walk-in clients with their name changes. Often called a name change clinic, participants reported a similar model in all five regions of the U.S. By holding a regular clinic, volunteers – lawyers and non-lawyers alike – were able to assist large numbers of people at a time fill out forms and gather the required documents for a name change. In its first year, Avi’s name change mobilization served 34 people. By the time I interviewed Avi in 2019, the mobilization was serving around 20 people per month. The clinics, which do not charge for their services, are a great option for people who do not feel confident navigating the name change process on their own and cannot afford to hire a lawyer. Generally, the clinics were led by a supervising lawyer who was able to answer questions and double-check that the forms were filled out correctly and fully. Volunteers were also able to ensure that the appropriate waivers – mostly fees and publication – were requested in the petition. State law regulates name changes and people generally file in their county of residence. As each state has different name change procedures, clinics worked a bit differently depending on where they were located. Some petitioners left the clinics ready to file their name change petition on their own while others filed their paperwork that day with the help of clinic volunteers.

Just because there is high demand, however, does not necessarily mean name changes are the top legal need for trans people, as one direct services attorney cautioned:

It’s the number one thing that gets served. Because it’s quick and easy. And it’s something that a lot of people in the community need, yes, but...like, there aren’t a lot of people doing a lot of other things that the trans community needs.
(Andrew O.)

Andrew’s comment serves as a reminder that while there is a high demand for name changes, it may not be the top legal need of trans people. Rather, it is the top need that gets met.

Furthermore, there is a feedback loop between ease and being the top legal service. Andrew

indicated that because name changes are a simple process, more lawyers offer it as part of their services, and consequently name changes become a common legal issue.

While simplicity of process and high demand undoubtedly contribute to the prevalence of name changes in this study, there's another explanation: names in and of themselves are incredibly meaningful.

ANCHORS FOR PERSONAL AND SOCIAL IDENTITIES

For more than a century, social scientists have noted the importance of names in our perceptions of self, others, and our social worlds (Atkins-Sayre 2005; Foote 1951; Marcus 1976; Miller 1927; Thwaites 2013). Names are also used by social scientists as an index for social change and cultural variability (Watkins and London 1994; Zelinsky 1970). Perhaps the first mention of names in a social science publication was in 1898 when psychologist G. Stanley Hall argued that names are central to people's sense of self (Lawson 1984). This argument was empirically tested in an early investigation of the self-concept theory of personality organization (Bugental and Zelen 1950). Asked to write three responses to the question "who are you?", participants most frequently gave their name, sex, and occupation. Although sex had a positive association and occupation a negative association with age, name remained the most consistent response. Bugental and Zelen concluded that names were a central aspect of self-perception.

As something we carry with us throughout our lives, names provide a thread of continuity around which we weave a personal and social identity (Finch 2008). Social scientists have referred to names as "anchorage points" (Twenge 1997) or "identity pegs" (Goffman 1963). Goffman defines personal identity as that which distinguishes individuals within social circles from other members. Rather than a core being, personal identity is the accumulation of social facts hung on an "identity peg." Identity pegs can be biometric, photogenic, or genealogical (i.e.,

the particular place a person occupies within a kinship network). On these identity pegs are hung the biographical facts that accrue over one's lifespan; it is the combination of facts that makes one unique and distinguishable from other group members. Goffman noted that personal names are the identity pegs most generally employed, even though they are not reliable: they are easily changed, and many people have similar if not the same name. As cultural geographer Zelinsky pointed out, "there are literally thousands of Robert Johnsons, Fred Smiths, and Frank Thomases in the United States" (1970:748). Therefore, it is not names alone that provide unique identifiers but names attached to particular bodies with specific sets of biographical details (Goffman 1963; Pilcher 2017).

As anchors for personal and social identities, names both represent the self and the social groups one belongs to (e.g., sex/gender, race/ethnicity, family, religious affiliation, occupation). In *The Society of Individuals*, sociologist Elias (1991) argued that first names represent the "I" identity – the uniqueness of an individual – and last names the "we" identities (e.g. family). My first name is me – my individual self traveling through life – and my last name is my family name – who I belong to. First names, however, have not always represented the unique individual presumed in contemporary society. Historians have found that in 17th and 18th Century New England, first names connected children to a family genealogy rather than provided unique identifiers (Main 1996; Smith 1985). As it was common for multiple community members to have the same name, an occupation in combination with a name was used to identify individuals.

Kin Naming: Family Social Groups

Last names (surnames) are generally referred to as the "family name." In patrilineal societies, wherein lineage is traced through the man's family, children are generally given their father's surname, even if a woman keeps her name upon marriage (Scheuble and Johnson 1998).

One of the assumptions underlying patrilineal surnaming is that carrying their father's name is in the best interest of the child so as to preserve a parental bond (Furstenberg and Talvitie 1980; MacDougall 1985). Compared to heterosexual couples, children in same-sex households are more likely to have hyphenated names or surnames different than their parents (Dempsey and Lindsay 2018; Patterson and Farr 2017). Some same-sex couples, however, opt for one surname to signal family unity and not have the children doubly marked as different (Almack 2005).

A first name (given name) can also be a family name. Kin-naming or naming your child after yourself or another member of the family is also a way to show family belonging through first names (Rossi 1965). Kin naming has a long history dating back to colonial America (Main 1996; Smith 1985) and is potentially a meaningful way of connecting individuals with their family genealogy. My mother loves being named after her father, a naming that continues to signify their close relationship decades after his passing.

Ethnic Social Groups

Ethnicity may also be read from either first or last names. My last name represents the family I was born into (Bender-Baird) as well as my German (Bender) and Scottish (Baird) cultural heritages. Since my first name, Kyla, is derived from a Scottish surname, it also represents my cultural heritage, something I was very aware of growing up and folded into my sense of self. Empirical studies of parents' decision-making process when naming children adds additional evidence to my personal experience of first names and ethnic identity. While most of the limited literature on names use birth name registration data sets, one UK study sought to understand the process behind naming decisions. Edwards and Caballero (2008) interviewed 35 (heterosexual) couples where the partners came from different racial, ethnic, and/or faith backgrounds. They refer to these couples as "mixed couples." In selecting names for their

children, Edwards and Caballero found that mixed couples wanted names that symbolized their children's heritages. The naming process often involved negotiations between the couple, with in-laws, and sometimes with the children themselves. Another study examined naming choices of Hispanic parents of babies born in Los Angeles County in 1995. Sue and Telles (2007) found that parents used names to bridge Hispanic and American culture. While greater exposure to U.S. culture increased the likelihood of parents giving children English names, these names were easily translatable to Spanish.

NAMING AND SEX/GENDER CATEGORIZATION

Names are also integral to the process of sex/gender categorization (Pilcher 2017). More than any other social characteristic, gender is read through our names (Lieberson, Dumais, and Baumann 2000). A nonrandom convenience sample of 224 people were given sixteen unique names – operationalized as no other child of the same gender and race born that year was given the name – and asked to guess the sex of the child. Sixty-nine percent of the respondents correctly guessed the sex of the child and even in the small number of cases that were wrong there was still overwhelming agreement among the respondents. The researchers concluded that gender can be inferred from names due to “a widespread assumption that names will be gender specific” (Lieberson and Mikelson 1995:939). Even social scientists studying naming patterns and their social-cultural significance take the gendering of names for granted. Cultural geographer Zelinsky claimed that parents face only three restrictions in naming their children: 1) names must not be grotesque or obscene; 2) two or more living siblings should not have the same name; and 3) “names are either masculine or feminine and should be assigned accordingly” (1970:747). In the United States, however, assigning masculine or feminine names is a cultural norm not a legal restriction: there are no U.S. laws regulating what parents can name their

children. Even in European countries with legal regulations, those regulations are changing. For instance, since the Revolutionary Law of 1803, France regulated the naming of children. Although the law was revoked in 1993, courts still have the right to veto parents' selection if they feel the name may not be in the child's best interests (Edwards and Caballero 2008; Lieberman and Mikelson 1995). More recently, Iceland passed the 2019 Gender Autonomy Act which included the de-gendering of names (Kyzer 2019). Previously, names were sex-specific, and the law required parents to name their children according to their birth sex. With the new law, names will no longer be designated male or female in the national naming registry. Time will tell what impact Iceland's law has on gendered naming. In the United States, despite the absence of legal restrictions, the cultural practice of gendered naming has a long history and persists today.

While androgynous names can be traced back to 13th Century Europe where daughters were sometimes named after male saints and sons after female saints (Lieberman et al. 2000), it has always been rare for someone to have an androgynous name in the U.S. In colonial America, less than one percent of names given to girls were closely related to names given to boys (Smith 1985). For most of the 20th Century, less than three percent of children were given an androgynous name, with a peak of around 10 percent in the 1970s (Lieberman et al. 2000; Rickel and Anderson 1981). The most common way names become androgynous is when girls are given names previously reserved for boys (Barry III and Harper 2014). For instance, starting in the 16th Century, only boys were named Ashley, but by my birth cohort (1980s to early 1990s), it was the most popular name given to girls. Names also do not remain androgynous for more than a few decades; once a name is given to one child per 500 births among either daughters or sons, it is unlikely to reach the same level for the "other" gender (Barry III and Harper 2014; Lieberman et

al. 2000). Parents are more likely to give a daughter a male name than to give a son a female name (Barry III and Harper 2014; Lieberman et al. 2000).

These gendered naming patterns reflect asymmetrical patriarchal dynamics whereby femininity is devalued, especially for boys whose masculinity risks contamination. Lieberman and Bell (1992) argued that gender stereotypes both impact naming practices and are further “sharpened” by naming practices: they found that names popularly given to boys are rated higher in terms of strength and activity while names popularly given to girls are rated higher in terms of goodness and sincerity. Parents also tend to give sons common or traditional names while daughters are given unique or trendy names, which scholars have interpreted as boys’ names being taken more seriously while girls’ names are seen as decorative (Allen et al. 1941; Lawson 1984; Lieberman and Bell 1992; Main 1996; Rossi 1965). Lieberman and Mikelson suggest that “gender marking in the naming process reflects the fact that such gender marking is a central feature in our culture” (1995:940).

As gender norms shape naming practices so do names shape the way others perceive our gender (Cromwell 1999). The femininity of my name aligns with my gender identity and facilitates an accurate gender attribution in most social situations. Of course, names are not determinative – those with androgynous names are no more likely to be androgynous than those with sex-typed names (Rickel and Anderson 1981) – but facilitative. Having a name that aligns with your gender identity may help facilitate others perceiving your gender correctly. In an early study of the affective value of common names, Walton noted “confusion of sex by the supervisors or teachers of children with [androgynous] names is frequent and results in embarrassment to the individual (1937:397). The implication is that in order to avoid embarrassment by people struggling to gender you, everyone should be given sex-specific

names. However, Goffman reminds us that “embarrassment is a normal part of normal social life” and may, in fact, be necessary in facilitating social change (1967:109). When one struggles to read another person’s gender, the mostly unnoticed gendering process in everyday interactions (West and Zimmerman 1987) is interrupted. If this interruption facilitates a questioning of gender as a structure, then “social structure gains elasticity” (Goffman 1967:112). Unfortunately, this is not often the case. Instead, the person whose gender has been misread is blamed and made to bear the embarrassment alone. Goffman argues that “joint responsibility is only right...the discreditor is just as guilty as the person he discredits” (1967:106). Goffman offers as a “classic circumstance” in which embarrassment may occur is when someone experiences a change in status (e.g. marriage or promotion) and others refuse to recognize the new self: “to acquire a self that other individuals will not fully admit because of their lingering attachment to the old self” (1967:106). This dynamic can be seen when trans people adopt chosen names but family members continue to use their birth name, causing distress (Muzzey, Kinney, and McCauley 2019).

Parents name children long before their gender identity is identifiable. Gender identity – or one’s internal sense of self as a gendered person – develops along with the socialization process and may change over time. Having a feminine name when one does not identify as a woman can be uncomfortable. As articulated by a genderqueer participant who legally changed their name and assisted over 60 people do the same, having a gendered name that does not match your gender identity can “make people feel like they’re not really who they are” (Lorenzo). For trans people, the gendering of birth names can cause problems ranging from psychological distress to misgendering to blocked access to employment, education, healthcare, and public accommodations. It is common for trans people to abandon their birth name for a chosen name

that better reflects how they see themselves and want to be seen by others. It is considered incredibly disrespectful and even distressing to refer to someone by their birth name after they have adopted a new name. The practice of using someone's former name is known as "deadnaming." While not every trans person has a negative relationship with their birth name and a few trans participants disagreed with the term "deadname," several participants shared the distress birth names caused them and/or their clients. Quill, a non-binary transmasculine person, articulated the visceral discomfort they associated with their birth name: "If I didn't change it, I'd have to always have this, like, gremlin following me around. Hearing my old name...it's just like nails on a chalkboard. It's really uncomfortable." Others reported feeling shame and cringing when they saw their birth name. One lawyer, Barrett, shared that for clients who struggled with gender dysphoria, being referred to by their birth name often intensified their symptoms. A study found that using a trans youth's chosen name rather than their birth name reduces depression symptoms by 71 percent, thoughts of suicide by 34 percent, and suicide attempts by 65 percent (Russell et al. 2018).

CHANGE IN IDENTITY, CHANGE IN NAME

If names provide pegs on which we hang our personal identities and serve as markers of our overlapping social identities, then name changes indicate a change in our personal and social identities (Falk 1975; Foote 1951; Miller 1927; Omole 2020). More than half of respondents in a survey of marital names believed their identities would change if their surname changed; this finding was particularly strong among male respondents (Intons-Peterson and Crawford 1985). Obviously, name changes do not cause changes in identity; rather, they reflect a "passage in the life course" (Finch 2008:712). In turn, the "matrix of social relations" shaping our everyday interactions also shift (Kang 1971:404). Although modern states assume (and sometimes try to

enforce) the stability of names wherein one name marks us from birth to death, names are easily altered (Goffman 1963; Palsson 2014; Watkins and London 1994). People frequently adopt nicknames and may use one version of their name in professional contexts and a different version in social contexts. Under English common law – which all states except Louisiana follow – everyone has the right to change their name at will without legal procedure by simply adopting a new name; the only stipulation is that the change cannot be for fraudulent purposes like concealing one’s identity in order to avoid financial obligations (Fermaglich 2015a; Kim 2010; MacDougall 1985).

Even with common law, some opt to formalize their name change through legal procedures. An advantage of legal name changes, in comparison to common law name changes, is that they preserve continuity by recording that, in Goffman’s terms, the identity peg has been tampered with. Mechanisms for legal name changes in the U.S. date back to the 17th Century (Scherr 1986) and there is evidence of people in the 18th Century replacing “Jr” or “3rd/4th/5th” with a middle name (Smith 1985). Once someone decides to file a name change petition in the U.S., they must state their reason for changing their name and a third party can object; however, with the exception of Texas, there are no restrictions on the reasons why someone is changing their name (Kovačič 2017). A study of 19th Century New York name change petitions found that the most frequent reasons people sought a formal change were to strengthen ties with families, improve business relationships, and take advantage of economic opportunities (Scherr 1986). For instance, petitioners became eligible for inheritance or economic support if they carried the family name. The most common reasons for legal name changes in the late 20th and early 21st Centuries are ethnic minorities trying to avoid discrimination and familial changes (e.g.

adoption, marriage, divorce) (Broom, Beem, and Harris 1955; Emens 2007; Finch 2008; Goffman 1963; Lawson 1984; Pilcher 2017).

Ethnic Name Changes and Stigma Management

For ethnic minorities, name changes are often a form of stigma management. Minorities informally adopt nicknames and/or formally change names through the courts in order to avoid scrutinization, surveillance, and discrimination. Name changes can also be a sign of assimilation and pursuit of upward mobility. In the 1940s, the U.S. naturalization process included an option for changing one's name (Maass 1958). Of course, changing your name to avoid stigma is different from state enforced changes as seen in the renaming of enslaved people from Africa during the trans-Atlantic slave trade, National Socialists in 1930s Germany requiring Jews to mark themselves by adding "Israel" or "Sarah" to their names, or the non-consensual anglicization of immigrant names by immigration officials. In his study of name change petitions filed in New York between 1848 and 1924, historian Scherr (1986) discovered many reverse name changes wherein immigrants petitioned to return to their original name after immigration officials non-consensually or coercively anglicized their name.

Starting in the early 20th Century, historians noticed an increase in name petitioners requesting to "Americanize" their names, perhaps in response to foreign language persecution that intensified after World War I (Fermaglich 2015b; Scherr 1986). In the 1930s, 75-85 percent of name change petitions were people trying to go unnoticed and avoid disadvantages by Americanizing their names (Fermaglich 2015a). Jewish names were noticeably overrepresented among mid-20th century name change petitions (Broom et al. 1955; Fermaglich 2015b, 2015a; Maass 1958). Like other ethnic minorities, Jewish petitioners desired a name change due to difficulty of spelling and pronunciation, anticipation of or experience with employment

discrimination, and to avoid ridicule. Additionally, Jewish refugees from Europe sought a name change to protect themselves and their families still stuck in Europe, especially if petitioners were politically active and/or faced capture when serving in the U.S. military during WWII.

Muslims are another ethnic group known to change their name in the U.S. and Sweden in order to avoid discrimination (Allen et al. 1941; Khosravi 2012). According to the Council on American-Islamic Relations (2008), names are a trigger for anti-Islamic discrimination in 22 percent of the cases reported to CAIR, a higher rate than hijabs or headscarves. Another report found that in Sweden, a man with a Swedish name was four times as likely to be offered housing than a man with a Muslim name (Ahmed and Hammarstedt 2007). Other social scientists have found similar reasons for name changes among Chinese students at American universities (Kang 1971); low-caste youth in Sri Lanka (de Silva 2018); Turkish, Southwest European, and former Yugoslavian immigrants in Germany (Gerhards and Hans 2009); people with Middle Eastern backgrounds in Sweden (Bursell 2012); and immigrants from Asian, African, or Slavic countries in Sweden (Arai and Thoursie 2009).

Marital Name Change

In the U.S. marital name changes are legally permitted but not required, a legal approach shared with Great Britain and Canada (MacClintock 2010). Given this permissive legal structure, it would be easy to declare marital name change a matter of choice and be done with it. Linguists remind us, however, that “naming conventions unveil how power and status are instantiated and perpetuated in a particular society” (Boxer and Gritsenko 2005:1). With marital name change, choices are constrained by strong social norms and pressures as well as legal defaults that perpetuate gender inequality (Castrén 2019; Kim 2010; Snyder 2009).

Patrilineal naming practices¹ – wherein a woman adopts her husband’s surname upon marriage and lineage is traced through his family – arose along with the accumulation of capital (Miller 1927). In fact, prior to the 11th Century, it was rare for anyone in England to have a surname (Emens 2007) and up until the 14th Century, surnames expired with the person (Scott, Tehranian, and Mathias 2002). Fixed surnames that passed down through the family emerged with the modern state, which managed populations by making individuals legible for purposes of tax collection, property registration, inheritance, conscription lists, and census rolls (Palsson 2014; Scott et al. 2002; Stoiko and Strough 2017). Accompanying permanent surnames was the social custom of coverture wherein upon marriage, women were subsumed under their husband’s legal identity and her possessions became his property. This custom became law through a series of court cases in the late 19th and early 20th century which tied women’s marital names to public activities like voting and driving (Boxer and Gritsenko 2005; Emens 2007; Kim 2010; Slade 2015). The right to retain one’s surname was a target of feminist activism starting in the mid 19th century, bridging what are commonly referred to as the first (mid 19th to early 20th century) and second (late 1960s and 1970s) waves (Atkins-Sayre 2005; Goldin and Shim 2004; Kim 2010). Only in the 1980s did all states recognize women’s right to keep their name after marriage (Dougherty, Hulbert, and Palmer 2014; Emens 2007; Kim 2010; MacDougall 1985; Twenge 1997). Currently, the legal default is that both spouses keep their name, but it is very easy for a

¹ Patrilineal naming practices are not culturally universal and may be more common in western cultures. In China, neither men nor women change their names as surnames are clan based (Maeda 2010). Women in Korea also keep their surnames (Kim 2010). In many Latin American cultures, children are given surnames from both sides of the family (Kopelman et al. 2009; Nugent 2010; Twenge 1997). Before the October Revolution of 1917, women in Russia were required to take their husband’s name and keep it even if the couple divorced. Under the Soviet Union, both men and women could keep their names or take their spouse’s name. In 1996, hyphenation was allowed (Boxer and Gritsenko 2005). Despite this cultural variation, anthropologists of kinship networks have found that patrilineal societies are twice as common as matrilineal societies (MacEacheron 2016).

woman take her husband's name simply by indicating as much on the marriage certificate; no additional name change petition is required.

Despite these legal changes and over a century of feminist activism, the majority of women in the U.S. and Britain continue to adopt their husband's surname upon marriage (Boxer and Gritsenko 2005; Brightman 1994; Gooding and Kreider 2010; Hoffnung 2006; Johnson and Scheuble 1995; Miller and Willis 2015; Mills 2003; Scheuble and Johnson 2005; Suter 2004). Studies of unmarried college students also consistently find the vast majority of (heterosexual) women plan on changing their names (Dougherty et al. 2014; Scheuble and Johnson 1993; Stafford and Kline 1996; Twenge 1997). As rare as it is for a woman to keep or hyphenate her name upon marriage, it is even less common for men to change their name after getting married (Lockwood, Burton, and Boersma 2011; Shafer and Christensen 2018). Generally, the onus of whether a couple's marital name is traditional or non-traditional falls on the woman (Boxer and Gritsenko 2005; Intons-Peterson and Crawford 1985; Kim 2010; Stoiko and Strough 2017). In one study, nearly 20 percent of husbands became very upset at the mere suggestion that their partner not take his name (Thwaites 2013) and another found some women were taking their husband's name so as not to hurt his feelings (Boxer and Gritsenko 2005). The most common rationales for marital name change are tradition, social norms, and family unity or commitment (Boxer and Gritsenko 2005; Dougherty et al. 2014; Hamilton, Geist, and Powell 2011; Hoffnung 2006, 2006; Intons-Peterson and Crawford 1985; Kim 2010; Kline, Stafford, and Miklosovic 1996; Lockwood et al. 2011; Stoiko and Strough 2017). Women who keep their names or opt for other nontraditional marital names tend to be more highly educated, have professional aspirations, marry at a later age, and be married in a non-religious ceremony (Boxer and Gritsenko 2005; Brightman 1994; Goldin and Shim 2004; Intons-Peterson and Crawford 1985;

Johnson and Scheuble 1995; Knotts, Wofford, and Griesedieck 2018; Kopelman et al. 2009; Scheuble and Johnson 1993; Scheuble, Klingemann, and Johnson 2000). Nontraditional marital names are also more common among women of color (Gooding and Kreider 2010; Hoffnung 2006; Twenge 1997). These same demographic patterns can be seen among women who resumed their pre-marital surname following divorce (Hoffnung and Williams 2016). The most common rationales among those who plan or make non-traditional marital name choices are identity and gender egalitarianism (Hoffnung 2006; Lockwood et al. 2011; Mills 2003; Stoiko and Strough 2017; Twenge 1997). Growing up, having both my parents' names as my hyphenated surname signaled to me their egalitarian partnership. When my parents married in 1977, they each kept their own last names. They also lived apart for their first year of marriage as my mother completed her graduate degree. When they began living together full-time as a married couple, they decided to hyphenate their name. For my mother, the hyphenation was symbolic, representing their union.

The vast majority of the marital name change literature focuses exclusively on heterosexual couples. In fact, heterosexuality is presumed and rarely named in the studies. There are a handful of studies that have examined the marital name decisions of same-sex couples. These studies have found that like heterosexuals, gay men and lesbians associate name keeping with a continuity of personal and professional identity and name changing with being a family (Clarke, Burns, and Burgoyne 2008; Dempsey and Lindsay 2018; Suter and Oswald 2003). Of course, in a heteronormative society, the need for securing external recognition and acceptance of one's family by institutions and extended families may be stronger for same-sex couples than for some heterosexual couples. Even so, name changing is not very common among same-sex couples. Only one participant in a study of 30 lesbians and gay men in a committed relationship

had changed their surname. For those contemplating changing their name, hyphenation was the most popular option (Clarke et al. 2008). While recent studies conducted after the Supreme Court recognized marriage equality find participants more open to making surname changes, name-keeping continues to be the default for same-sex couples (Kim and Thurman 2016; Underwood and Robnett 2021).

Traditional marital names are sustained by social attitudes and legal defaults. Three-quarters of respondents to the 2006 Constructing the Family survey agreed that it is better if a woman changes her name upon marriage and nearly half disagreed that it was okay for a husband to take his wife's name (Hamilton et al. 2011). In several studies, women who kept or hyphenated their name after marriage were seen as self-centered, less committed to their marriage, bad mothers, unattractive; they were even called "bitches" by some (Murray 1997; Robnett et al. 2016; Shafer 2017; Suter 2004). Men who hyphenated or whose wives retained their name were seen as less masculine, less instrumental, more expressive, and holding less power in the relationship (Forbes et al. 2002; Robnett, Wertheimer, and Tenenbaum 2018). These social attitudes are reinforced by additional administrative burdens for non-traditional marital name changes. The legal default in the U.S. is that both partners keep their name, but the assumption is that the woman will change hers. In all 50 states, a woman can change her name upon marriage simply by filling out the marriage certificate. However, in all but nine states (as of 2015), men must petition the court to change his name; a court order is also required if the couple chooses a new name entirely (Emens 2007; Finch 2008; Slade 2015; Snyder 2009). Additionally, while the Social Security Administration's database will record a hyphenated name, the hyphen will not appear on the social security card and other databases do not allow the import of a hyphen (Emens 2007). Legal scholar Emens (2007) found traditional marital names

further reinforced informally by what she calls “desk-clerk law” when the person at the desk gives incorrect or normative-driven responses that discourage non-traditional choices. Emens called county clerks and DMVs in all 50 states, inquiring about marital name changes.

Frequently, clerks stated that changing his name would be harder than changing her name. In ten states, at least one clerk suggested contacting an attorney to change his name even if no court order was required in that state.

GATEWAY TO DIGNITY

“We did lots and lots of name changes because that’s, like, right, a gateway to dignity for a lot of people” (Barrett, direct services lawyer, non-binary)

Starting in the 1960s, trans people petitioned courts for name and gender marker changes (Meyerowitz 2002). However, there have been very few social science studies of trans people’s name changes. The few that have been published align with the larger literature on names, reporting that names for trans people are an important source of internal and external affirmation of their identity. A psychoanalytic interview study with six transmasculine people – five male-identified and one non-binary identified – in Ireland found names to be one of the major themes emerging from the interviews. Names were “a means of confirming and ensuring that the participants’ gender identity was validated by others as a ‘real thing’” (Rodgers and O’Connor 2017:147). Likewise, interviews with binary and non-binary trans young adults in the Midwest found that choosing a name was an important stage in gender identity development, particularly for non-binary participants. In choosing a name, some participants honored their birth name by altering it while others wanted to change their name in order to distance themselves from trauma associated with their birth name. Participants also changed their name in order to avoid misgendering: people attributing them a gender other than the one they identify with (Kinney,

Muzzey, and McCauley 2019). One of the reasons name changes are important is because they provide dignity. Several UN Conventions, including the Declaration on the Rights of Children and the International Covenant on Civil and Political Rights, underscore names as fundamental to the right of recognition and dignity (Caplan and Torpey 2001; Emens 2007). Name changes provide internal dignity in the sense of affirmation and external dignity in terms of respectful interactions with others.

Internal Dignity: Sense of Affirmation

During our interviews, most participants shared strong, positive feelings associated with declaring their chosen name. They spoke of changing their name as validating, affirming, claiming their identity, and being recognized for who they truly are. When I asked Ruth, a transwoman living in the Southwest, why it was important for her to legally change her name, she replied, “Well, I’m a woman! So yeah, I can’t have a guy’s name. This is who I am, you know? Who I’ve always been.” Similarly, Christine, a trans woman living in the Northeast, characterized her name change as “going through a door. I felt like I was taking control of my destiny. Not letting anyone else define who I was. I was defining me.” Over a third of participants who talked about their name change and/or assisting others with the process framed it as a step often associated but not always with transition. Historian Susan Stryker defines the concept of transgender as “the movement across a socially imposed boundary away from an unchosen starting place, rather than any particular destination or mode of transition” (2017:1). Once understood as a linear trajectory from psychiatric diagnosis to surgical alteration of the body to, when possible, legal status change, since the 1990s, transition has dominated discourse as a recognition of the multiple journeys individuals may travel (Carter 2014). Some elect to take hormones on a short- or long-term basis; some do not. Some seek surgical procedures with or

without hormones; some do not. Many make changes to their gender presentation through haircuts, clothing, and accessories. For some, transition is a movement from one state of being to another which may be within the binary or beyond. For others, transition is simply making obvious to everyone else what has always been understood internally. Eve, a Midwestern trans woman with a private legal practice, said that for her, transitioning was spiritual, with a shift in consciousness much more significant than any bodily changes.

Whether or not one's name change was a step in their transition and/or part of an affirming process, it tended to hold great emotional significance for many participants. As psychoanalyst Falk (1975) argued, strong emotions around names indicate their deep psychic implications as symbols of people's identities. Upon receiving their name change, participants felt excited, ecstatic, free, liberated, a huge weight lifted off their shoulders. Andrew B immediately got on the phone and called his family. Christine wanted to take a photo with another trans woman she spotted in the courtroom also getting a name change. For her, seeing her chosen name on the court order "was a natural high." Some participants wanted to frame the order and post it on their wall. Kathy was disappointed that the plainness of the court order did not reflect the pomp and circumstance she felt appropriate for the occasion: "Once I got the paperwork, I was kind of not impressed with this court order, because my friend got a nice court order with a gold seal from [a neighboring state]. And I just got a handwritten piece of paper with a stamp!" Lorenzo was ecstatic the day they got their name change: "I remember when I went to Chase bank and was like, here's my name change order, and they were like, 'Okay, Mr. Lorenzo.' I was like [gasps] me!" For others, emotions were more mixed. While Noah hated his deadname, he felt overwhelmed when granted his name change. Already struggling with mental health issues, Noah took a moment to release his complicated emotions: "I had to sit down on the

first floor and cry for a minute.” Quill had a different reaction to receiving their name change order: “I felt a bit pissed off. There was a lot of work. It was just a beginning.” Quill petitioned for their name change *pro se*, assembling the paperwork, following the procedure – including publishing and paying fees – without the assistance of a lawyer. They knew that the court order was not the end of the process. After securing a legal name change, people have to update all their identity documents (e.g., driver’s license, Social Security, passport, birth certificate) and any place where their name is used including bank and school records.

Whatever the exact emotion, the strong feelings participants expressed in conjunction with their name change indicates the importance of this legal declaration. With a legal name change order, the state affirmed how participants wanted to be recognized, conferring a sense of dignity.

External Dignity: Respectful Interactions with Others

“...at least someone is recognizing you and you have the documentation to shove in someone’s face if they’re messing with you” (Charlie, non-binary, lawyer)

In addition to producing internal feelings of affirmation, legal name changes harness the power of law to demand recognition and respect from others. Psychologists recognize misgendering, using incorrect pronouns, and deadnaming as microaggressions targeting trans people (Fiani et al. 2017; Freeman and Stewart 2018; Nadal et al. 2016; Nordmarken 2014; Pitcher 2017; Pulice-Farrow, Clements, and Galupo 2017). Microaggressions are subtle forms of discrimination endured by minorities in everyday interactions through often unintentional and perhaps unconscious verbal, behavioral, and environmental slights (Casey et al. 2019; Haines et al. 2018; Nadal 2019; Nadal et al. 2016; Sue et al. 2007; Woodford et al. 2013). The classic racial microaggression is the question “Where are you from?” Teachers mispronouncing names

has also been recognized as a racial microaggression (Kohli and Solórzano 2012). Sometimes dismissed, especially by perpetrators, as innocent missteps, microaggressions “are a constant, continuing, and cumulative experience” that daily reminds minorities of structural inequality (Sue et al. 2008:278). As microaggressions, misgendering and deadnaming negate the experiential reality of minorities. By repeatedly using incorrect names and pronouns, trans people’s identities are daily questioned and invalidated. In May 2020, ACLU attorney Chase Strangio penned an op-ed calling out the *New York Times* for deadnaming his client, Aimee Stephens, in her obituary. Stephens was a plaintiff in the first trans employment discrimination case heard by the U.S. Supreme Court. Sadly, Stephens passed before the Court issued its decision, which declared that trans people are protected from sex discrimination under Title VII. In his op-ed, Strangio argued that deadnaming “[ensures] that I will never have the authority to claim the truth of who I am” (Strangio 2020). In asking to be correctly addressed by their chosen name and pronoun, trans people are participating in a long history of resisting being dismissed as monstrous (Nordmarken 2014; Stryker 1994), deceptive (Bettcher 2007), or not real (Riddell 1995; Stone 1992).

The social norms around people’s names (and pronouns) are currently in flux. Over the last few decades, trans advocates have modeled asking for and using people’s chosen names and pronouns – regardless of what is on someone’s legal documents – as a sign of respect and upholding people’s dignity. While this practice has gained ground in some places – college classrooms, social justice spaces, and some professional conferences, for instance – it is not yet the prevailing norm. A survey found that teachers inconsistently used trans students’ correct pronouns with genderqueer and gender non-conforming students receiving less affirmation through correct pronoun usage than binary trans students (Wentling 2015). Correctly addressing

someone by their name indicates that you are paying attention while using the wrong name comes across as rude, dismissive, and even undermining. When my students and I come to a shared agreement about addressing each other by the names and pronouns we use regardless of what is on our official records, I frame it as an act of respect: “Wouldn’t it be weird if I told you my name was Jolene, and you decided to call me Jessica no matter how many times I told you my name was Jolene? Same thing with pronouns. Calling people by their chosen names and pronouns is a sign of respect.”

Being addressed by their chosen name and pronouns was taken by participants as a sign of respect – that this individual may actually listen to what they have to say, attempt to understand their concerns, and treat them with a modicum of dignity. Similarly, lawyers signaled to their client that they were on their side by using a client’s chosen name and pronoun. Lawyers also reported educating other legal actors – including colleagues, opposing counsel, and judges – on the importance of correctly using someone’s name and pronoun. Sometimes such peer education was handled through formal trainings. Jose, a direct services lawyer in the Northeast, conducted a trans and gender non-conforming training for housing and civil court judges in 2016. In the training, Jose told the judges to “Respect pronouns, respect names. It’s your legal duty to treat people with respect.” Other times the peer education was handled through informal conversations. Joni, a private practice attorney in the Midwest, shared that in her latest conversation with opposing counsel, she had to repeatedly correct his misgendering of her client:

We had a hearing, and it was just me and opposing counsel sitting outside of chambers waiting for the hearing to start. And he kept using the wrong pronoun...I’m just going to keep correcting you every time you say it wrong. You’re either going to get worn out or start doing it right...You’re going to respect my client’s pronouns and name.

Participants emphasized that it is impolite to repeatedly use someone's deadname and the associated pronoun. People who misgendered participants were deemed untrustworthy and treated with suspicion. For instance, Sophia's current probation officer always refers to her as "sir." Not only does this aggravate Sophia but it provides an example of a legal actor not recognizing her identity. During our interview, Sophia seemed concerned that when she goes before a judge for her name change, the judge will similarly refuse to recognize her identity and deny her name change. When discussing treatment in courtrooms, trans participants and their advocates assessed a judge's level of respect for trans people by their use of chosen names and pronouns. Whether in a legal, business, or social setting, participants connected using someone's correct name and pronoun with showing respect.

When that dignity was not given, participants could harness the power of law – by referring to legal documents or legal duty – to advocate for themselves and/or their clients. Law, as a normative institution, can be a tool in efforts to shift practices around name and pronoun usage. One study found that low-income trans women of color seeking a legal name change were five times more likely to report experiencing recent verbal abuse from family or friends than respondents who had already completed a legal name change. The study authors suggested that this "may indicate that legal name change helps to legitimate trans individual's identities in the eyes of family and friends" (Hill et al. 2018:31). If others refuse to respectfully address someone – for instance, by repeatedly deadnaming someone after being corrected – they can whip out their court order and use the law's legitimating force to insist on being referred to by their chosen name. One participant shared using this tactic. In social and professional situations where others were not recognizing her name and gender, Kathy pointed to her name change order and new birth certificate as proof backing her up. She jokingly threatened to sue a lawyer who was

helping her change her will when they struggled to use her new legal name: “I have a court order, so I’m going to take you to court if you screw it up [laughs].” Several lawyers echoed Kathy’s belief that name changes provide legal backing for a population that is socially marginalized and legally precarious. Private practice attorney Jillian stated that “when you don’t have a lot of personal power, it’s important to have a piece of paper,” especially if that paper represents the force of law.

Name changes were a particularly important tool in advocating for respect in the courtroom during family law cases where emotions can run high and hurt people may behave in inappropriate and disrespectful ways. For participants entering divorce proceedings and/or child custody disputes, having a legal name change provided them with an extra layer of support in ensuring respectful treatment, including the use of correct names and pronouns. Participants shared stories of using name change orders to advocate for themselves or their clients in response to consistent misgendering from the other party.

For instance, two years after their divorce, Imani and her ex-wife renegotiated their child custody arrangements. Due to financial restraints, Imani did not have legal representation and went before the judge *pro se*. During one of the hearings, opposing counsel repeatedly misgendered Imani and used her old name. According to Imani, she waited “for about five or six times and then just asked the judge if we could stop for a minute so I could ask her to stop being so rude.” She felt like the lawyer was misgendering her purposefully in order to insult and provoke her, a tactic she suspected her ex encouraged. Imani interrupted the proceedings in order to advocate for her respectful treatment through the use of her correct name and pronoun. In her advocacy, Imani pointed to her ID, which had been updated following a legal name change. The document provided Imani a legal basis from which to insist that she be treated respectfully by

opposing counsel. After Imani's intervention, the judge insisted she was appropriately gendered for the remainder of the proceedings, correcting opposing counsel when she struggled to switch.

Knowing how having a legal name change can help when the opposing side is having difficulty with her client's transition, private practice attorney Kristen generally asks trans clients seeking a divorce if they'd like to do a name change first. During a particularly nasty divorce – “scorched earth” is how Kristen described it – the spouse reportedly refused to sign the settlement agreement because it had Kristen's client's new name on it. Kristen pointed out that the client's new name was her legal name, which she should use to sign a legal agreement. The judge agreed with Kristen's reasoning. The parties came to a compromise where the case was captioned using her client's former name, but her client signed the paperwork with her current legal name.

Of course, there are cases where one might want to finish the divorce before filing a name change – such as when someone is not yet out to their soon-to-be-former spouse or going in front of an unfriendly judge – and lawyers emphasized that the decisions they make depend on the best interest of each individual client. They also underlined that legal name changes should not be a pre-requisite for respectful treatment and push their colleagues to use their client's chosen name regardless of what is on their documents. However, participants' experiences show how legal name changes can be an effective tool when that respect is not being extended, such as during contentious family law cases.

LIVING SELF-DETERMINED LIVES: PRESENTATION OF SELF IN EVERYDAY LIFE

“Having an ID that matches what people see when they look at them materially affects the circumstances of their lives. Basically, are you allowed to exist in public life or not?” (Andy, lawyer at non-profit firm, gender ambivalent)

In addition to being meaningful and harnessing the power of law to facilitate respectful social interactions, name changes also help trans people secure accurate identification. The lawyers I interviewed consistently tied the importance of name changes to accessing accurate identity documents. Simone practices impact litigation in a southern state that offers no protections against housing, public accommodations, or employment discrimination based on gender identity or sexual orientation. Consequently, Simone believes it's especially important for her trans clients to have accurate identity documents – that “match who they are” in her words – as this provides them a “sort of protection.” Identity documents act as a proxy for self: I present this document as proof of who I am. In general, people can change their name using common law (with the exception of Louisiana), as long as they are not defrauding anyone. However, even in states that recognize common law names changes, not all institutions (e.g., banks) will update records without a formal court order. Therefore, advocates recommend that trans people follow the formal legal name change procedures in their state to ensure their records and documents accurately reflect who they are (Lambda Legal 2012). Having identification that aligns with your self-presentation greatly impacts people's everyday lives and institutional access.

Identification, or identity documents, have not always been such an integral part of daily life and institutional access. Written documentation of individual identity may be traced, at least in Europe, to the “early medieval transition from oral to written procedures, prompted by royal interest in the reliable documentation of property ownership and legal processes” (Caplan and Torpey 2001:2). Paper registration in 15th and 16th Century Europe was used selectively, mostly issued to those deemed delinquent or deviant. The French Revolution and its concept of national citizenship introduced the 19th Century practice of everyone being made visible to the state through registrations (Caplan and Torpey 2001). The three major forms of identification we now

carry – driver’s licenses, birth certificates, and passports – were all introduced in the early 20th Century with the bureaucratic expansion of the modern state (Adair 2019; Fermaglich 2015a, 2015b). When driver’s licenses were first introduced around 1903, they were designed to be ephemeral – printed on cardstock and expiring annually – and were treated with suspicion, especially by rural white men who associated the documents with policing and surveillance. It took nearly four decades for driver’s licenses to be reimagined as symbols of citizenship and national belonging. According to Adair (2019) this change was accomplished through racialized associations of sanity and competency.

Within trans studies, the regulatory effects of identity documents are well-established (Davis 2017; Spade 2008, 2011). The role of names, however, remains under-examined as much of the literature focuses on gender markers to the exclusion of name changes. Both names and gender markers are important pieces when it comes to trans people having accurate identification. Many trans people in the U.S. do not have accurate identification. Among those who have transitioned, between 30 percent (Grant et al. 2011) and 46 percent (James et al. 2016) do not have accurate identification. Trans people who are racial minorities, young, poor, and/or have a disability are even less likely to have accurate identification. Inaccurate identification is linked to economic insecurity. The percentage of National Transgender Discrimination Survey respondents experiencing hiring discrimination rose from 52 percent of those with accurate driver’s licenses to 64 percent of those without an accurate driver’s license (Grant et al. 2011). In a survey of low-income trans women of color, respondents who had secured a legal name change reported higher monthly incomes and greater housing stability (Hill et al. 2018). Accurate identification may also impact people’s access to voting (Brown and Herman 2018) and college applications (Mottet 2013).

When theorizing personal identity, Goffman emphasized that identity documents, whose purpose is to prevent error or ambiguity, were intended for presentation “only in special situations to those specifically authorized to check up on identity” (Goffman 1963:60).

Validating identity through documentation, however, has proliferated. No longer do you only present identification when crossing borders or applying for jobs. Every time you enter an office building or bar, use your credit card, or make a reservation, you have to show your identification and use your name. Participants who had legally changed their name as well as lawyers and advocates who assisted others with their name changes speculated that most people do not realize how often they present their identification. Cameron, who is trans non-binary and manages a multi-location name change project, believes that cisgender people in particular are not sensitized to the importance of accurate identification:

I really always challenge cis folks who use their birth [name] to think about anytime they have to show their ID or use their name – it’s just all the time. It’s just all the time. It’s something that people really take for granted.

If your presentation and identification match, these everyday interactions most likely run smoothly to the point of not having to think of them. They’re routine, habit. When your identification does not match your sense of self and how you present that self, it can feel, as one participant put it, like “much of the world is gated off” (Faye). Daily interactions and institutional access are a major motivation for people seeking a legal name change. In particular, participants mentioned the importance of accurate identification for consumer transactions, travelling, police interactions, estate planning, and access to public benefits, healthcare, education, and employment.

Consumer Transactions

As the U.S. moves further and further away from a cash economy, each time someone buys groceries, fills their gas tank, or any number of regular consumer transactions, it is likely they will be asked to show identification. This can lead to awkward situations that may escalate to embarrassment and even harassment. For instance, Seebie, who identifies as non-binary, goes by a different name than the one listed on their credit card, which they consider their deadname. When asked for a name while attending a drag brunch, Seebie gave the name listed on their credit card only to be told that the name would be displayed. They immediately asked to give a different name as they did not understand the name would be used in that way. Seebie was shocked that an event catering to the LGBTQ community would not have been more sensitive in asking for names. While Seebie was able to rectify the situation and recover from their temporary embarrassment, other participants shared stories of harassment. Katie, a trans woman living in the South, reported, “I’ve gotten the look – been called ‘it’ – because I’m standing there trying to buy something, and my credit card had a boy’s name on it, and I clearly wasn’t.” A few lawyers indicated that they had heard several horror stories from clients who were yelled at and/or followed out of stores after presenting identification that did not match their presentation. Given the high rates of violence against trans people, which are often precipitated by accusations of trans people deceiving others (Bettcher 2007; Lee 2020; Lee and Kwan 2014; Wodda and Panfil 2014), access to accurate identification is a safety concern. Nearly half of respondents to the U.S. Transgender Survey reported being verbally harassed and nearly one in ten physically attacked because of their gender in the past year. Nearly half had been sexually assaulted at some point in their lifetime (James et al. 2016). Approximately one LGBTQ person is murdered in the U.S. every week (Waters et al. 2018). Nearly 20 trans people, the majority of whom are women

of color, have been killed so far in 2020 (NCTE 2020). Charlie, a non-binary lawyer in the Northeast, shared “every time you leave your house, you have no idea what’s going to happen.”

Travelling and Transportation

Many participants shared that traveling was a major motivation to pursue their legal name change. Isaac needed a name change to update his passport for an upcoming family event in another country. Kathy likes to vacation in Mexico. As she began to grow out her hair, she reported “it was getting harder for me to come back into the country with longer hair and my old passport...I used to get comments.” With a legal name change, participants like Isaac and Kathy were able to update their identity documents, which are screened at travel points. The increased surveillance and security practices at airports can cause problems for bodies and subjects that exceed gender norms (Beauchamp 2018; Currah and Mulqueen 2011). With sex-specific body scanners and having to specify sex on identification when purchasing tickets, “flying while trans” is, as one participant put it, “kind of an adventure” (Casey). When traveling for a family funeral, Casey brought two driver’s licenses as he did not have time to update the airline with his new name. At security, the TSA agent conducted a thorough pat down as Casey was wearing a binder. The experience was “uncomfortable and upsetting” and Casey was nearly in tears. Connie, a cisgender lawyer with a private practice in the south, advises her clients to get global entry to help make traveling less uncertain.

Gender norms have also been used in anti-fraud efforts by public transportation administrations, causing problems for participants in their daily transportation. Cameron, who identifies as trans non-binary, remembered adjusting their gender presentation in anticipation of showing the conductor their monthly commuter pass: “I was gender non-conforming even back then. I always, like, take off my hat and try not to look androgynous, I guess because I didn’t

want to go through any scrutiny.” Transit passes were sex-marked with either the passenger’s sex listed on the back of the card, the card itself being colored blue or pink, or the conductor punching an M or F on the card. Advocates in Philadelphia, Chicago, and New York City successfully stopped this practice due to its harmful impact (Chayes 2017; Davis 2017).

Interactions with Police

Interactions with police were another situation wherein participants worried about facing additional scrutiny while carrying identification that did not match their presentation. In explaining the importance of name changes, many participants expressed fears around being pulled over. Participants worried that if they were pulled over with inaccurate identification, they would not just be given a ticket but arrested. Unfortunately, this fear is not completely unfounded. In 2019, the NYPD charged a trans Latina with false impersonation after she gave them her birth name during questioning for walking through a park after dark. Although the woman had a legal name change, previous interactions with the police led her to believe she was required to tell them her birth name rather than her legal name. The charges were eventually dropped and the ACLU sued the police department for malicious prosecution (Bonvillian 2019). One lawyer shared that a trans woman called their law office after spending a night in jail. She and her friend (a cisgender man) were stopped by a cop while riding public transportation. While the cop let the friend go, she was arrested for presenting false ID. Another client, also a trans woman, was pulled over by a cop who reportedly forced her to remove her wig because her ID had an M on it. The policing of trans people, particularly trans women of color, is so notorious, there is a term for it: “walking while trans” (Carpenter and Marshall 2018). Eagle, a black trans man, shared that he was so worried about the police’s reaction to his inaccurate identification that he left the scene of a car accident:

I was an attorney, so I didn't give a damn. But then I got in an accident. I had my old ID and my new ID. And the first thing I wanted to do was get out of the scene. That was the worst thing I could have done, because I had a broken back! I didn't know. It took years to discover that I had a broken back. I'm just recovering from that broken back. I was just like, get me out of here! It came to haunt me [for] years. I'm still dealing with it. I'm on the tail end of two years of surgery from that broken back that happened eons ago. I've been dealing with all this pain, because I left the scene. Because I was freaked out because I had two IDs. I just wanted to get the hell out of there.

As characterized by one participant, having accurate identification can “de-escalate” these interactions that come with heightened scrutinization.

Accessing Medical Services

A few participants mentioned not wanting to visit a medical provider before their name change as having the wrong name called in the waiting room would out them to other patients. This was especially uncomfortable for participants who experienced distress around their deadname. One third of respondents to the U.S. Transgender Survey who had seen a medical provider in the past year reported having at least one negative experience, including verbal harassment, being refused treatment, or having to teach the provider about trans people in order to receive care (James et al. 2016). Other participants mentioned uncomfortable conversations with medical providers caused by the sex listed on their medical record. Jesse is a trans legal fellow in the West who changed his name a decade ago but has not gotten around to updating his gender marker. When he did his name change, Jesse says it was not as common to also update your gender marker. However, he is now thinking about taking that step to avoid confusing conversations at doctor's offices. For instance, when they see on his medical record Jesse is listed as female, providers automatically follow protocol and ask him questions about pregnancy. While some trans men do choose to become pregnant (Besse, Lampe, and Mann 2020; Currah 2008; Reese 2018) for Jesse, these frequent interactions were bothersome. He feels mistaken for

a woman and needs to out himself as trans, which leads to “confusing circumstances.” On the flip side, Quill is hesitant to change their gender marker. Although their state now offers an X option, which would be in alignment with Quill’s non-binary identity, Quill fears being denied medical care: “the part that really scares me the most is worst case scenario being denied medical attention. There are so many horror stories of people who got really sick and needed medical attention. I don’t need that to be my story.” There are many horror stories that circulate among trans people and their community. In 1995, DC EMTs laughed and made derogatory comments instead of administering care when responding to Tyra Hunter’s car accident. Tyra, a black trans woman, later died in the hospital (Bowles 1995). To add insult to injury, news articles covering Tyra’s death misgendered her. Around the same time, trans activist and author Leslie Feinberg was turned away from a hospital while running a 104-degree fever. Suffering from endocarditis, the doctor reportedly told Feinberg “you have a fever because you are a very troubled person” (Feinberg 1998:2, 2001). Jonathan, a private attorney who has practiced civil rights law in the Southeast for nearly three decades, told me about one of his clients who encountered a hostile environment at a hospital. During preparation for her gender affirming surgery, Jonathan shared that the nurse repeatedly told his client she was a man and would always be a man. Although his client was able to have her surgery, Jonathan said the incident was traumatizing “at a time when she was particularly vulnerable.”

Employment

Participants also shared struggles relating to identification and employment eligibility. After 9/11, the U.S. government passed the Real ID Act to standardize driver’s licenses as part of its anti-terrorism strategy. Legal advocate Dean Spade argues that using gender markers to surveil people through their identity documents as part of the War on Terror is “based on a

cultural logic that gender is fixed and obvious and therefore an easy classification tool for verifying identity” (2011:152). Since the U.S. does not issue national identification cards, driver’s licenses have been a de facto standard form of identification. Prior to the Real ID Act, each state set its own rules and policies, including requirements for updating names and gender markers. Trans advocates worried that the Real ID Act would lead to surgery requirements becoming the standard (Mottet 2013). Concern was also raised that trans people might be outed as copies of their past and present identity documents, which may show a bureaucratic misalignment of gender, are stored in DMV databases (Glavinic 2010). Similarly, no match letters from the Social Security Administration during employment background checks leave trans people vulnerable to outing. According to Lambda Legal, SSA no match letters are no longer issued for private employers but continue for public employers (Lambda Legal 2012). Simone, a cisgender lawyer who does impact litigation in the south, reported that she had one client who had not applied for a job for several years because she was afraid of being outed and denied employment. As soon as she got her name change and updated her documents, the client applied for a job and excitedly called Simone when she got it. According to Simone, “she was just ecstatic that she didn’t have to explain anything to anyone. She got to go in, be herself, and there was no explanation needed.”

Several of the trans lawyers shared how using their old name became problematic at work. Originally, Charlie was not planning on changing their name. They figured after law school, they would practice under their birth name and use Charlie everywhere else. That approach turned out to be “unsustainable.” Like other trans and LGBTQ lawyers I interviewed, Charlie struggled to find a job after law school. It took them four years to find a job. Charlie attributes at least some of this struggle to applying with a feminine name while presenting

masculine: “I would interview and walk in in a suit, and people would look at my resume and look at me. Someone at an interview asked if I was sure that was me.” Cory also was not in a rush to change their name. As a lawyer, however, they have to sign a lot of paperwork with their legal name. After a while, Cory shared, it “was becoming increasingly hard to do.” In particular, Cory got tired of always having to explain themselves:

I felt like I just kept having to explain my transness to people or to explain why I was using this other name...if you have a typically female name and you’re being, like, “actually, call me Cory,” it is a more vulnerable and longer [laughs] interactions. And that just really ground me down after a while.

When Cory switched jobs, they decided to go ahead and get a legal name change so that they could start the new job with their chosen name and not have to constantly explain themselves. After getting their legal name change, Lorenzo was also relieved to no longer have to explain to people their name. When Lorenzo was in college, they had several internships where they would have to explain that they are trans and go by this name which is different from the legal one they applied with.

Legal name changes also facilitated respectful interactions at work. When Quill filed their name change petition, they were working two jobs: an after-school counselor and a bakery. Quill felt the first job was conservative and quit when they decided to officially change their name. Trans people who work with children often encounter hostility due to longstanding moral panics around gender/sexual difference. Trans teachers face harassment on the job at higher rates than lesbian or gay teachers (Irwin 2002) including from students (McCarthy 2003). At the bakery, Quill posted a sign in English and Spanish – many of their co-workers were Spanish mono-lingual – announcing they were going by a different name. Quill felt supported by their colleagues at the bakery: “even though people didn’t really understand, they were like, ok, cool.” In a much less supportive working environment, Erica used her legal name change to force her

employer to put “Erica” on her name badge. Working at a drugstore chain, Erica was required to clearly display her name badge as part of the dress code. However, when she started transitioning on the job in 2008, the district manager would not allow Erica to use her chosen name.

According to Erica, her store changed their policy so that everyone had to use their formal legal names on their badges. Before, people were allowed to use nicknames. Only in 2011 when Erica got her legal name change, was she able to wear a name badge that reflected how she presented at work. Until then, she would wear her name badge near her collar and let her hair fall over it. Having to display a name not in line with her self-presentation embarrassed Erica.

Accessing Benefits

Not having one’s name and gender correctly recognized had economic consequences for trans people outside of the employment context. I spoke to a couple of lawyers involved in a New York case – *Doe v. The City of New York* (2013) – wherein a trans woman was mistreated by personnel at the NYC Human Resources Administration (HRA) when attempting to update her public benefits records. According to its website, HRA serves over 3 million New Yorkers and is responsible for administering over a dozen public assistance programs including food stamps, cash assistance, Medicaid, and HASA (HIV/AIDS Services Administration). For years, lawyers working with low-income trans and gender non-conforming (TGNC) New Yorkers heard about HRA mistreating recipients, including misgendering them and using deadnames. Additionally, there was no consistent rule for updating name and gender markers on HRA cards and records. While some people were able to update their records, others were denied. One of the lawyers I spoke with mentioned that their colleagues at other organizations had offered trainings to HRA personnel on how to treat trans clients with respect. However, the mistreatment persisted. From around 2011 to 2015, lawyers from organizations such as the Sylvia Rivera Law

Project (SRLP), New York Legal Assistance (NYLAG), Legal Services NYC (LSNY), Legal Aid, and Transgender Legal Defense and Education Fund (TLDEF) met regularly as a coalition. As a group, they pushed for people to be called by their chosen name, whether it had been legally changed or not. Their efforts came to a head with the case *Doe v. The City of New York*.

One of the lawyers in the coalition helped a Puerto Rican trans woman secure a court order for her legal name change. When it came time to update her HRA record, the client went along with her patient navigator – someone assigned to her by the Callen-Lorde Community Health Center to help her navigate the healthcare system and overcome obstacles. Knowing that she might encounter resistance, her lawyer was available on the phone. The client presented HRA with her name change court order and a doctor’s note. However, HRA refused to change her record and, in the process, repeatedly misgendered her and called her by her birth name in front of everyone waiting in the office. According to the lawyer, the request went up the chain from her case manager to a supervisor and finally the director. Eventually, the request to update her HRA record was denied. The lawyer reported that their client felt “distraught” and “humiliated.” The second lawyer I spoke with about this case said the client left the HRA office in tears, fell into a depression, and did not leave her house for “a significant period of time.” On behalf of their client, several lawyers sued the HRA, claiming discrimination on the basis of sex and disability under state law and gender under city law. HRA filed for a motion to dismiss. During oral arguments, a lawyer reported struggling to get the judge to understand the treatment of his client by HRA as discrimination. Although the lawyer described oral arguments as “a bloodbath,” the judge dismissed HRA’s motion, writing that calling someone by the wrong pronouns is a form of discrimination. Subsequently, the case settled in conjunction with another

case where a trans woman making the same request at another HRA office had been held down by security.

Being able to update their public benefits record and possessing a card that accurately represents their presentation is key to accessing benefits. Several other lawyers not associated with this case reported having clients denied their benefits, including food stamps, when they presented as female but had a male designation on their benefits card.

Education

One catalyst for many participants filing for a name change was education records. Seeing their correct name on diplomas was incredibly meaningful. Christine, for example, was so excited, she invited her lawyer to her graduation, reportedly telling her, “I want you to be there, because you are responsible for me having my actual name on my diploma when I graduated.” Conversely, having birth names on school records put participants in uncomfortable situations where they either had to out themselves or be called by a name they no longer used. Universities often use legal names for school emails and class rosters, which are then used on educational platforms like Blackboard. Lorenzo expressed exasperation with always having to explain themselves and referred to Blackboard as “the bane of [their] existence. Political scientist Johnson (2015) argues that university policies regarding how students are represented in school records are matters of political and social factors not technical constraints.

A few participants also suspected that mismatched names on identity documents interfered with university admissions and financial aid applications. For instance, name mismatch caused problems for Aiden as he applied for financial aid for his master’s degree. He initially worked to get his name changed before graduating high school so that his correct name would be on the diploma. However, his first petition was denied, and Aiden applied for his first

college loans under his birth name. After his name change, Aiden claims the payment requests were not sent to him as the loan was still under his birth name. Consequently, he defaulted on the loan, which he discovered only when denied financial aid for his master's program. With the help of a lawyer, Aiden got the loan payments sorted and was able to finish his Master's in Social Work. Participants whose legal name changes were complete before applying to college or graduate school reported that the process was smooth and expressed relief to not have to deal with being outed by former names appearing on school records.

While all of my participants were over the age of 18 and therefore reported on their educational experiences in high school and beyond, several of the lawyers and advocates I interviewed represented trans youth. Lawyers and advocates from the Northeast, Southeast, and Midwest shared that school districts often insisted on court orders and/or amended birth certificates in order to grant elementary and junior high school students access to sex segregated facilities and activities as well as update school records. In a study conducted by the Movement Advancement Project and GLSEN (2017), nearly three-quarters of trans respondents reported that when forced to use school bathrooms or locker rooms not aligned with their gender identity, they simply did not use the bathrooms. Avoiding using the restroom can lead to urinary tract infections or other kidney-related medical problems (National Center for Transgender Equality 2016). Simone pointed out that for children under 16, birth certificates – as opposed to driver's licenses – are their primary form of identification. Aaron works for a statewide LGBT advocacy organization in the Northeast. Although Aaron is not a lawyer, in his role as policy director, he often advocates for people who reach out for assistance. For instance, a parent of a transmasculine child in elementary school reached out when the school refused to update the student's electronic records. Although the school allowed the child to use the boy's restroom and

use his chosen name, he ran the risk of being outed by school records. The name on school records is the one that appears on class rosters, email addresses, and IDs. Aaron set up a meeting with the superintendent who apparently claimed their lawyers said a legal name change was necessary for the electronic records to be updated. By the time Aaron's meeting with the superintendent arrived, four other families with trans children in the school district had joined. One of the children was refusing to return to school as he found it too stressful to be outed as trans by his school records. At the meeting, the IT Director reported that it was no problem to update the school records and the superintendent agreed to not require a legal name change. Aaron believes that the strong advocacy reputation of his organization, which often involves a media strategy, aided in facilitating this successful outcome. However, not all advocates got the same result. Eve, a lawyer in the Midwest, took a case all the way up to her state's court of appeals and was denied. Her client had a trans child whose school was not allowing him to use the boy's bathroom. Initially, the school claimed that the board would only allow such access with an amended birth certificate that proved the child was legally male. However, once the family was able to provide this proof, the school insisted that because the child enrolled as a female in kindergarten, that was how the child would be recognized as long as he remained in the school district.

CONCLUSION

As I have argued in this chapter, name changes were the most common legal matter in this study not just because there is a low threshold of access compared to other legal issues but also because names in and of themselves are personally and sociologically meaningful. To use Goffman's language, names are an "identity peg" on which people hang biographical facts that, in combination, form an identity. Names provide a thread of continuity in our lives, allowing

others to recognize us as individuals and as members of social groups (e.g., kin networks, racial/ethnic groups, religious affiliation, occupation).

Names are also part of the sex/gender categorization process. More than any other social characteristic, gender is read through our names (Lieberson et al. 2000). Although there are no U.S. laws regulating what parents can name their children, gendered naming remains a taken-for-granted cultural practice. Androgynous names have been around for centuries but have always been very rare in the U.S. In fact, androgynous names do not remain androgynous for very long: once a name is given to one child per 500 births among either daughters or sons, it is unlikely to reach the same level for the “other” gender (Barry III and Harper 2014; Lieberson et al. 2000). Parents name children long before their gender identity, which develops along with the socialization process, is identifiable. As a result, some people experience a misalignment between their sense of self and their name. Having a name that does not reflect how you see yourself can be quite distressing. Having a name that aligns with your gender identity may help facilitate others in perceiving your gender correctly. While not every trans, gender non-conforming, or non-binary person has a negative relationship with their birth name, many participants expressed discomfort, with one person referring to their birth name as a “gremlin” (Quill). To relieve this discomfort, many trans people chose to change their name so that it aligns with their sense of self and self-presentation. Using someone’s chosen name rather than their birth name greatly reduces depressive symptoms and suicidality (Russell et al. 2018).

If names are anchors for personal and social identities, when that identity shifts, a name change signals that change. The two most common types of legal name changes in the 20th and 21st centuries are ethnic name changes and marital name changes, which is reflected in the social science literature. Social norms shape these common types of legal name changes: ethnic

minorities change their name in order to avoid discrimination and social ridicule and marital name change is driven by patriarchal notions of family. Although trans people have been petitioning courts for name changes since the 1960s, there have been very few social science studies of trans people's name changes. The few that have been published align with the larger literature on names, reporting that names for trans people are an important source of internal and external affirmation of their identity. The current study adds to this emerging literature by showing how name changes are incredibly meaningful to trans people, can help facilitate respectful social interactions by harnessing the power of law, and allow trans people to have accurate identity documents which further facilitates safe daily interactions and institutional access.

Of course, not all trans people change their names, legally or socially, and each person who files for a legal name change will have slightly different reasons. Participants in this study stressed that name changes hold different significance for people: "We've helped people as young as five years old and we've helped people as old as 78 change their name. People have very different reasons depending on what phase of life they're in" (Avi). Whatever the reason, participants shared strong emotional reactions to their legal name changes with several reporting a sense of affirmation. A strong theme in the interviews was how legal name changes helped trans people live their lives. With deadnaming and misgendering recognized as types of microaggressions, legal name changes help buttress using people's correct names. Participants emphasized that people's chosen names should be used regardless of what's on their paperwork. However, when such dignity was not conferred, court orders could be whipped out to insist on respectful treatment. Participants used legal name changes as reinforcement for respectful treatment in social, business, and legal interactions. For instance, in heated family law cases,

having a legal name change assisted in correct names and pronouns being used. Finally, with a legal name change, trans people can update their identity documents (e.g., birth certificates, driver's licenses, passports, etc.). Without accurate identification, trans people face high rates of harassment and violence. With accurate identification, trans people can more easily access employment opportunities, travel without heightened scrutinization, and ensure their credentials match their self-presentation.

In conclusion, this chapter showed not only the sociological and personal significance of names but also how law, as a normative institution, can be used by a marginalized group to fight for respectful treatment and institutional access.

Chapter 5: Medicalizing Trans: A Brief Historical Overview

“We cannot escape classifications and categorizations. Without them, the world is a formless mass. What matters is who makes the definitions and how they are lived.” (Weeks 2015:1095)

Since first emerging in the 1950s, trans identity categories have been placed under medical jurisdiction, with experts defining the parameters of gender deviance and who is recognizable as trans. Although there has been strategic resistance to such medicalization – the “process by which nonmedical problems become defined and treated as medical problems usually in terms of illness and disorders” (Conrad 2007:4) – the frame persists. In this chapter, I will sketch a brief historical overview of the medicalization of gender variance to provide background for the following chapter, which will examine how medicalization followed trans rights-seekers into the courtroom.

EMERGENCE OF A (MEDICALIZED) CATEGORY

In the United States, trans as an identity category emerged in the 1950s alongside a “new body of medico-psychiatric knowledge producing new forms of power with which to regulate bodies” (Aizura 2006:292). Although gender variance across cultures has a long history (Epstein and Straub 1991; Feinberg 1997; Green 1998; Herdt 1994; Kulick 1998) only in the 20th century did the category “transsexual” materialize in the United States. The category “transsexual” entered the American lexicon among shifting scientific conceptualization of sex (Hausman 1995; Meyerowitz 2002), developments in medical technology including plastic surgery and endocrinology (Hausman 1995), as well as the rise of medical science as “the highest social authority” (Stryker 2008a:36). In defining this new category, U.S. medical scientists looked to their European colleagues in the scientific community as well as popular culture in the U.S. and the life histories they collected from patients coming to them, asking for transition services

(Meyerowitz 2002). Much of what came to be recognized as trans medicine came out of turn of the century life sciences, particularly endocrinology and urology, and their interest in biological plasticity, which was linked to eugenics and threatened the stability of a binary sex system. The treatments and procedures trans people would begin advocating for in the 1930s were developed through experiments on intersex children (Gill-Peterson 2018).

Psychiatrist David O. Cauldwell first coined the term “transsexual” in 1949 to describe people who desired to medically alter their sex (King 1995; Meyerowitz 2002; Schilt 2009b; Stryker 2008a). However, Cauldwell took a conservative approach to actually providing medical transitions, endorsing surgery only for intersex people and recommending psychiatric treatment for transsexual people (Hausman 1992; Meyerowitz 2002). It was endocrinologist Harry Benjamin and his more sympathetic approach to treatment that popularized the term in the 1950s (King 1995; Meyerowitz 2002; Stryker 2008a). Benjamin’s approach contrasted sharply with the dominant medical views at the time, which followed Cauldwell and other psychiatrists who believed in changing the mind rather than the body of transsexual people. Considered a “maverick” among his peers, Benjamin’s more liberal views may be attributed to his Berlin training at the Hirschfeld Institute for Sexual Science, where the theory of human bisexuality was more popular than within the U.S. medical community, as well as his early encounters with trans people requesting treatment (Meyerowitz 2002; Schilt 2009a; Stryker 2008a). In 1966, Benjamin published *The Transsexual Phenomenon*, in which he argued that “a person’s gender identity could not be changed, and that the doctor’s responsibility was thus to help transgender

people live fuller and happier lives in the gender they identified as their own” (Stryker 2008a:73).¹

ON WHOSE AUTHORITY

Also in 1966, John Hopkins University Hospital, with funding from the Erickson Education Foundation, opened one of the first Gender Identity Clinics (Meyerowitz 2002) ushering in what Stryker (2008a) calls the “big science” of trans history with university based gender clinics offering research and evaluation for hormone treatment and genital surgery.² As doctors providing surgery to transsexual people were outsiders in their profession until the 1970s, they held tight to their authority and proceeded conservatively, offering treatment to a select few who adhered to strict guidelines (Ekins and King 1995; Meyerowitz 2002).

Contemporary cultural gender and sexual politics shaped these guidelines. Conferral of recognition as transsexual depended on the doctor’s assessment of one’s gender performance. If the performance aligned with the doctor’s beliefs of a heteronormative gender display,³ a

¹ Benjamin went on to form the Harry Benjamin International Gender Dysphoria Association in 1978, which became the World Professional Association for Transgender Health (WPATH) in 2006. WPATH is a professional association for psychologists, sociologists, voice therapists, and medical professionals who study and promote transsexual surgery. In addition to holding conferences, WPATH established the medically accepted view of transsexuality and the first standards of care (Allee 2009; Meyerowitz 2002). Catalyzed by a diagnosis of gender identity disorder, the standards of care outlined three phases of treatment: hormone therapy, “real-life” experience, and sex reassignment surgery. WPATH believed that the diagnosis was “important for patients’ overall well-being, processing insurance claims, and guiding professional research” (Allee 2009:402). In 2011, WPATH released the seventh and most recent version of its standards of care, emphasizing that care should be individualized and that there was not one treatment path for alleviating gender dysphoria (WPATH 2011).

² The clinics would help legitimize what began as a fringe element within medicine. Eventually, private medical professionals began to specialize in transsexual surgery (Billings and Urban 1982; Hausman 2001; Irvine 2005, 2005; Meyerowitz 2002; Raymond 1979).

³ Transsexuals were distinguished from homosexuals to the point that disgust for homosexual behavior was a guideline for identifying a “true” transsexual (Billings and Urban 1982) and an openly gay identity disqualified you from service at the gender clinics (Hausman 1995; Stryker 2008a). The sexual impulses of people seeking a diagnosis of transsexuality became so policed that any acknowledgement of pre-surgical pleasure was disallowed (Latham 2016b; Stone 1992). On the flipside, heterosexual desire combined with physical attractiveness – or displaying conventional gender norms – sped up the diagnostic process for trans women (Hausman 1995; Irvine 2005; Shapiro 1991).

diagnosis was much more likely. For instance, one physician said that if he could make the prospective client cry after bullying them, that was indicative of a female gender identity (Billings and Urban 1982). Another doctor in a conference presentation discussing one of his transfeminine patients offhandedly remarked “she is also not a bad looking female”, implying his positive assessment of her attractiveness was further evidence of the appropriateness of the diagnosis he had given her (Fink 2005:119). Physical “passability” was one of the factors the Stanford gender clinic used for determining acceptability for surgery (Fisk 1974). The doctors felt fully confident in their ability to distinguish “genuine” performances of gender from “false” performances (Billings and Urban 1982; Hausman 1995; Stone 1992), which ignores that all gender is a performance (West and Zimmerman 1987) and, in fact, “we are all passing” (Shapiro 1991:257). Instead, doctors relied on what they considered “commonsense knowledge” in their patient assessments (Billings and Urban 1982:275). This “commonsense knowledge” referred to both assumptions of what a woman should look like as well as what a woman should do in society. One of the proposed criteria for diagnosing transsexualism in adults was vocational choice (MacKenzie 1978). There is of course a long history of scientists basing their classificatory systems on contemporary cultural politics of gender (Schiebinger 1993) and medicine has a similarly long history of sexism (Ehrenreich and English 2011; Porter 1997). While early researchers like Benjamin saw themselves as promoting a liberal, scientific attitude towards sexuality, the institutionalization of transsexuality also occurred within larger socio-cultural gender and sexual shifts with the homophile and women’s liberation movements. Thus, strict guidelines on who was a “true” transsexual served as a containment strategy for “societal

anxiety about gender” (Keller 1999:56).⁴ Medical diagnoses of transsexuality and later gender identity disorder produced a naturalized, dichotomized understanding of gender through its reification of gender normativity (Spade 2006).

Although medical recognition of transsexuality provided legitimation and treatment to those seeking surgery, it also conferred sole authority to medical scientists to define transsexuality and who qualified as transsexual (Keller 1999; Stryker 2008a). While some transsexual people gained access to desired treatment, they lost the authority to define their own identities. For instance, the 5th International Symposium on Gender Identity in 1971 established a standards of care committee comprised of six doctors, and the committee voted to exclude a trans applicant who sought to join the committee (Meyerowitz 2002). Transsexuality became synonymous with desire for surgery (Hausman 1992, 1995); people who we would now recognize as trans but were not seeking physical changes were not included in the initial medical understanding of transsexuality. The great diversity of gender variance was narrowed to one desire that not all trans people share (Prosser 1998; Stone 1992). Keller describes this as a “crisis of authority” (1999:58) wherein trans people are not allowed to theorize their own gender, and are approached only as subjects of study by cisgender/non-trans researchers. Medical scientists are given the “author-ity” (Prosser 1998:151) to set the parameters of intelligibility for transsexuality (Prosser 1998; Stone 1992). When trans people resisted these parameters of intelligibility by offering alternative narratives of self, medical professionals obstructed access to surgery by refusing to writing letters required for surgery (Spade 2006).

⁴ Various scholars have referred to this containment strategy as a “social tranquilizer” (Raymond 1979:xvii), attempting to “stuff the feminist genie back in its bottle” (Stryker 2008a:113), and taming “a potential wildcat strike at the gender factory” (Billings and Urban 1982:278).

There is a tricky rewriting of history in this transfer of power. To author something is to be the originator of that idea; however, medical scientists initially learned about cross gender identification from gender variant people (Gill-Peterson 2018; Meyerowitz 2002; Prosser 1998). People taking hormones and undergoing double mastectomies – procedures that would later be recognized as potential parts of medical transitions – predated the medical establishment of transsexuality. While medical scientists ultimately were given the authority to name and define this new category, their understanding was built through interactions with people who would come to be identified as transsexual. It was people desiring mastectomies and genital surgeries who pushed doctors in the U.S. to develop and offer such treatment (Edgerton 1973; Hausman 1995; Meyerowitz 2002; Stone 1992). Early grants to researchers, gender clinics, and for training medical professionals were given by the Erickson Education Foundation, a philanthropic organization started by a trans man (Devor and Matte 2004). Medical scientists tapped into the security of professionalism to reposition themselves not as learners but authors. Prosser traces this transfer of authority to the shift from sexology to psychoanalysis, which was a shift from scientists listening and learning from patient's stories to interpreting those stories. For instance, when 19-year-old Agnes (a pseudonym) presented herself to sociologist Dr. Harold Garfinkle and psychiatrist Robert Stoller at the UCLA Department of Psychiatry in 1958, she was searching for access to medical transition services. Garfinkle learned from his interviews with Agnes about the rituals of socially constructed gender through everyday behavior. With Garfinkle's publication of *Studies in Ethnomethodology*, his position was secured as author/scientist not learner and Agnes faded into obscurity (Connell 2009; Schilt 2016).

In this shift, (trans) voices that were once authoritative became suspect. While medical scientists built their understanding of transsexuality on the personal narratives of their patients,

once treatment for these patients was institutionalized in gender clinics, such narratives were dismissed. For example, in 1968, the Stanford Gender Dysphoria Program was the center of western studies of the etiology, diagnostic criteria, and treatment for transsexualism. According to Stone, the researchers at this clinic did not collect autobiographical accounts of trans people because “they consider autobiographical accounts thoroughly unreliable” (1992:155). In other words, medical authority had thoroughly colonized understandings of sex/gender so that trans people’s own accounts of their identities were dismissed as unreliable while the categories that the researchers were inventing were considered not only reliable but valid. Stryker captured this dismissal of trans voices in her classic essay on trans rage: “I live daily with the consequences of medicine’s definition of my identity as an emotional disorder. Through the filter of this official pathologization the sounds that come out of my mouth can be summarily dismissed as the confused ranting of a diseased mind” (1994:244).

As those with medical authority were imbued with the power of gatekeeping, trans people learned how to navigate the system and say the right things to gain access to services they desired. For instance, in 1966 Harry Benjamin’s book *The Transsexual Phenomenon* was released as the first textbook on transsexuality. Gender clinics used it as a reference and were excited to see that their candidates’ behavior and reported life histories matched Benjamin’s criteria. It took a while for the clinicians to realize that trans people also had access to Benjamin’s book as well as other sexological literature (Hausman 1995) and, realizing that saying the right things meant gaining access to services at the clinics, could match their behavior and life histories to the criteria established by Benjamin (Stone 1992). By the end of the 1960s, doctors caught on and the medical literature frequently noted that trans people may re-write their life histories to mirror diagnostic criteria (Fisk 1974; Meyerowitz 2002). The life history

narratives used to diagnose transsexuality were subsequently treated with great suspicion with Billings and Urban going so far as to refer to this process as “the con” (1982:273). Such framing positions trans people as deceitful (Bettcher 2007) while ignoring that we all revise our stories to fit culturally recognized narratives of identity (Shapiro 1991). In “Mutilating Gender,” Spade (2006) shares how he learned that a therapist’s office was not the space to work out the political implications of transition; such transparency only lead to therapists declaring him not a “real” transsexual and refusing to write surgery-authorizing letters. Among other trans people Spade found a more expansive understanding of gender, support for self-determination, and advice on how to navigate medical gatekeeping.

By the mid-1970s, with greater public support, trans-medicine specialists increased their authority in establishing a new diagnostic category (gender dysphoria syndrome), expanding gender clinics and research programs, and testifying in court cases. Subsequently, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) and its diagnoses have been a touchstone of trans people’s relationship with the medical community (Bryant 2009, 2011; Daley and Mulé 2014; Meyer-Bahlburg 2010; Winters 2006). As the “psychiatric bible” (Kutchins and Kirk 1997; Lev 2005), the DSM plays a central role in framing difference as illness. Trans identities were first listed as mental disorders in the third edition of the DSM published in 1980.⁵ In the chapter on psychosexual disorders, the American Psychiatric Association (APA) listed three

⁵ *DSM-III* was written and published in the midst of shifts within and surrounding psychiatry. While *DSM-I* and *DSM-II* were primarily administrative codebooks, APA positioned *DSM-III* as a repository of scientific knowledge (Kutchins and Kirk 1997). In preparing *DSM-III*, the APA underwent a lengthy process in which psychiatric nosology was altered reflecting factions within the profession as well as an increase in outpatient treatment and the need to have a diagnosis for reimbursement. Subsequently the size of the DSM expanded from 150 to 500 pages. Since then, the DSM has been revised four times, with each revision reflecting debates within psychiatry as well as negotiations with stakeholders external to the profession including pharmaceutical companies, patients, and advocacy organizations (Anspach 2011; Bryant 2006; Kutchins and Kirk 1997).

diagnoses for gender identity disorder: transsexualism, gender identity disorder (GID) of childhood, and atypical gender identity disorder. The formulation of these diagnoses can be traced to the work of Benjamin and other early medical thinkers on gender variance (Bryant 2009; Lev 2005; Stryker 2008a). For trans people seeking medical treatment, the diagnosis was validating (Hausman 1995; Keller 1999; Lev 2013). For doctors providing treatment and worrying about lawsuits, the diagnosis offered a sense of security while reaffirming their authority to regulate who counts as “transsexual” (Irvine 2005).

MEDICALIZATION OF SOCIAL DEVIANCE

One of the functions of diagnosis, as the authority to define behaviors and persons, is establishing the jurisdictions to which medicine lays claim (Anspach 2011; Conrad and Schneider 1992; Davis 2011). While trans-medicine gained acceptance in the medical profession, sociologists were noticing and critiquing the increasing medicalization of social deviance as well as medical institutions’ role in social control (Conrad 1975; Kittrie 1971; Zola 1972). The medicalization of social deviance added to an expansion of medical jurisdiction (Conrad 1975; Kittrie 1971; Zola 1972) that was already underway thanks to developments of the 19th and 20th centuries, including the professionalization of medical occupations (Porter 1997); emergence of modern medicine characterized by its incorporation of science, technical developments, and clinical gaze (Bynum 1994; Foucault 1973; Porter 1997); sexology’s taxonomies of the sexual peculiar (Ekins and King 2006; Foucault 1978; Hausman 1995; Porter 1997); medicalization of mental illness via arrival of psychiatry as a medical specialty (Conrad 1975; Foucault 1965; Porter 1997); and the rise of the therapeutic state (Kittrie 1971). Once medicine incorporated science, it gained the ability to relabel anything related to the body a “medical problem” (Conrad 1975; Zola 1977). With this new authority, medicine created social meanings of illness that were

not there before (Billings and Urban 1982). By the 20th century, medical jurisdiction had surpassed healing the sick and placed medical institutions firmly in the business of social order (Porter 1997). Medicine as an institution of social control is particularly difficult to resist because not only does it hide behind technical, scientific, and supposedly objective processes, but it also says that it intervenes for our own good.

Part of the medicalization trend was a reframing of deviance as illness rather than immorality or criminality in a humanitarian effort to decrease condemnation. Medicalization as a stigma management strategy is about the displacement of blame. According to medical sociologists, a medical frame removes blame because people are not responsible for falling ill. There is some evidence that medicalization of identities can be a strategy of stigma management. Seeing sexual and gender deviance as a medical condition helped some doctors rationalize their treatment of what was seen as a fringe population; they felt they were providing treatment for people who otherwise would be thrown in jail (e.g. Oremland 1973).

The effectiveness of this strategy, however, is questionable. Take for example the medicalization of fatness. The medical frame of fatness replaced the immorality frame in the mid-20th century, shifting fatness from a weakness of moral fortitude – mostly, evidence of sloth and gluttony – to a health condition requiring medical intervention. The result of this shift, however, was not a decrease in stigma around fatness. As Saguy (2014) documented, the medical frame worsened weight-based stigma and discrimination. Framing fat as a public health issue resulted in participants agreeing that it is justified to discriminate on the basis of body size in employment. Rather than decreasing stigma and discriminatory attitudes, therefore, a medical frame can sometimes support the social exclusion of groups labeled “ill.” Medicalization has been an even less successful strategy for stigma management when it comes to mental illness as

it has the tendency to provoke harsher treatment (Corrigan and Watson 2004; Estroff, Penn, and Toporek 2004; Mehta and Farina 1997). For trans people, the consequences of a mental health diagnosis have included having one's fitness as a parent questioned, being fired from teaching positions in order to "protect the children," denial of professional licenses from agencies like the Federal Aviation Administration (Green et al. 2011) and being banned from military service (Currah 2018).

Instead of succeeding in the humanitarian aims of decreasing condemnation, the medicalization of social deviance simply reframed the stigma and introduced a new system of social control (Conrad 1975; Conrad and Schneider 1992). Kittrie (1971) argues that the stigma of illness is as bad as criminal stigma: you're still "disqualified from full social acceptance" (Goffman 1963:preface). One of the supposed humanitarian advances of medicalizing deviance was the absolution of responsibility. However, such absolution is contingent on acceptance of the "sick role," meaning you must accept that you are sick and turn yourself over to the experts – doctors – for treatment (Conrad and Schneider 1992). Furthermore, there is little opportunity, once labeled ill, for the individual to challenge the "label-diagnosis" (Zola 1977:63).

In addition to medical social control, Conrad (1975) names three further consequences of medicalization, which other scholars have also pointed to. First is the problem of expert control: "By defining a problem as medical it is removed from the public realm where there can be discussion by ordinary people and put on a plane where only medical people can discuss it" (Conrad 1975:18). Medical professionals claim a specialized knowledge that lay persons or other professionals do not have access to, which makes it particularly difficult to challenge their authority. Illich (1977) referred to this as a "disabling profession" whereby the ability to define the situation or conceptualize an alternative is disallowed when medical professions have the

sole authority to particular forms of knowledge. For trans people, this is demonstrated when trans people are not allowed to define the meaning of transness and must secure a medical diagnosis in order for their identity to be legitimated. Second is the individualization of social problems: a medical diagnosis locates the need for change in an individual rather than society (Conrad 1975; Zola 1977). If deviance can be “fixed” through medical intervention, then we don’t have to question social norms. Rather than questioning the social construction of oppositional binary gender hinged on heteronormativity, we can grant hormonal and surgical changes to those who fall outside of the binary provided they adhere to contemporary medical understandings of this new disease category. Unfortunately, early critiques of the medicalization of trans identities, such as Billings and Urban (1982) and Raymond (1979) fell into this individualizing trap, blaming trans people in addition to their doctors for perpetuating the oppressive gender order. Consequently, deviant behavior is depoliticized, the third consequence of medicalization Conrad identifies. Since the individual is disordered, there is no need to question the social order. By focusing on supposed symptoms of an individual, we fail to see deviant behavior as an adaptation to a disordered society. In 2001, a trans woman testifying before the New York City Council hearing on a trans rights bill put the onus back on society, stating “I do not suffer from gender dysphoria. I suffer from bureaucratic dysphoria” (as quoted in Currah 2003:717).

CONTINUED MEDICALIZATION IN CONTEMPORARY U.S. SOCIETY

Although there have been changes over time, tensions and debates around the medicalization of social deviance and gender variance in particular continue to this day. Starting in 1985, trans medicine moved away from a disease model towards an identity model (Bockting 2009). The disease-based model assumed that “normative gender identity development has been compromised and that the associated distress can be alleviated by establishing congruence

between sex, gender identity, and gender role” (p. 103). In other words, something is wrong with the individual that psychotherapists, endocrinologists, and surgeons can fix. Under this mode, during these decades, Bockting claims that inclusion of a diagnosis in the *DSM* “validated transgender people’s experiences” (p. 104). Starting in 1985, however, understandings of trans identities shifted as there emerged greater numbers of trans people affirming identities outside of man/masculine and woman/feminine. Therefore, trans medicine shifted to an identity-based model and rather than trying to “fix” the individual, facilitated a trans coming out process. Under the identity-based model “gender variance is merely an example of human diversity and the distress transgender individuals might experience results from social stigma” (p. 103). Rather than affirming, the diagnoses were seen as pathologizing (Bockting 2009). In the late 1960s and early 1970s, some trans people began to challenge the medical model (Meyerowitz 2002) and a new identity category emerged: transgender. Transgender in the 1960s was for people living full time in a gender identity not aligned with their sex assigned at birth without undergoing any medical transitions (Ekins and King 2006; Stryker 2008b). In the 1990s, “transgender” took on new meaning following the circulation of a pamphlet by activist Leslie Feinberg. Since then, transgender has been used expansively to include all forms of gender variance (Denny 2004; Schilt 2009b; Stryker 2008b, 2008a; Tauches 2009).⁶

With the trans liberation movement gaining momentum as well as internal critiques within the medical and mental health professions, the *DSM* became a target for many activists

⁶ Although this is the recognized historical trajectory of the category – medicalized 1950s transsexual, non-medical 1960s transgender, anti-normative 1990s transgender – recent challenges this neat history. Trans historian Cristan Williams found instances of medical professionals, journalists, and famous trans people using “transgender” and “transsexual” dating back to the mid-1960s suggesting a longer trend in nomenclature rather than abrupt shifts and new meanings (Williams 2014).

(Bryant 2009, 2011).⁷ While some argue for depathologization through removal of the diagnosis, others emphasize that while trans identity are not in of themselves pathological, removing a DSM diagnosis is not pragmatic as the diagnosis facilitates access to care and legal recognition by legitimizing the identity and giving it a name (Burke 2011). The latest revision of the DSM, published in 2013, rehearsed these debates. Thirteen workgroups had convened for the revision process with the goals of making the DSM compatible with the *International Classification of Diseases* (ICD) and improving its clinical usefulness (Narrow and Cohen-Kettenis 2010). The workgroup on sexual and gender identity disorders had an additional goal of lessening stigma while preserving access to treatment and insurance reimbursement. Those who supported retaining the diagnosis feared losing access to treatment and coverage while those who supported removing the diagnosis were quick to point out that the diagnosis did not guarantee coverage so long as insurance policies considered the treatment “cosmetic.” By renaming the diagnosis “gender dysphoria,” the APA signaled that sex/gender incongruence in itself was not a mental illness but that distress over the incongruence should be treated. With the selection of “gender dysphoria,” the APA returned to a term used before any diagnosis regarding gender variance was in the DSM. Since the end of the 1970s, clinicians used gender dysphoria for their patients experiencing distress, dissatisfaction, or discomfort with their gender but not necessarily their

⁷ The trans depathologization movement is part of a history of critiquing the pathologizing of oppressed populations via diagnosis and medical authority (Bryant 2009). These critiques may be traced back to the 1960s anti-psychiatry movements that argued mental illness was a label rather than objective behavioral or biochemical phenomena (Porter 1997). The 1970s escalated this cultural challenge to medical authority, especially around the pathologization of difference as seen in the effort to de-list homosexuality from the DSM, an effort that in 1973 succeeded (Meyerowitz 2002). By the 1980s, resistance to psychiatric classifications had developed into a “gender-transgressive culture that rejects binary gender and invents its own terminologies” (Aizura 2006:292). The depathologization movement repositions gender transition as a “human right and expression of human diversity” rather than a mental disorder (Suess, Espineira, and Walters 2014:74).

sex (Farr 2009; MacKenzie 1978).⁸ The diagnosis was also removed from the DSM chapter on sexual dysfunctions and given its own chapter titled “Gender Dysphoria.” The workgroup charged with revising GID believed that this move would lessen stigma while retaining access to treatment (Moran 2013); however, critics remain skeptical (Daley and Mulé 2014; Davy 2015).

In the 2000s, there were other significant changes in trans medicine. In 2008, the American Medical Association passed a resolution for removing barriers to treatment for trans people with explicit support for insurance coverage. That same year, the World Professional Association for Transgender Health (WPATH) released a statement that sex reassignment treatment was medically necessary. They followed up with a statement in 2010 supporting the depathologization of trans identities. That same year the Patient Protection and Affordable Care Act (ACA) made it illegal for insurance companies to automatically exclude transition services from their plan, although they retained the right to deny coverage on a case-by-case basis if deemed not medically necessary.

Through all these shifts, trans people continued to fight to be heard on their own terms even as medical professionals resisted ceding much authority. In their study of mental and physical healthcare providers, Shuster (2016) suggests that strict adherence to clinical guidelines – acting as gatekeepers, insisting on absolute certainty from their patients, and assuming binary

⁸ Dating back to the 1970s, clinical practitioners who treated trans people used the term gender dysphoria (Ekins and King 2006; Hausman 1995; King 1995). The term can be traced back to Norman Fisk, a psychiatrist who led the Stanford gender dysphoria program with surgeon Donald Laub. In the early 1970s, Fisk and his team discovered that their patients were altering biographies (the dominant diagnostic tool) to present as textbook cases of transsexualism. Fisk (1973) describes facing two dilemmas upon this discovery: 1) potential patients denied treatment called out his hypocrisy and revealed that former patients had similarly altered their biographies, 2) he felt that by asking evaluating psychiatrists to act as gatekeepers in identifying “true” transsexuals according to the Harry Benjamin definition, they were interrupting the traditional treatment relationship. Fisk resolved these dilemmas by liberalizing their diagnosis and applying the expanded diagnostic category “gender dysphoria syndrome.” Fisk (1974) felt this was the appropriate step as gender dysphoria was the most common denominator among his patients and the differential diagnosis did not impact treatment. On the other side of the country, Jon Meyer (1973) of the John Hopkins Gender Identity Disorder Clinic took a similar approach.

identification – may be a way of dealing with uncertainty in providing care for trans patients. As Shuster writes, “uncertainty creates dissonance for providers, as it conflicts with professional norms of expertise. Most medical decision making contains some degree of uncertainty, but an abundance of it casts doubt on a professionals’ claim to expertise, and many will seek to control it” (p. 321). Performance of gatekeeping practices may inhibit medical providers from seeing what is in front of them. In a *Studies in Gender and Sexuality* article, “Making and Treating Trans Problems,” Latham (2016a) discusses his struggle to get taken seriously by medicine as he engages in a dialogue with a letter to the editor published in *Aesthetic Plastic Surgery* by Selvaggi and Giordano, scholars of plastic surgery and bioethics. Latham suggested in his response to their letter that compulsory psychiatric assessments for trans patients seeking cosmetic surgeries to which non-trans patients gain access without such assessment creates an undue burden on trans people, is a form of discrimination, and violates patients’ right to self-determination. Instead of engaging with Latham’s question of treating trans patients differently than non-trans patients, Selvaggi and Giordano rely exclusively on their gatekeeping logic, suggesting that psychiatric assessment is a form of *positive* discrimination as it leads to better care for trans patients. As Latham points out in his recounting, Selvaggi and Giordano shift from people seeking trans medical procedures to people with gender dysphoria, thus reifying the medical construction of trans people as people defined by a mental illness. When Latham presented this exchange at the 2016 Trans*Studies Conference, his frustration of not being heard was palpable. His point is reminiscent of Singer’s (2006) concept of the “transgender sublime” where healthcare providers are unable to wrap their heads around trans bodies and subsequently provide poor healthcare to trans patients. With Latham, what’s at stake is an authoritative voice.

Selvaggi and Giordano enact the “transgender sublime” with their inability to recognize what a trans person is saying to them.

Chapter 6: Medicalization and Transgender Rights Claims in Published Employment Discrimination Court Decisions

The previous chapter provided a brief historical overview of how gender variance was inserted into a medical framework in the early to mid-20th century through the creation of the identity category “transsexual.” Sociologist Peter Conrad defines medicalization as the “process by which nonmedical problems become defined and treated as medical problems usually in terms of illness and disorders” (2007:4). As a result of medicalization, trans identities were framed as pathological disorders. Additionally, insertion into a medical framework extends medical jurisdiction into arenas, such as the law, where medical professionals generally do not have authority; erects a line between normality and abnormality; and acts as a social control, especially as the diagnostic categories reflect social and political values (Conrad 2007; McGann 2006). This chapter examines medicalization as it follows trans plaintiffs into the courtroom. In particular, I analyze the court decisions in 53 sex and/or disability employment discrimination cases with a trans plaintiff published between 1975 and 2015. I investigate the following questions: How often are trans plaintiffs inserted into a medical frame in employment discrimination court decisions? How does medicalization impact the outcome of the case? What are the functions of medicalization in the court decisions?

My analysis confirms high rates of medicalization in trans employment discrimination cases: of the 53 opinions analyzed, 47 (or approximately 89 percent) included medicalization. The six cases that did not include medicalization were all federal cases. The analysis spans four decades, during which important shifts in medical and legal understandings of trans identities occurred. Up until 1985, trans identities were understood through a disease model in which it was considered an internal dysfunction causing distress that could be alleviated with surgery. During this time, trans people were legally unintelligible with courts interpreting Title VII’s sex

protections to refer only to biological sex defined as male or female and explicitly excluding trans plaintiffs. Since 2004, courts have increasingly expanded their interpretation of Title VII to cover trans plaintiffs. By then, the medical community understood trans identities through an identity model where trans was no longer only understood as desire for surgery and distress came not from an internal dysfunction but social stigma (Bockting 2009). The identity model, however, is still a medical model in which trans identities are understood through diagnosis and treatment protocol. Therefore, while there have been significant changes over the past four decades, medicalization has not been displaced.

It is worth noting that this study was not concerned with the medical interventions trans people may or may not seek, nor did it examine whether trans people internalize medical framings of their identities when making rights claims. As other scholars have documented, there is incredible diversity among trans people in how they understand their identities and what medical services they seek (Burke 2011). Certainly, there is a connection worth exploring between plaintiff self-understanding and perceptions of justice before the law (Dorfman 2017); however, that is beyond the scope of the current study. Rather, following law and society scholars (Kirkland 2008; López 2006), this chapter examines the way law talks about people as well as what sources of authority it draws upon. Medicalization remains one of the major frames through which trans identities are understood (Aizura 2006; Ekins and King 1995).

I argue in this dissertation that trans people turn to the law for its normative power which, in turn, sets the parameters of inclusion. As marginalized groups, including trans people, advocate for an expansion of recognition, the law tends to fit them within existing categories rather than add new categories of recognition. Such efforts to “fit” people into legal classifications reauthorizes hegemonic values and norms (Bower 1994). By relying on medical

evidence and authority, courts tap into the operation of medicalization that erects a boundary between normality and abnormality (Conrad 2007; McGann 2006). The medicalization of trans plaintiffs in court opinions reflects this power of medical authority to regulate norms. When trans identities are “fit” into binary legal classifications through medicalization, cisnormativity – or the ideology that presumes everyone is cisgender and subsequently naturalizes/normalizes the congruence of birth assigned sex and gender identity (Nordmarken 2014; Schilt and Lagos 2017; Sumerau, Cragun, and Mathers 2015) – is reauthorized.

MEDICALIZATION IN THE COURTROOM

Reliance on medical authority can be found in some of the earliest legal cases involving trans plaintiffs. In the late 1960s and 1970s, when courts began ruling on petitions from trans people to change their name or sex on birth certificates, lawyers called in doctors as expert witnesses, testifying both against and in support of trans petitioners (Meyerowitz 2002). Medical experts were also brought in for employment discrimination cases. In 1971, elementary school music teacher Paula Grossman was suspended without pay after she started living as a woman. When her employment discrimination case came before the New Jersey Superior Court three years later, both sides lined up medical experts. The Board of Education brought in a psychoanalyst who argued that Grossman’s presence would harm the children while Grossman’s attorney countered with a psychiatrist who argued that her presence would have no effect on the children. In the end, Grossman got back pay but not her job back (Meyerowitz 2002).

For three decades after Grossman’s case, courts consistently ruled that trans employees were not protected by Title VII. During this time, Anna Kirkland investigated what she called “victorious transsexuals” – the few trans plaintiffs who won their cases – in hopes of discovering “law’s benevolent postures and the catalogue of potential liberation strategies” (2003:6). Instead,

what Kirkland discovered was the cost of winning. Aside from exclusion (the most frequent outcome), Kirkland identified a range of legal responses to trans plaintiffs, including normalization, medicalization, and essentialization. Normalization arose in the context of family law disputes, particularly around child custody. Medicalization appeared as a legal response to petitions for funding gender-affirming surgery, which required proving medical necessity accomplished via testimony from medical experts. Although Kirkland does not code it as such, medicalization in the form of a psychiatric diagnosis was also key in cases applying disability law where diagnosis was put forth as evidence for disability accommodations in public school dress codes. Instead of medicalization, Kirkland classified this as essentialism wherein trans plaintiffs pursued a strategy of recognition via a protected social group. Kirkland found essentialism as a legal response in both disability cases and equal protection cases, which hinged on proving immutability to be considered a protected social group (Currah 2006). A more recent study of how institutions gender individuals connected the legal response of medicalization to essentialism. Meadow (2010) found that courts turn to medical corroboration of irreversible body changes to deal not only with anxieties of fraud and stability associated with trans identities, but also to ensure that medical interventions have prepared the litigant's body for heterosexual, conjugal marriage. Meadow concludes that legal attempts to stabilize gender underscore the mutability of gender.

There is disagreement among legal scholars whether or not relying on medical authority is sound legal strategy. Some connect medicalization with favorable outcomes, suggesting that medicalization humanizes trans people, framing gender variance in a way that may be understood even by judges unfamiliar with trans people (Bailey 2013; Levasseur 2015; Levi 2003, 2014; Yuracko 2016). In my interviews with lawyers who have represented trans clients,

participants discussed assembling cases in ways that judges could easily understand. For many, this included presenting medical evidence either through diagnosis and/or medical expert testimony. Although very few of the lawyers understood trans identities through a medical frame, they shared how medical evidence helped judges take their clients seriously. There was some evidence in the employment discrimination case decisions I analyzed of a relationship between medicalization and favorable final court decisions for the plaintiff as well as the court recognizing trans people as belonging to a protected class. Medicalization was higher among decisions favorable to the plaintiff. Only one of the cases whose decision favored the plaintiff did not include medicalization. A greater proportion of cases that included medicalization were granted protected class status than cases without medicalization (65 percent compared to 50 percent). Even with this relationship, however, trans people's employment claims were largely not successful. Two-thirds of the court decisions analyzed were favorable to the defendant. These results align with other social science evidence that employment discrimination case outcomes generally, regardless of claim (e.g., race, age, disability, sex) favor the defendant (Hirsh 2008; Nielsen et al. 2008; Nielsen and Nelson 2005; Siegelman and Donohue 1990). Making oneself recognizable through the familiar lens of medicalization was not enough to outweigh the odds against one-shotters (Galanter 1974). Furthermore, there are constraints associated with medicalization. Legal scholars critical of relying on medical evidence point out that not all trans people have access to medical professionals, many do not seek medical "treatment," and framing trans identities through diagnosis is pathologizing (Romeo 2005; Spade 2003; Storrow 1997; Strassburger 2012). This chapter looks at three ways that trans plaintiffs were inserted into a medical framework in the court opinions of their employment discrimination cases: consultation of medical authority, details of a medical transition, and diagnosis.

CONSULTING MEDICAL AUTHORITY IN CONSIDERING LEGAL STANDING: EXPANDING MEDICINE'S JURISDICTION

Trans plaintiffs were inserted into a medical framework in the decisions analyzed when the court relied on medical authority to define sex, explain gender identity, and/or verify the identity of the plaintiff. Such reliance included expert testimony of notable figures in the medical community such as Dr. Walter Bockting – former president of the World Professional Association for Transgender Health (WPATH) – and citation of the American Psychiatric Association. Fifty-eight percent ($n = 31$) of the cases cited medical authority. As gatekeepers, medical professionals are given the authority not only to decide who is qualified for which treatments and services, but as an extension, who will be recognized as trans and what that category of “trans” should look like (Keller 1999). What is at stake with medical authority is who is given the right of authorship in determining who is recognized as trans. For trans people, such right of authorship was taken out of their hands and given to medical professionals with the professionalization of trans-medicine in the mid-1970s. Since the 1990s, if not earlier, trans activists have worked to reclaim the authority to define their community. In the analyzed court opinions, the right of authorship stands firmly with medical professionals.

Medical definitions of gender identity disorder had particular legal relevance for disability claims. Most of the plaintiffs who filed disability discrimination claims appealed to state law as federal disability law explicitly excludes protection for transsexuality (Barry et al. 2016). In considering a plaintiff's disability claim, courts looked to the DSM. As some version of gender identity disorder (GID) has been listed in the DSM since 1980, the courts generally

accepted GID as a mental disorder.¹ From there, courts decided whether or not state law included GID in its definition of disability. Courts in Connecticut and² New Jersey³ found state law to be inclusive while courts in Pennsylvania⁴ and Massachusetts⁵ found state law to be exclusive of GID in disability protections. The DSM, therefore, was cited as an authoritative text in the legal reasoning of disability claims.

For some courts, the mere listing of a disorder in the DSM was insufficient: courts required direct verification of the plaintiff from a medical expert. In cases where this evidence was not provided, even courts friendly to legal protections for trans employees did not grant the plaintiff's claims.⁶ In 1995, West Jersey Health Systems hired Enriquez to be their medical director of an outpatient treatment facility. Enriquez had been a licensed physician in private practice since 1974. In September 1996, about a year into her employment with West Jersey Health Systems, Enriquez began to transition. A few months later, two vice presidents and one of

¹ I am using "gender identity disorder" as a catch-all term for different diagnoses applied to trans people that were mentioned in the court decisions. In the decisions analyzed, courts used transsexual, transvestite, gender identity disorder, and gender dysphoria, often interchangeably. Also, the nomenclature in the DSM has also changed over time from transsexualism and gender identity disorder (1980) to gender dysphoria (2013). I chose GID, because it is the most recognized terminology.

² *Conway v. City of Hartford*, 1997 and *Commission on Human Rights v. City of Hartford*, 2011

³ *Enriquez v. West Jersey Health*, 2001

⁴ *Dobre v. AMTRAK*, 1993

⁵ *LeFleur v. Bird-Johnson Company*, 1994

⁶ I want to underline that even as courts required direct medical verification of the plaintiff, having such evidence did not necessarily secure a favorable outcome, especially in the 1980s. In 1982, the 8th Circuit Court of Appeals found that Title VII did not prohibit discrimination against transsexuals. In support of her sex discrimination claim, the plaintiff submitted multiple medical affidavits which defined transsexuality and verified that the plaintiff should be considered female. The defendant countered with an affidavit from a physician saying the plaintiff should be considered male. In considering the conflicting affidavits, the district court wrote, "Although the Court is aware of plaintiff's personal dilemma...Plaintiff, for the purposes of Title VII, is male because she is an anatomical male. This fact is not disputed." Similarly, in *Ulane v. Eastern Airlines* (1984), the plaintiff presented as evidence a diagnosis, proof of surgery, a birth certificate with a female sex marker, FAA certification listing her as female, as well as expert testimony from psychiatrists and physicians. Even with all this evidence, the 7th Circuit Court of Appeals was not convinced, writing "Ulane is entitled to any personal belief about her sexual identity she desires...but even if one believes a woman can be so easily created from what remains of a man, that does not decide this case." The court found that Easter Airlines terminated Ulane because she is transsexual, that the statutory language of Title VII does not prohibit discrimination against transsexuals, and consequently entered judgement for the defendant.

their assistants approached Enriquez, expressing discomfort with her changed gender presentation. In July 1997, Enriquez received a letter from one of the vice presidents that the hospital was terminating the contract in ninety days as the program was being absorbed into a different entity, and they would be in touch about a new contract with that entity. By September 1997, Enriquez still had no new contract. In October, Enriquez approached one of the vice presidents with a coming out letter she wanted to share with patients that explained Enriquez's transition. Instead, Enriquez was given a termination letter, told not to return to the office, and that her patient appointments had been cancelled. Enriquez sued for wrongful termination, claiming disability, gender, and sexual orientation-affection discrimination under the New Jersey Law Against Discrimination, as well as breach of contract and trade libel. The Superior Court, Law Division dismissed Enriquez's disability claim and entered summary judgement for the defendant. On appeal, the Superior Court, Appellate Division spent nearly a third of its opinion discussing whether or not gender dysphoria or transsexualism was a handicap under the New Jersey Law Against Discrimination. In this discussion, the court consulted the DSM, medical journals, sexology handbooks, and case law. The court concluded that gender dysphoria can be a handicap under the state law; however, it was not convinced by the evidence the plaintiff provided of her diagnosis. The background facts of the case established that Dr. William Stayton from the University of Pennsylvania diagnosed Carla Enriquez (the plaintiff), but when ruling on Enriquez's disability claim, the court writes "there is an absence of evidence from Dr. Stayton" (*Enriquez v. West Jersey Health Systems*, 2001). The opinion goes on to cite Dr. Herbert Bower, a psychiatrist, who criticizes the DSM's diagnostic description of GID. In order to determine whether Enriquez's gender dysphoria is a disability, the court indicated it would need evidence from Dr. Stayton proving that he diagnosed Enriquez with gender dysphoria, explaining his

methods of diagnostics, and showing that his diagnostic technique is accepted. It is unclear from the opinion whether or not Enriquez’s counsel included any evidence from Dr. Stayton (e.g., affidavit or expert testimony) or simply mentioned his diagnosis in their complaint. Reading between the lines, the court seemed to be prompting Enriquez to provide expert testimony from Dr. Stayton. Therefore, the appellate court reversed the previous court decision dismissing Enriquez’s disability claim and remanded the case for trial, where Enriquez would have an opportunity to provide the medical evidence the court found missing.

The outcome in *Enriquez* is similar to another case – *Kastl v. Maricopa County Community College District* – where the court dismissed the sex discrimination case due to insufficient evidence that the plaintiff was a biological female. In a footnote, the judge indicated that expert testimony was needed to establish the plaintiff’s sex. In both *Enriquez* and *Kastl*, the court was open to recognizing protections for trans employees but required medical verification of the plaintiff’s disability and sex, respectively.

While medical authority was turned to less often with sex discrimination claims, courts occasionally relied on medical authority to define sex and explain gender identity when reasoning through sex discrimination claims. During the time period analyzed (1975-2015), judicial interpretation of sex discrimination underwent several shifts and courts grew friendlier towards trans rights claims. When the first trans employment discrimination cases came before the courts in the 1970s, courts stuck to a “plain meaning of sex” (i.e., biological) in interpreting sex discrimination claims. As discussed in Chapter One, the 1989 *Price Waterhouse* Supreme Court decision marked a significant shift in sex discrimination jurisprudence, introducing the concept of sex stereotyping. Following *Price Waterhouse*, courts understood sex discrimination to include adverse employment outcomes when someone failed to live up to gender expectations

(e.g., women deemed too masculine through abrasive leadership styles, men seen as effeminate). However, courts did not extend sex stereotyping reasoning to trans plaintiffs, consistently ruling that sex discrimination protection did not apply to trans employees. Only in the mid-2000s did courts begin to apply the theory of sex stereotyping to trans plaintiffs. Through these shifts in interpretation, courts continued to turn to medical authorities in defining sex and explaining gender identity.

In an early case, varying definitions of transsexuality in the medical community hurt the plaintiff's case. Barbara Lynn Terry filed a Title VII complaint when the Marc's Big Boy Corporation did not hire her as a server. In granting the defendant's motion to dismiss, the District Court of Eastern Wisconsin indicated that while there was "no general accepted definition of the term transsexual," there was legal consensus that trans people were not protected by Title VII (*Terry v. EEOC*, 1980). In coming to this conclusion, the court cited one conference presentation from the Second Interdisciplinary Symposium on Gender Dysphoria Syndrome, which took place at the Stanford University Medical Center in 1973. The proceedings were published in 1974, in a volume edited by Donald R. Laub – Chief of the Division of Plastic and Reconstructive Surgery – and Patrick Gandy. The presentation cited was a psychological study of "transsexualism" by a group of researchers whose research on 20 people seeking gender reassignment/sex-reassignment surgery was published in 1975 in the *American Journal of Psychiatry*. Based on the conference presentation, the court found that psychiatrists disagreed on the "origin and development of transsexualism" and whether or not a request for surgery indicated psychopathology. Against medical uncertainty, the court cited three court cases decided between 1975 and 1977 that found Title VII does not protect trans employees. Therefore, the court concluded that it was legal for Marc's to refuse to hire Terry:

...neither Title VII nor the due process and equal protection clauses prohibit the refusal of Marc's Big Boy from hiring Terry as a waitress/hostess. He is still a male; a [sic] this point he only desires to be female. He is not being refused employment because he is a man or because he is a woman. Under these facts, Title VII and the constitution do not protect him. The law does not protect males dressed or acting as females and vice versa. (*Terry v. EEOC*, 1980)

In its conclusion, the court dismissed Terry's gender identity and legal claims.

In an unusual decision, a district court in New York denied a defendant's motion to dismiss by recognizing trans men as a "subgroup of men," which were protected by sex discrimination law (*Maffei v. Kolaeton Industry*, 1995). Maffei had worked at Kolaeton for eight years before he transitioned. After his transition, Maffei alleged that the president of Kolaeton harassed him by calling him names, ostracized him from co-workers, and other such actions that created a hostile work environment. Since *Meritor Savings Bank v. Vinson* (1986), sexual harassment has been prohibited by sex discrimination law. Before turning to case law to consider Maffei's legal standing, the court defined transsexualism by citing law review articles and Harry Benjamin's *The Transsexual Phenomenon*. In defining transsexuality through these legal and medical sources, the court mentioned no ambivalence as the court in *Terry* had found. The definitional clarity may have aided the court in extending sex discrimination protections to trans employees.

While courts grew friendlier to trans sex discrimination claims, especially after the mid-2000s, debates in medical definitions continued. However, with case law building in favor of trans plaintiffs, conflicting medical opinions did not derail cases in the same way as in the 1980s. In 2008, the D.C. District Court ruled that the Library of Congress had violated Title VII when it rescinded its job offer to Diane J. Schroer, awarding Schroer nearly half a million dollars in back pay and losses. In 2004, before Schroer had transitioned and legally changed her name, she applied for the position of Specialist in Terrorism and International Crime with the

Congressional Research Service at the Library of Congress. After being offered and accepting the position, Schroer requested a lunch meeting with the assistant director who had hired her. At the meeting, Schroer shared that she was transitioning and would start the job as Diane, not the male birth name she had applied under. The next day, the assistant director called Schroer, rescinding the job offer. In her lawsuit, Schroer advanced two legal theories why the Library of Congress's actions constituted sex discrimination: first, they decided not to hire her based on her "failure to conform with sex stereotypes;" second, discrimination on the basis of gender identity is sex discrimination. Ultimately, the court agreed that the Library of Congress violated Title VII based on both sex stereotyping and statutory language. In considering Schroer's sex stereotyping claim, the court looked to the body of case law following *Price Waterhouse*, particularly decisions in the 6th Circuit that applied sex stereotyping to trans plaintiffs, as well as direct evidence "that the Library's hiring decision was infected by sex stereotypes." To reason through Schroer's second legal theory – that gender identity is a component of sex, thus, discrimination based on gender identity constitutes sex discrimination – the court turned to expert testimony. Both sides of the case put forward testimony from medical experts explaining sex and gender identity. Dr. Walter Bockting, associate professor at the University Minnesota Medical School, provided expert testimony for the plaintiff stating the scientific community agrees that gender identity, or the sense of oneself as male or female, is one factor that constitutes sex. The defense team countered Bockting's testimony with their own expert witness – Dr. Chester Schmidt – who disagreed with Bockting's characterization of consensus among the scientific community. Schmidt, a professor of psychiatry and behavioral sciences at the John Hopkins University School of Medicine, further argued that sex's component parts have determinable biological etiologies of which gender identity is not one. The court, recognizing that resolving this dispute

was “not within this court’s competence,” side-stepped the debate on whether gender identity is a component of sex and looked directly at the Library of Congress’s actions, concluding “the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* ‘because of sex’” (emphasis in original).

While the legal interpretation of sex discrimination has changed from the beginning of the cases analyzed (1975) to the end (2015), the courts continue to consult medical authorities to define sex and explain gender identity and reason through disability discrimination claims. Such consultation shows how medicalization extends medical jurisdiction into arenas, such as the law, where medical professionals generally do not have authority.

DETAILS OF A MEDICAL TRANSITION: REAUTHORIZING CISNORMATIVITY THROUGH GENITAL NARCISSISM

Eighty-one percent ($n = 43$) of the court decisions analyzed included details of the plaintiff’s medical transition. Since the mid-1990s, “transition” has been widely used to describe the “process or experience of changing gender” (Carter 2014:235). Medical transitions may involve a range of interventions including but not limited to chest reconstructive surgery or breast augmentation, hormone therapy, electrolysis, tracheal shaves, facial feminization surgery, and genital surgery, of which there are several varieties. In focusing on transition details, courts reduce plaintiffs to a series of medical procedures and deploy an archaic and limited definition of trans identities. When the medical community first defined transsexuality in the 1950s, they focused their definition on a desire for surgery (Hausman 1992, 1995), which never represented the full experience of gender variance. Some trans people challenged the medical model and used “transgender” as an alternative to the medicalized “transsexual” in describing people living

full time in a gender identity not aligned with their sex assigned at birth and who may or may not undergo any type of medical transition (Ekins and King 2006; Meyerowitz 2002; Stryker 2008b). Since the mid-1960s, both terms have been used (Williams 2014). By the mid-1980s, medical understanding of gender variance shifted towards an identity model so that being trans was no longer synonymous with desire for surgery, even within the medical community (Bockting 2009). In listing the medical transition details of plaintiffs in the background facts of the case, court decisions evoke an outdated understanding of gender variance wherein identity and desire for medical procedures were conflated.

In detailing plaintiff's medical transitions, there was a particular focus on genital surgery. The 53 court decisions analyzed contained 68 mentions of sexual reassignment surgery (SRS), gender reassignment surgery, or sex changes,⁷ which generally allude to genital sex-reassignment surgeries that have been frequently misunderstood as “the surgery” in medical transitions. As listed above, there are many different procedures someone may or may not undergo while medically transitioning. In comparison to the 68 mentions of genital surgery, facial feminization surgery was only mentioned four times, breast augmentation once, and electrolysis and mastectomy were mentioned once each. A focus on genital surgery does not align with how many trans people approach their medical transitions, especially as genital sex-reassignment surgeries are often cost prohibitive (Heyes and Latham 2018). Focusing on genital surgery as “the surgery” elevates its importance as other parts of a medical transition are more likely to impact social survival: aside from doctors and sexual partners, very few people see the post-surgery results of genital surgeries while faces, body hair, and presence or absence of

⁷ The language describing surgeries trans people may pursue in their medical transitions is contentious and evolving. Increasingly, scholars use the phrases “gender affirmation surgery” or “gender confirmation surgery” rather than “sex reassignment surgery.”

breasts are part of everyday gender presentation. Acknowledging the importance of social recognition, providers of facial feminization surgery (FFS) have increasingly positioned FFS as a sex-changing surgery rather than an elective surgery sometimes sought following genital surgery (Plemons 2017). Therefore, focusing on genital surgeries in court decisions does not accurately reflect trans experiences and instead reinforces a dominant belief that sex is determined by genitalia. Legal scholar Richard Juang (2006) refers to this as “genital narcissism” or the stubborn assumption that cisgender bodies and their genital configuration define sex for all bodies.

Genital narcissism can be seen in court decisions when the plaintiff is introduced by their surgical details before any employment information is shared. In 2003, the District Court for the Western District of New York issued an opinion on a motion to dismiss. Caillean McMahon Tronetti was suing her former employer TLC Healthnet Lakeshore Hospital (hereafter, TLC) for sex discrimination, disability discrimination, hostile environment, and retaliation. When TLC hired Tronetti, a clinical psychiatrist, in September 2000, she informed them that she was trans and transitioning, which her co-workers were made aware of. Tronetti was advised by TLC’s Vice President for Mental Health to “avoid wearing overtly feminine attire.” As Tronetti advanced in her transition, she presented more femininely at work. Starting in December 2001, Tronetti became the subject of rumors, including that she was sexually harassing a gay male employee. Tronetti believed that a nurse manager, who later urged her staff to misgender Tronetti, started the rumors. The rumors persisted despite complaints from Tronetti. In March 2002, Tronetti was disciplined for having an “improper conversation” with a nurse about cosmetics. In January 2003, Tronetti learned that a member of TLC’s Board of Directors was spreading rumors about her, including insinuations that her sanity was affected by her transition.

Tronetti called a program manager, threatening to complain about the rumors to the Vice President of Mental Health, believing that the manager would put a stop to the rumors. Instead, Tronetti was suspended with pay and subsequently constructively discharged in a meeting to which she was not allowed to bring legal representation. A constructive discharge is recognized as a termination since the employee did not willingly resign but resigned due to a hostile work environment. In the court decision, Tronetti's sex discrimination, hostile environment, and retaliation claims survived the motion to dismiss. What is notable about this opinion, however, is not how the court ruled on the motion but how Tronetti is initially introduced. The opinion opens with a quick paragraph reviewing the legal proceedings of a motion to dismiss and then turns to introduce the case at hand:

Tronetti is a person who, prior to sexual reassignment surgery, was a biological male transsexual who suffered from gender dysphoria. Tronetti had been a male at all times relevant to the Complaint – i.e., before undergoing sex reassignment surgery. Tronetti, a clinical psychiatrist and Doctor of Osteopathy, was hired by TLC in September of 2000. (*Tronetti v. TLC Healthnet Lakeshore Hospital*, 2003)

In this court opinion regarding employment discrimination, before we are introduced to the plaintiff's occupation, employer, or date of hire, the court states twice that it understands Tronetti to be a biological male until she underwent sex reassignment surgery. The repetition indicates a need to underline the establishment of sex based on genitalia. It is clear that by "sexual/sex reassignment surgery" the court means genital-sex reassignment surgery as later in the opinion a facial feminization surgery date is documented that is separate from the surgery mentioned in these first two sentences. The opinion notes that Tronetti was scheduled for sexual reassignment surgery in February 2003 and had facial feminization surgery in January 2002. Thus, we can deduce that the sexual reassignment surgery mentioned twice in introducing Tronetti refers to genital surgery. By introducing Tronetti by her surgical details before relevant employment

details, the court implies that what is most important to understand about the plaintiff is her sex as determined by genitals.

Court decisions also documented medical transitions in great detail, even when such details were not pertinent to the court's decision. In October 2001, Maricopa County Community College District (hereafter, Maricopa) received complaints from students that a man was using the women's restroom on campus. In response, Maricopa issued a restroom policy that required two trans faculty members to use the men's restroom until they could provide proof of genital surgery. One of the faculty members was adjunct instructor Rebecca Kastl, who was also enrolled as a student. Maricopa hired Kastl in May 2000 to teach a computer course beginning in August. Kastl was subsequently re-hired to teach courses in the Spring, Summer, and Fall 2001 semesters. At the time of hire, Kastl had yet to transition and therefore was hired under her birth name and sex. In August 2000, Kastl began to transition. She presented as a man at work until March 2001 when she legally changed her name and updated the sex marker on her driver's license. After these changes, Kastl updated her employee records to reflect her new name and legal sex and continued working as a woman. Maricopa issued its restroom policy during Kastl's fourth semester teaching at the community college. When asked for proof of her biological sex in order to use the women's restroom, Kastl presented her driver's license, which showed that the Arizona Motor Vehicle Department recognized Kastl as legally female. In order to secure a driver's license with a female sex marker on it, Kastl had provided a doctor's letter stating that she was "living functionally as a woman." Maricopa found the driver's license inconclusive and insisted Kastl use the men's restroom until she could provide proof of genital surgery. Kastl refused to comply, explaining that she did not feel safe in the men's restroom. Maricopa informed Kastl in December 2001 that her teaching contract would not be renewed for the

following semester. Kastl filed a lawsuit in August 2002, after receiving her right-to-sue letter from the EEOC. Kastl's Title VII, Title IX, and Section 1983 violation of right to privacy, equal protection, and freedom of speech claims survived a 2004 motion to dismiss. However, at summary judgement two years later, the District Court of Arizona found that Kastl had failed to provide evidence that she was a biological female and therefore did not have a discrimination case, an opinion that was upheld at the appellate level in 2009. While Maricopa focused on genitalia as determinative of biological sex, the judge – who presided over both the 2004 motion to dismiss and 2006 motion for summary judgement – seemed open to other indicators, noting in the 2004 opinion that genitals were not the sole indicator of sex. Ultimately, the evidence the court required to affirm Kastl as female was expert testimony, which Kastl did not provide. If expert testimony was the evidence the court required to recognize Kastl as female, it is unclear why her other medical transition details were written into the court decision as they did not bear on the merits of her case. In the background section of the court opinion, the District Court of Arizona specified not only when Kastl was diagnosed with GID or gender dysphoria, but also which surgeries she had undergone:

Between March 2001 and July 2002, Plaintiff underwent several surgical procedures to develop a more feminine appearance, including breast augmentation, rhinoplasty, brow reconstruction, and genioplasty (chin augmentation). In July 2003, Plaintiff had sex reassignment surgery, including a vaginoplasty and labiaplasty to develop the appearance of female genitalia. (*Kastl v. Maricopa County Community College District*, 2006)

Inclusion of the particular surgeries Kastl underwent between 2001 and 2003 is unnecessary. By the time Kastl had her genital surgeries, she was no longer employed by Maricopa; therefore, the information has no bearing on the case. Inclusion of such information draws attention away from the facts of the case and towards Kastl's genital configuration. At no point in the 2004 or 2006 decisions does the court indicate that surgeries are necessary or sufficient proof of biological sex.

Therefore, this level of detail serves not to determine Kastl's case outcome but reinforces law's cisnormative construction of gendered bodies.

By including details of plaintiff's medical transitions, focusing especially on genital surgery, even when such details are not used to determine the plaintiff's legal standing, courts reduce trans plaintiffs to their medical procedures and perpetuate genital narcissism.

DIAGNOSIS: PRESCRIBING MEDICALIZED SOCIAL DEVIANCE

Cisnormativity is also reinforced in the court decisions when a plaintiff's gender presentation outside of social norms is explained through diagnosis. In "Sociology of Diagnosis," Annemarie Jutel writes that a diagnosis "provides a cultural expression of what society is prepared to accept as normal and what it feels should be treated" (2009:279). Forty-nine percent ($n = 26$) of the cases analyzed included a diagnosis for the plaintiff. In several of the cases analyzed, diagnosis became a vehicle for understanding – though not necessarily accepting – non-normative gender behavior as medically prescribed. The prescription of medicalized gender deviance can be seen in the cases when employers required confirmation that the changes in an employee's appearance were prescribed by medical standards of care. Employers also demanded medical documentation in determining which bathroom the employee should use. Additionally, in reporting background facts of the case, the courts often positioned altered gender presentations as part of the standard medical protocol associated with the diagnosis of gender identity disorder or gender dysphoria. The diagnosis may have helped the court understand the cross-gender behavior of the trans plaintiff. If legal actors operate with cisnormative assumptions that people identify with the sex assigned to them at birth and dress according to that identification, then someone assigned male at birth wearing feminine clothing at work or even outside of work may

be viewed as quite strange. A diagnosis gives some reasoning to this seemingly deviant behavior – a way for the legal actors to understand trans plaintiffs.

Requests for medical documentation from employers were often triggered by changes in the employee's gender presentation and/or questions about which bathroom the employee was using. In *Johnson v. Fresh Mark*, the plaintiff was told by her supervisor to not return to work until she could provide a doctor's note indicating which bathroom she should be using on the job. When Selena Johnson started working at Fresh Mark, a meat packing plant, she had been living as a woman for nearly a decade. Following allegations that Johnson was using both the men's and women's restroom at the plant, Fresh Mark's Director of Personnel reviewed her file and found a driver's license indicating Johnson was legally male. Johnson could only correct her Ohio driver's license once she had proof of completing genital sex-reassignment surgery. Upon this discovery, Fresh Mark sent Johnson home, informing her that she could only return to work once she had provided a statement from her doctor affirming her gender and explaining why she was using both bathrooms. Johnson instead hired a lawyer who advocated use of the women's restroom or a unisex restroom claiming Johnson was "neither entirely male not [sic] entirely female" (*Johnson v. Fresh Mark*, 2003). Pointing to the sex marker on Johnson's driver's license, Fresh Mark responded that Johnson would be required to use the men's restroom at work. Fearing for her safety, Johnson did not return to work and was subsequently fired. In response, Johnson filed two claims of discrimination. First, she claimed Fresh Mark discriminated against her for failing to adhere to sex stereotypes of how women appear and behave. Second, she filed a disability claim under the Americans with Disabilities Act, claiming that her Gender Identity Disorder results from a physical impairment. The district court in Ohio granted the defendants' motion to dismiss for both claims. The court dismissed Johnson's

disability claim on the grounds of statutory language excluding gender identity disorders and Johnson not informing her employer of her disability. The court dismissed Johnson's sex stereotyping claim as she failed to provide medical evidence of a female identity. In lieu of this evidence, the court upheld Fresh Mark's reliance on Johnson's driver's license to determine her gender at work and consequently which bathroom to use. This bureaucratic verification reflects genital narcissism by saying Johnson's gender at work is determined by an identity document sex marker that can only be updated with genital sex-reassignment surgery. Fresh Mark, the court, and the DMV insisted that genital configuration defines gender. One can read Johnson's lawyers response of her being "neither entirely male not entirely female" as an attempt to evade cisnormativity. Unfortunately, this refusal to play into the equation of genitals equal sex as either male or female undercut Johnson's right to safety at work or any recourse following termination.

If the court had understood Johnson's behavior as medically prescribed, perhaps it would have been more amendable to her claims. In a case with a similar fact pattern as *Johnson*, the court denied the defendant's motion to dismiss a sex discrimination claim. Jane Doe transitioned nearly three decades before she began working for United Consumer in a temp-to-hire position. During a performance evaluation meeting two months into her employment, the human resources coordinator brought up rumors about Doe, with co-workers referring to her as "Mrs. Doubtfire." Curious, United Consumer dug into Doe's background "more thoroughly than its normal procedures required" (*Doe v. United Consumer Financial Services*, 2001). The human resources coordinator called Doe, saying they were having trouble verifying her high school graduation. At that time, Doe explained she had changed her name in 1973 and shared her former name, which was a traditionally male name. That same day Doe was called into a meeting with her supervisor, human resources, and the vice president of United Consumer where they asked her about her

gender. Doe explained that she was trans and provided documentation that she had been legally female since 1973. The documentation included her legal name change, driver's license with female sex marker, social security card with current name, and Ohio Notary Public identification. The United Consumer personnel were not satisfied with this documentation and pressed Doe about her surgical status, which Doe replied was inappropriate. They requested "medical evidence of her sexuality." The following day Doe received notice of her termination. She filed sex and disability discrimination claims. The court granted the defendant's motion to dismiss Doe's disability claim but denied the motion to dismiss her sex discrimination claim.

In both *Johnson* and *Doe*, an inquiry into the plaintiff's gender was triggered by people questioning the plaintiff's behavior (bathroom use and appearance), which uncovered a previous male identity (sex marker on driver's license and name change), effectively outing the employee as trans. The employee was questioned about her surgical status, which she refused to answer. Both employees were let go and filed disability and sex discrimination claims. While *Johnson* was unsuccessful, Doe's sex discrimination claim survived a motion to dismiss. In comparing these two cases, there are two significant differences. First, Doe's identity documents aligned with her gender identity and presentation (she presented femininely and was listed as female on her driver's license) while *Johnson*'s identity documents listed her as male despite living as a woman for nearly a decade. While United Consumer was not convinced by Doe's identity documents, they may have been persuasive to the court. Second, in the background facts, the court opinion in *Doe* stated that Doe was diagnosed with GID, which includes living in "their preferred gender role by dressing, naming, and conducting themselves in conformity with that gender" (*Doe v. United Consumer Financial Services*, 2001). From this information, the court seems to understand Doe's non-normative behavior – living in a gender different from her sex

assigned at birth, including changing her name and dressing femininely – as part of her diagnosis. The court opinion in *Johnson* does not include such information. Thus, understanding gender non-normative behavior as medically prescribed may have aided *Doe* in coming to a favorable outcome for the plaintiff. In four other court opinions with favorable outcomes for the plaintiff, the court associated the plaintiff's gender non-normative behavior with diagnosis and medical protocol.⁸ Such association implies that gender behavior outside of current norms is understandable only so long as it is medically prescribed. With the medicalization of social deviance, drawing the boundary between norms and deviance falls into medicine's jurisdiction.⁹

A consequence of medicalizing deviance is that while courts may understand non-normative gender behavior, the plaintiff is understood as a disordered person. As medical sociologists have argued (Conrad and Schneider 1992; Kittrie 1971; Zola 1977), the medicalization of social deviance through diagnosis may shift the blame from the individual so that they are no longer criminalized for non-conforming behavior; however, it does not lessen stigma or increase social inclusion. In several court cases, a diagnosis and medical definitions of trans identities were introduced before any details of the plaintiff's work history or employment status. This ordering of information positions trans plaintiffs suing for recourse following discrimination first as disordered people and secondly as workers. Being positioned as disordered may have negative consequences for trans people, such as having your sanity and

⁸ *Smith v. City of Salem* (2004), *Doe v. Boeing*, *Lie v. Sky Publishing Corporation*, *Lopez v. River Oaks Imaging*

⁹ I do not mean to imply that medically prescribed gender non-normativity guarantees a favorable outcome for the plaintiff. There were a few cases with unfavorable outcomes where the plaintiff's non-normative gender behavior was also explained by diagnosis and medical protocol (*Creed v. Family Expression Corporation*, *Holt v. Northwest Pennsylvania Training*, *Sturchio v. Ridge*). Upon closer inspection, it was the plaintiff not the court offering a medical explanation for their gender presentation. Therefore, it may be that the court has to buy into the medically prescribed frame for the plaintiff's claims to survive. The court has to adopt the understanding not simply be presented with it.

fitness for work questioned. For instance, after disclosing that she was transitioning, clinical psychiatrist Caillean Tronetti learned that a board member of the hospital she worked for was openly questioning Tronetti's sanity (*Tronetti v. TLC Healthnet Lakeshore Hospital*). A mental health diagnosis, or even a perception of insanity, can be quite sticky. Once labeled as disordered, all behavior is filtered through that label and can be taken as further evidence of your illness. In the infamous Rosenhan Experiment, eight researchers were sent to twelve different mental hospitals around the U.S. and presented symptoms in order to secure a schizophrenia diagnosis. Once admitted to the mental hospital, the researchers began behaving normally; however, all their behavior was used by the hospital staff to corroborate the original diagnosis rather than question it (Strand 2011). In historian Susan Stryker's pivotal essay on trans rage, she depicts what it is like to be seen as disordered: "I live daily with the consequences of medicine's definition of my identity as an emotional disorder. Through the filter of this official pathologization the sounds that come out of my mouth can be summarily dismissed as the confused ranting of a diseased mind" (1994:244). In the court decisions analyzed, courts sometimes used stigmatizing language when denying the plaintiff's claims. In *Sommers v. Iowa Civil Rights* (1983), the court wrote that Sommers had allegedly been dismissed "because of her transsexual condition" (p. 1), implying that her identity is a medical problem. Synonyms for medical problems like disorder or defect show the stigmatizing effect of this framing. Later in the opinion, the court talks about trans people as persons "with a serious problem of gender disorientation" which may be caused by "medical, in addition to psychological, disturbances" (p. 7). Framed as disordered individuals, trans people stand outside legal protections. Such reasoning was used as late as 2007 by the 10th Circuit Court of Appeals in *Etsitty v. Utah Transit Authority*.

Fortunately, the courts seem to be switching away from such pathologizing language and call out defendants who try to use the stigma around trans identities to excuse discriminatory behavior. In *Schroer v. Billington* (2009), the D.C. district court ruled that the defendant's concerns about security clearance, trustworthiness, and distraction related to the plaintiff's gender identity disorder diagnosis were pretextual. In *EEOC v. R.G. & G.R. Harris Funeral Homes* (2015) the defendant's motion to dismiss argued that gender identity disorder is not covered by Title VII. The district court opinion quickly pointed out that the plaintiff was not claiming discrimination due to a gender identity disorder and in fact never used that terminology. Both the *Schroer* and *EEOC* court decisions were favorable to the plaintiff.

CONCLUSION

Through consultation of medical authority, looking to diagnosis to explain gender deviance, and focusing on plaintiff's medical transitions, particularly their genital surgery status, court opinions reflect the power of medicalization to regulate norms. In particular, cisnormativity is upheld in the court opinions through genital narcissism when focusing on genital surgeries reinforces the dominant belief that sex is determined by genitalia. Cisnormativity is also upheld in the decisions when courts understand non-normative behavior – such as adopting a name and gender presentation not associated with your birth assigned sex – as medically prescribed. I argue in this dissertation that trans people turn to the law for its normative power. This chapter shows the other side of normativity – its regulatory power. While legal interpretations may shift, persistent medicalization of trans plaintiffs seeking recourse for employment discrimination ensures that gender norms are maintained.

Chapter 7: Conclusion

For this dissertation, I set out to understand why trans people turn to the law. In part, I was interested in the type of social problems trans people turn to the law with. From my own research I was most familiar with employment issues. Judging from the news, the most pressing issues for trans people were work (including military employment) and access to bathrooms. But were these the top legal issues for trans people in their everyday lives? Or were these just issues shaped by social movement priorities and/or what the media paid attention to? Even more than the types of social problems, I was interested in *why law*. What was it about law that pulls marginalized groups to lay their troubles before it? When writing my master's thesis on the workplace experiences of trans people in the U.S., I spent a lot of time reading Title VII court decisions. At the time, I was analyzing how the absence of legal and policy protections shaped the workplace experiences of my participants. But in the back of my mind, I also noted the pathologization of trans plaintiffs in the court decisions. What did someone's surgical status have to do with whether or not they could do their job well? And yet, trans people continued to bring their claims. When you are likely to be subjected to pathological framing and unlikely to win your case, why pursue a legal claim? In the dissertation I explored why trans people turn to the law, how trans people and their lawyers advocate for their right to be recognized as legally protected, and how medicalization frames this advocacy.

To answer these questions, I interviewed 20 trans people who had considered hiring a lawyer (who I call rights-seekers) and 56 lawyers who had represented at least one trans client in a non-criminal case. Along the way, I also connected with 12 advocates (e.g., paralegals, social workers, policy directors, program managers) who used law in their work on behalf of and with

trans communities. What I found was, like other marginalized groups, trans people turn to the law for its normative power.

To be normal is not only to be average but also to be valued (Halley 2001), which counterbalances the stigma and dehumanization many marginalized populations have faced. Faced with accusations of immorality (Fingerhut et al. 2011), some sexual minorities turned to the courtroom as a way of asserting themselves into the mainstream (Rimmerman 2001). Trans people have historically been denied their humanity – called perverts, psychologically sick, and monstrous (Bryant 2009, 2011; Daley and Mulé 2014; Meyer-Bahlburg 2010; Nordmarken 2014; Stryker 1994; Winters 2006). Recognition can be a way of re-thinking (Halley 2001) and engagement with law may offer a way to disrupt stereotypes (Barclay et al. 2011). For those facing exclusion and prejudice, legal recognition can be a meaningful symbol of inclusion and a weapon against bias: “even without resorting to litigation, simply knowing one *has* rights can dramatically improve the lived experience of individuals” (Berrey et al. 2017:12).

As discussed in Chapter 3, faced with legal precarity, trans rights-seekers demanded inclusion. Nearly every rights-seeker commented on the legal precarity they felt as a trans person and their consequent anger, fear, or anxiety. Participants mentioned two major sources of precarity. First, geography-based rights, meaning what rights and protections you have depend on where you live, leading to misinformation. Second, forms of law that are particularly vulnerable to changes in political climate. Rather than federal statutory law, trans people have gained legal protections in the U.S. through state and local legislation, judicial interpretation, and executive orders. This leaves trans people reliant on lawyers, judges, and presidents to interpret their inclusion. Actions of the Trump administration accentuated feelings of precarity, which many participants responded to by demanding federal legislation explicitly stating their legal

inclusion. However, unlike previous research on LG(BT) legal consciousness that focused on a single legal right – relationship recognition through parental or marital status – which was being denied to same-sex couples, this study examined trans people’s multiple forms of legal engagement. Participants shared experiences with name change petitions, family law disputes, and discrimination cases. By examining multiple forms of legal engagement, I found that even while trans people critique their exclusion from full equality, they make use of the legal systems available to them and subsequently develop a dual legal consciousness. I am using dual legal consciousness to get at the sense of seeing oneself as a rights bearer while also seeing oneself as legally excluded. While this concept arises out of my study of trans people seeking recognition and protection before the law, I do not mean to imply that a dual legal consciousness is unique to trans people. It is worth exploring in future studies whether other minority groups who have some rights but are denied others also express a dual legal consciousness.

Chapter 4 showed how trans people and their lawyers and advocates harness the power of law to normalize using people’s correct names and pronouns rather than misgendering and deadnaming people by using birth assigned names and sex categories. While many participants emphasized that people’s preferred names and pronouns should be used regardless of legal documentation, having a court order helped in situations where others struggled to follow this practice. Having a name change was also an important source of validation for many participants. Finally, legal name changes allowed participants to update their identity documents (e.g., birth certificate, driver’s license, passport). Accurate identity documents facilitated safer public life, including access to healthcare, employment, and education without the increased risk of being misgendered.

However, norms are double-sided. On the one hand, norms are mechanisms of inclusion and legitimacy. They confer approval and value and offer an alternative to the pathological. On the other hand, they are regulatory, ways of keeping people in line (Warner 1999). The cost of social inclusion through the establishment of legal norms is being subject to the law's terms. As discussed in Chapter 6, trans rights seekers are regulated through medicalization. Insertion into a medical framework extends medical jurisdiction into arenas, such as the law, where medical professionals generally do not have authority; erects a line between normality and abnormality; and acts as a social control, especially as the diagnostic categories reflect social and political values (Conrad 2007; McGann 2006). In analyzing the 53 decisions of employment discrimination cases with a trans plaintiff published between 1975 and 2015 that were decided on merits not procedural grounds, I identified three ways trans plaintiffs were inserted into a medical framework: consultation of medical authority, details of a medical transition, and diagnosis. While there was some evidence that medicalization sometimes helped the court arrive at a favorable outcome for the plaintiff, it came at a cost. By including details of the plaintiff's medical transitions, focusing especially on genital surgery, even when such details were not used to determine the plaintiff's legal standing, courts reduced trans plaintiffs to their medical procedures and perpetuated genital narcissism. In several of the cases analyzed, diagnosis became a vehicle for understanding – though not necessarily accepting – non-normative gender behavior as medically prescribed. Genital narcissism and only understanding gender “deviance” when it is medically prescribed reinforce cisnormativity – or the ideology that presumes everyone is cisgender and subsequently naturalizes/normalizes the congruence of birth assigned sex and gender identity (Nordmarken 2014; Schilt and Lagos 2017; Sumerau et al. 2015).

Thus, in turning to the law for its normative power by demanding inclusion and harnessing the power of law to support normalizing inclusive name and gendering practices, trans people are also subjected to the regulatory power of law as a normative institution that imports the norm-deviance boundary-making of medicalization.

LIMITATIONS

The findings of this dissertation should be evaluated in light of some significant data limitations. First, as they are based on a non-probability sample, conclusions drawn in this dissertation are not generalizable to the larger population of trans people in the U.S. or the lawyers and advocates that work on their behalf. Second, in Chapter 1, I reflected on how my position as an outsider (non-trans, non-lawyer, and someone who has never sought legal advice or representation) not only shaped how I approached the project but also the participant recruitment process. Two additional factors impacted the recruitment process and, consequently, the demographic composition of the sample. First, a lack of funding with which to compensate participants for their time and labor. I had hoped to secure grant funding particularly to offer nominal participant stipends but was unsuccessful. Therefore, I was asking people from an economically marginalized population – only 17 percent of respondents to the U.S. Trans Survey owned their home and only a third were employed full-time (James et al. 2016) – to participate for nothing more than a coffee and bagel at their chosen interview spot. Also, while the national LGBT organizations have decently sized budgets, many of the smaller organizations, particularly those run by and for trans people, are volunteer run with leadership sometimes being paid the equivalent of a part-time salary. Therefore, my findings reflect the experiences of trans people who had the financial resources and bandwidth to afford spending an hour or two talking with me. Second, I am English monolingual. Although there is a sizable and active trans Latinx

community in NYC, I was unable to gain access due to my limited language skills. In future research projects, I hope to work with bilingual research partners to expand the racial and linguistic diversity of participants.

QUESTIONS RAISED

In closing, I would like to reflect on possible directions for this research going forward. As with any decent research project, this dissertation generated more questions than it answered. In particular, I will offer ideas on how to further develop the findings around legal consciousness and medicalization in rights claims.

Legal Consciousness

There are several directions in the area of trans legal consciousness that are worth exploring, including variation in legal consciousness by race and class, how legal concepts show up (or not) in trans people's descriptions of everyday troubles, how engagement with criminal law and/or the process of criminalization impacts legal consciousness among trans people.

The current sample skews white: 85 percent of trans rights-seekers, 42 percent of advocates, and 73 percent of lawyers interviewed identified as white or Caucasian. In comparison, the U.S. Census Bureau estimated that 60 percent of the U.S. population was white in 2019 (U.S. Census Bureau n.d.), and 58 percent of self-identified LGBT respondents in a Gallup poll were white (The Williams Institute 2019). White people are generally overrepresented in the legal profession and in studies of trans people. My sample of lawyers is actually more racially diverse than the national average: according to the American Bar Association, 85 percent of lawyers identified as white in 2019 (American Bar Association 2020). And in comparison to the 2015 U.S. Transgender Survey, where 82 percent of respondents were white (James et al. 2016), I interviewed a more racially diverse group of trans people: 75 percent

of trans lawyers, advocates, and rights-seekers identified as white. In my analysis of dual legal consciousness, I am not claiming to represent all forms of legal consciousness that may be found among trans communities, which is a very diverse population. Previous studies found a relationship between social location and variability of legal consciousness (Hirsh and Lyons 2010; Nielsen 2000) and sociologists have long established a link between race and the functioning of the U.S. legal system (Bobo and Thompson 2006). In fact, I think it would be hard to over-state the importance of race in relationship to law. A more racially diverse sample of trans rights-seekers may reveal different relationships to law and patterns of legal consciousness.

Additionally, the current sample of trans rights-seekers also skews highly educated: Seventy-five percent had at least a college degree compared to the national average of 36 percent (National Center for Education Statistics 2019). A recent study of legal consciousness found that high cultural capital contributes to a sense of self-efficacy and entitlement (Young and Billings 2020). Thus, the highly educated participants may have been particularly willing to seek legal representation following an injurious incident and/or felt confident in their capabilities of advocating for themselves. They may have also felt more entitled to legal inclusion than a sample of participants with lower educational attainment.

However, while participant's educational background may have cultivated an entitlement to justice, that did not mean they could access it. The median income among trans rights-seekers was \$30,000, below the national median of \$40,247 (U.S. Census Bureau 2019). As is well-known, private attorneys are very expensive in the U.S. As of 2014, the average hourly rate charged by associates at small private law firms was \$274; the hourly rate increases with seniority and size of firm, among other factors like specialization ("A lawyer's value" 2014). While there are free or low-cost legal services available for many legal issues, the demand often

outpaces the supply. According to the Legal Services Corporation, 50 percent of eligible people who seek legal aid from LSC-funded organizations are turned away due to lack of organizational resources (The Current Crisis in Legal Services n.d.). Many participants shared that cost factored into their decision whether or not to hire a lawyer, with some stating plainly that legal representation was cost prohibitive, forcing them to move forward on their own. Others mentioned that they were only able to hire lawyers on commission or through programs offering free legal aid to low-income people. Some of those who were able to afford private attorneys commented on how finances restricted the quality of lawyer they could retain.

For younger participants, their class backgrounds in addition to family relationships impacted their access to legal representation. Take for example Alex (20) and Andrew (22). Andrew had a supportive family that not only accompanied him to his initial name change hearing but tapped into their social network to identify attorneys for the appeal. His successful name change appeal was handled by a national impact litigation non-profit. In comparison, Alex became a homeless youth after her family disowned her when Alex disclosed that she was trans. Only after talking to a friend who was in law school did Alex recognize that a lawyer might be able to do something about her being kicked off an online magazine where she had been a model. Alex reached out to two nationally known impact litigation non-profits but, at the time of our interview, had not gotten a response. Alex did not know how else to find legal representation and has not been able to pursue anything further. While Andrew was currently in graduate school, Alex only completed high school and an IT certification (which has subsequently expired). Andrew had family and class resources to tap into for legal representation that not all trans people have access to.

Furthermore, participants reported difficulty finding a lawyer who not only had expertise in their particular legal issue but also was comfortable and competent working with a trans client. It is worth further investigating how mixed class status (high educational attainment, lower than median incomes) impacts both trans legal consciousness and access to justice. A larger sample would aid in this exploration.

A broader investigation of how legal concepts show up (or not) in trans people's descriptions of everyday troubles is warranted. The study only looked at trans rights-seekers – people who were asking for something from the law through civil claims and/or administrative procedures. However, most people do not recognize their social problems as legal matters (Sandefur 2014). Trans people who do not seek to solve their social problems through legal means and/or who experience the law as intrusive and something to be avoided are not represented in the study's findings.

This study explicitly excluded any engagement with criminal law as there is a different relationship between individuals and law when one comes to the law (rights-seeking) compared to the law bearing down on someone (criminalization). I got a glimpse of this at the end of an interview. Joy sought legal representation when going through a contentious divorce and transitioning at a religiously affiliated workplace. Although she believes the law to be a “terrible way to try and fix relationship problems,” Joy availed herself of legal resources in defense against the hostility she encountered as a trans person in both her personal and professional life. However, as we were winding down the interview, Joy pointed out that I had not asked her about policing. She shared that the first time a police officer grabbed her breast, her relationship with and understanding of the law changed – she never looked at cops in the same way, now regarding them with suspicion. The policing of trans people, particularly trans women of color, is

so notorious that there is a term for it: “walking while trans” (Carpenter and Marshall 2018). Eleven percent of respondents to the 2015 U.S. Trans Survey reported that in the past year a police officer had assumed they were a sex worker, 49 percent had been repeatedly misgendered by a police officer, and 20 percent were verbally harassed, 4 percent physically attacked, and 3 percent sexually attacked by a police officer in the past year (James et al. 2016). In February 2021, New York repealed a 1976 anti-loitering law that was commonly referred to as the “walking while trans” ban due to who police tended to target in enforcing the law, which sought to prohibit loitering for the purposes of prostitution (Diaz 2021). Future research should pick up this question on the relationship between criminal law, criminalization, and trans communities. There is work on the rights-seeking behavior of individuals who have been criminalized (Calavita and Jenness 2013) as well as the treatment of trans people within criminal justice institutions (Stanley and Smith 2011; Sumner and Sexton 2016), but to my knowledge, the relationship between criminal law and trans communities has yet to be examined through the lens of legal consciousness.

Finally, going beyond trans legal consciousness into the broader literature on legal consciousness, it is worth exploring whether other minority groups who have some rights but are denied others also express a dual legal consciousness.

Medicalization and Trans Rights Claims

In the area of medicalization, there are also several promising threads that might be worth following up on. For this dissertation, I only looked at employment discrimination court decisions in order to more clearly see what medicalization does in the court decisions by focusing on one type of legal case. Does medicalization do different things depending on the legal issue? My interviews with lawyers suggested possible functions that need empirical

validation: with healthcare cases a major issue is proving medical necessity; with name and sex marker changes judges might ask for medical evidence due to essentialized beliefs and immutability legal requirements (in some locations); and with immigration cases medical evidence helps establish credibility. Is there something that holds constant about medicalization across legal issues? Additionally, my analysis only looked at the operation of medicalization in the court decisions. But how is medicalization introduced into the case and how, if at all, does that matter (e.g., plaintiff or defendant, amicus brief(s), case law)?

Furthermore, medicalization is incredibly adaptable, and its understanding of gender variance has shifted over time while maintaining its dominance. There are solid historical accounts on the medicalized emergence of the category “transsexual” in the early to mid-20th century (Gill-Peterson 2018; Meyerowitz 2002) and there was a noted shift from the disease model to an identity model in the mid-1980s (Bockting 2009). But how did that shift happen? What were the internal debates within trans-medicine as well as responses to socio-political changes that may have led to that shift? Were all the major professional medical associations on board with the shift (e.g., American Psychiatric Association, WPATH, American Medical Association, World Health Organization)? Are we still in the identity model of the late 20th century or are we moving into a new medical model? How has the solidification of non-binary identities (perhaps replacing other beyond-binary identities such as agender and genderqueer, at least in terms of public and state recognition) impacted the medical model?

I’m particularly curious what was going on from around 2008 to 2010 with the release of several statements from medical associations and shifts in policy relating to the medical model of trans identities. In 2008, the American Medical Association passed a resolution for removing barriers to treatment for trans people with explicit support for insurance coverage. That same

year, the World Professional Association for Transgender Health (WPATH) released a statement that sex reassignment treatment was medically necessary. They followed up with a statement in 2010 supporting the depathologization of trans identities. That same year the Patient Protection and Affordable Care Act (ACA) made it illegal for insurance companies to automatically exclude transition services from their plan, although they retained the right to deny coverage on a case-by-case basis if deemed not medically necessary. Also, in 2010 the Department of State updated its passport policy, allowing gender markers to be changed with a physician's letter rather than proof of surgery. Although *DSM-V* was not published until 2013, it was undergoing the revision process during this same time period and posted a draft in 2010 inviting public commentary.

FUTURE RESEARCH

Finally, there were two topics that emerged from the interviews that I found particularly intriguing but beyond the scope of the current project.

First, a few of the rights-seekers who shared their experience with family law commented on how (cisnormative and heteronormative) gender assumptions built into family law put them in uncomfortable positions in their divorce proceedings. A trans man was unhappy when his lawyer played up the fact that he had been the birth parent in advocating for custody. A trans woman felt that being seen as the (formerly male) breadwinner increased her alimony payments beyond what she could reasonably afford. There is some legal literature about how divorce proceedings have called into question a trans person's sex. But I think it would be interesting to look at the possible unintended consequences of feminist interventions in family law as well as marriage

equality¹ for same-sex couples and trans litigants. U.S. family law that was formed in the eighteenth and nineteenth centuries reinforced heteropatriarchal norms, treating the man as the representative of the family in political engagement and economic interests. This left women economically, socially, and politically dependent on their husbands. With the advent of divorce in the late 1800s and its extension in the mid-twentieth century, women were increasingly able to establish independent social identities and legal standing. Feminist activism pushed divorce proceedings and child custody arrangements to recognize and account for gender dynamics in heterosexual relationships in order to ensure that women are not left financially destitute following the dissolution of their marriage. What happens to these gendered implications in family law when marriages involving LGBTQ+ people end?

Second, one of the lawyers I interviewed had a novel approach of using IEPs (Individualized Education Program) to advocate for trans children in school. IEPs come out of special education and recognize the individualized learning needs of children. As the lawyer explained it, IEPs provided a familiar model to incorporate an emergent population. The familiarity of the model helped calm concerns around the unfamiliarity with gender diversity. Do other lawyers use this technique to advocate for trans and non-binary children? Are IEPs used to help advocate for other groups of children who may not be traditionally thought of in the disability model? There has been a surge of research on trans kids recently (Gill-Peterson 2018; Meadow 2018; Rahilly 2020; Travers 2018); perhaps it is time to add a legal angle.

¹ As some have commented, with gay marriage comes gay divorce.

In this dissertation I investigated why trans people turn to the law, how trans people and their lawyers advocate for their rights, and how medicalization frames this advocacy. I conducted 88 interviews with trans people and the lawyers and advocates who represent them and analyzed the 53 employment discrimination cases with a trans plaintiff published between 1975 and 2015 where the decision was based on merits of the case rather than procedural grounds. From this research, I found that, like other marginalized groups, trans people turn to the law to fight for inclusion, protection, and formal equality. In particular, I argue that trans people turn to the law for its normative power which, through medicalization, constrains trans lives even as it enables them. This project contributes to sociolegal understanding of how previously excluded minority groups are incorporated within legal landscapes and under what circumstances.

Appendix: Participant Characteristics

Table 1 Participant Characteristics: Rights Seekers

Participant	Gender Identity	Racial Identity	Age	Highest Educational Degree	Occupation	Region	Legal Issues
Alex	Female	White	20	HS	Unemployed	West	Employment, Name change
Andrew	Transman	White	22	MA expected	Student	Southeast	Name change
Erica	Female	White	49	BA	Client support services	Northeast	Employment, Divorce, Housing, Name change
Casey	Transmale	White	27	HS	Bank teller	West	Name change
Ceyrs	Transman	White	21	BA expected	Student	Southeast	Employment
Christine	Female	Black	58	MSW	Social worker	Northeast	Name change
Imani	Transwoman	Black	42	HS	Office administrator	Midwest	Custody, Name change
Isaac	Transmasculine gender queer	White	31	MA	Public health professional	Northeast	Personal injury, Housing, Name change
Jake	Transmale	White	39	JD	Lawyer	Northeast	Housing
Jenny	Transwoman/female	White	65	BA	Manufacture sales representative	Midwest	Divorce, Name change
Joy	Female	White	55	PhD	Professor and writer	Northeast	Divorce, Employment
Kathy	Female	White	63	BA	Retired	Northeast	Name change
Levi	Transmasculine	White	29	BA	Food safety manager	West	Name change, Employment
Nathan	Transman	White	49	PhD	Teacher and program director	Northeast	Divorce, Employment

Quill	Non-binary transmasculine	Mixed	28	BA	Retail	Northeast	Name change
Rachel	Female/transwoman	White	36	BA	Library services assistant	Midwest	Employment, Health insurance
Ruth	Transwoman	White	52	MD	Physician	Southwest	Custody, Name change
Samantha	Transwoman	White	65	BS	Pharmacist	Northeast	Name change
Sophia	Transgender, gender fluid	White	37	BA expected	Student	Southwest	Name change
Terry	Transwoman	White	64	MBA	Unemployed	Northeast	Employment, Divorce

Table 2 Participant Characteristics: Lawyers

Participant	Gender Identity	Sexual Orientation	Racial Identity	Age	Region	Type of Practice	Trans clients legal Issues
Abby	Transwoman	Lesbian, open	White	65	Southwest	Private practice	Name change
Alejandra	Transwoman	Lesbian	Hispanic, white	27	Northeast	Direct services	Immigration, Family law, Name change, Discrimination
Alyssa	(trans) Female	Bi (attraction), Lesbian (relationship)	White	58	Southwest	Private practice	Name change, Family law, Discrimination
Amy	(cis) Woman, masculine of center	Lesbian	White	45	Southeast	Direct services	Health insurance, Immigration, Name change, Discrimination
Andrew	(cis man)	Gay	White	30	Southeast	Impact litigation	Employment, Healthcare
Andy	Gender ambivalent	None	White, Jewish	31	Northeast	Non-profit firm	Family law, Name change
Asaf	Cisgender man	Straight	Middle Eastern	37	West	Impact litigation	Healthcare, Health insurance, Family law, Education
Avi	Trans	Queer	White	41	Midwest	Direct services	Name change
Barrett	Non-binary	Queer	White	34	Northeast	Direct services	Name change, Family law, Health insurance, Employment
Belkys	Ciswoman	Straight	Mixed race Latina	41	Northeast	Direct services	Health insurance, Public benefits
Brittany	(trans) Female	Straight	White	38	Midwest	Private practice	Name change, Employment
Cathy	(cis) Female	Hetero	White	51	Northeast	Direct services	Housing, Public benefits
Charlie	Non-binary	Queer	White	31	Northeast	Non-profit firm	Employment, Health insurance, Name change
Christy	Cisgender female	Bisexual	White	41	Midwest	Impact litigation	Employment, Healthcare

Connie	(cis) Female	Lesbian	White	54	Southeast	Private practice	Family law, Name change
Cory	Transmasculine	Queer	White	36	Northeast	Direct services, Government	Civil rights, Name change, Housing, Employment
Dan	(cis) Man	Gay	White	37	Northeast	Direct services	Public benefits
David	Non-binary, gender fluid	Queer	Mixed, Filipino and White	34	West	Direct services	Name change, Health insurance
Diana	(trans) Female	Bi	White	64	Southeast	Private practice	Civil rights
Dolly	Assigned female at birth	Gay	White	60	Midwest	Private Practice	Name change, Family law
Drew	Cisman	Queer	Multiracial	33	Northeast	Direct services	Name change, Employment, Housing, Immigration
Dru	Transgender male	Bisexual/Pansexual	White	42	Northeast	Impact litigation	Name change, Health insurance
Eagle	(trans) Male	Straight	Black	53	Northeast	Private practice	Family law, Name change
Elana	(trans) Female	Queer	White	38	Northeast	Direct services, Government	Name change, Immigration, Public benefits
Emily	(cis) Female	Bi/pan/queer	White	37	Midwest	Direct services	Name change, Immigration, Public benefits
Ethan	(trans) Male	Bisexual	Mixed, Latinx	32	Northeast	Private practice	Health insurance, Employment, Education, Name change
Eve	(trans) Female	Lesbian	White	50	Midwest	Private practice	Civil rights, Employment, Education, Name change, Family law
Geoff	(cis) Male	Bisexual/queer	White	40	Northeast	Direct services, Impact litigation	Immigration, Name change
Jack N	(cis) Male	Gay	White	43	Northeast	Direct services	Public benefits, Housing, Family law,

							Immigration, Name change
Jack R	(trans) Male	Queer	White	40	West	Private practice	Employment, Health insurance
Jamie	(cis) Female	Bisexual	White	39	Northeast	Direct services	Health insurance
Jennifer	(cis) Female	Hetero	White	56	Midwest	Direct services, Impact litigation	Employment, Health insurance
Jesse	Trans	Queer	Mixed	34	West	Non-profit firm	Name change, Employment, Health insurance
Jillian	Cis female	Straight	Multiracial	49	Southwest	Private practice	Immigration, Name change
Jill	(trans) Female	Lesbian	White	57	Northeast	Direct services, Private practice	Employment
Jonathan	Cis	Hetero	White	60	Southeast	Private practice	Civil rights, Employment
Joni	Cisgender	Straight	White	50	Midwest	Private practice	Family law, Name change
Jose	Cisgender	Queer	Asian	35	Northeast	Direct services	Name change, Public benefits, Healthcare, Immigration
Julian	Non-binary transmasculine person	Queer	White	28	Northeast	Direct services	Name change, Health insurance, Public benefits
Katie	(trans) Female	Lesbian	White	51	Southwest	Private practice	Family law, Name change
Kelsey	Genderqueer	Bisexual	White	31	Southwest	Direct services	Name change, Employment, Housing
Kristen	I'm me	Date primarily women	White	68	Northeast	Private practice	Family law, Civil rights, Name change
Kristine	(trans) Female	Bisexual	White	62	Northeast	Private practice	Name change, Discrimination
Lorilei	(cis) Female	Queer	Mixed	31	Northeast	Direct services	Immigration, Name change

Luke	(trans) Male	Queer	Native American	35	Southeast	Private practice	Employment, Housing
Maricar	Transgender woman	Straight	Filipina	36	West	Impact litigation, Private practice	Employment, Family law
Marie	(cis) Female	Hetero	Indian	35	Northeast	Direct services	Health insurance, Public benefits
Michelle	(cis) Woman	Lesbian	White	65	Southeast	Impact litigation, Private practice	Family law, Civil rights, Name change
Noah	(trans) Male	Gay	White	41	Northeast	Non-profit firm	Employment, Health insurance, Name change
Noura	(cis) Female	Hetero	South Asian	26	Northeast	Direct services	Immigration
Phil	Cisgender	Gay	White	52	Midwest	Impact litigation	Health insurance, Name change
Rebecca	(cis) Male	Gay	White	32	Southeast	Private practice	Family law, Name change
Scott	(cis) Male	Gay	White	62	Midwest	Private practice	Name change, Employment, Health insurance
Seebie	Non-binary	Queer	White	28	Midwest	Direct services	--
Sherlock	(cis) Male	Gay	White	44	Southeast	Private practice	Name change
Simone	(cis) Female	Lesbian	White	28	Southeast	Impact litigation	Name change, Health insurance, Education

Table 3 Participant Characteristics: Advocates

Participant	Gender Identity	Sexual Orientation	Racial Identity	Age	Highest Educational Degree	Occupation
Aaron	(trans) Male	Gay	White	41	ABD	Policy Director
Aiden	Transmale	Pansexual	White	25	MSW	Social Worker
Cameron	Trans non-binary	Queer	Asian	28	BA	Program Manager
Carrie	(trans) Woman	Bi	White	59	MSW	Consultant
D'hana	Transmasculine	Queer/gay	Black	41	MFA	Health Administrator
Dee	Gender non-conforming female	Queer	Black	39	JD	Non-profit Manager
Ellie	(trans) Female	Bi	White	62	JD	Speaker
Faye	(trans) Female	Asexual	White	31	Some college	Clinic Administrator
Ian	Genderqueer	Queer	White	34	MA	Social Worker
Lorenzo	Genderqueer	Queer	Dominican	29	Some graduate school	Intake Coordinator
Vianca	(cis) Female	Queer/straight	Hispanic	26	BA	Paralegal
Victoria	Transgender woman	Lesbian	Latina	29	JD	Policy Director

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